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26 Cal.2d 365

INTAGLIATA v. SHIPOWNERS & MERCHANTS TOWBOAT CO., LIMITED.

S. F. 17102.

Supreme Court of California.

May 25, 1945.

Rehearing Denied June 21, 1945.

1. Collision 🔑111

A claim for damage to plaintiff's fishing boat colliding with defendant's car float towed by tug on navigable waters of the United States involved a maritime cause of action which, in a federal court sitting as a court of admiralty, would be determined under federal maritime law. St.1937, p. 801, § 292(c).

2. Collision 🔑144

The federal maritime law provides for equal division of damages resulting from collision of vessels if both parties were at fault, notwithstanding there was a disparity in fault.

3. Admiralty 🔑2

The remedy afforded in state court for damages resulting from collision on navigable waters of the United States may be invoked to secure such rights as readily admit of assertion and enforcement in actions in personam according to course of the common law. Jud.Code § 24(3), 28 U.S.C.A. § 41(3).

4. Admiralty 🔑1

The general rules of maritime law apply whether proceeding be instituted in admiralty or common-law court, and state courts must preserve litigants' substantial admiralty rights.

5. Admiralty 🔑1

A state court having same jurisdiction over case that a federal court would have if suit had been brought there, must determine rights of parties under maritime law as a system of law operating uniformly in the whole country

6. Admiralty 🔑1

State law is inapplicable to maritime cause if it contravenes essential purpose expressed by an act of Congress, or works material prejudice to characteristic features of general maritime law, or interferes with proper harmony and uniformity of that law in its international and interstate relations.

7. Collision 🔑144

The division-of-damages rule in maritime collision cases involving fault of both parties is binding on state courts since right of a plaintiff to division of damages is a substantial right deeply rooted in admiralty.

8. Negligence 🔑103½

Under conflict of laws rule, effect of contributory negligence is governed by law under which cause of action was acquired rather than by law of forum.

9. Collision 🔑2

Federal law governs not only consequences of fault of parties involved in collision on navigable waters of the United States but the question whether vessels were operated in compliance with rules governing navigation on such waters so that Federal Inland Rules of Navigation are controlling except as they permit application of special local laws. Federal Inland Rules, arts. 18, rule 3, 19, 22, 23, 25, 27, 29, 33 U.S.C.A. §§ 203, rule 3, 204, 207, 208, 210, 212, 221.

10. Collision 🔑107

Under inland rule providing that in obeying inland rules due regard shall be had to special circumstances which may render departure from the rules necessary to avoid immediate danger, "special circumstances" exist if danger was manifest to captain of vessel faced with problem of departing from the rules. Federal Inland Rules art. 27, 33 U.S.C.A. § 212.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Circumstances".

11. Collision ⟹107

Where two courses are open to vessel, one to follow prescribed rules and other to depart from them, the duty is imperative to observe rules and to assume that an approaching vessel will do likewise until after danger has become so manifest as to show there is no proper choice of judgment other than that of departure from the rules. Federal Inland Rules, arts. 18, rule 3, 19, 22, 23, 25, 27, 29, 33 U.S.C.A. §§ 203, rule 3, 204, 207, 208, 210, 212, 221.

12. Collision ⟹90

In determining liability for damage to plaintiff's fishing boat resulting from collision, defendant's vessels which were on starboard side of fishing boat were "privileged vessels" with duty to hold their course and speed while it was duty of fishing boat to keep out of their way. Federal Inland Rules, arts. 18, rule 3, 19, 22, 23, 25, 27, 29, 33 U.S.C.A. §§ 203, rule 3, 204, 207, 208, 210, 212, 221.

See Words and Phrases, Permanent Edition, for all other definitions of "Privileged Vessel".

13. Collision ⟹90

The preferred vessel in collision will not be held at fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting, at least in absence of some distinct indication that she is about to fail in her duty. Federal Inland Rules, arts. 18, rule 3, 19, 22, 23, 25, 27, 29, 33 U.S.C.A. §§ 203, rule 3, 204, 207, 208, 210, 212, 221.

14. Collision ⟹149

In action for damage to plaintiff's fishing boat colliding with defendant's car float towed by tug, whether tug captain should have known that dangerous situation was developing when its signal indicating a change of course remained unanswered so that only safe procedure was not to maintain his course and speed but to stop and reverse the tug or to change his course at once was for jury, especially where captain did not maintain special lookout on tug as required by inland rules. Federal Inland Rules, arts. 18, rule 3, 19, 22, 23, 25, 27, 29, 33 U.S.C.A. §§ 203, rule 3, 204, 207, 208, 210, 212, 221.

15. Collision ⟹99

A tug with a tow does not comply with inland rule requiring maintenance of special lookout on vessel simply because officer in charge looks out from pilot house. Federal Inland Rules, art. 29, 33 U.S.C.A. § 221.

16. Collision ⟹95(1)

Although ordinarily it is duty of other ship to make allowance for encumbered state of a tug, captain of tug with barge in tow must give consideration to special danger connected with such tug in deciding whether situation was so dangerous that he should stop the tug, in determining liability for damages resulting from collision. Federal Inland Rules, arts. 18, rule 3, 19, 22, 23, 25, 27, 29, 33 U.S.C.A. §§ 203, rule 3, 204, 207, 208, 210, 212, 221.

17. Collision ⟹122

Where fault on part of one vessel is established by uncontradicted testimony and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to management of other vessel and any reasonable doubt with regard to propriety of conduct of such other vessel should be resolved in its favor under "major and minor fault rule".

See Words and Phrases, Permanent Edition, for all other definitions of "Major and Minor Fault Rule".

18. Collision ⟹19, 122

The rule that where one vessel was guilty of gross fault, the other is presumed not to have been in fault is artificial and misleading unless very carefully applied and even though the first vessel is grossly at fault, a plain fault on part of other vessel is not excused.

19. Collision ⟹20

The major and minor fault rule must give way to rule of maritime law that if one vessel, though correctly navigated some time before the collision, can perceive that dangerous situation is developing through mismanagement of another vessel, it becomes her duty with all means at her disposal to prevent the accident, and even gross fault of one vessel, does not absolve the other from use of such precaution as good judgment and accomplished seamanship require. Federal Inland Rules, art. 29, 33 U.S.C.A. § 221.

20. Trial ⇨253(7)

Instructions on hypothetical state facts not sustained by evidence were apt to be confusing and hence should not have been given.

21. Trial ⇨194(15)

In action for damage to plaintiff's fishing boat colliding with defendant's car float towed by tug, instruction that tug must keep a lookout at bow of the tow alongside when the tow projects beyond the tug, was erroneous as invading province of jury, there being no rule that lookout must be stationed at particular place. Federal Inland Rules art. 29, 33 U.S.C.A. § 221.

22. Collision ⇨149

In action for damage to plaintiff's fishing boat colliding with defendant's car float towed by tug, formula instruction with respect to effect of disabled condition of fishing boat was not erroneous in omitting element of contributory negligence but was incomplete in omitting any reference to plaintiff's duty to indicate disabled status of his boat by giving danger or other distress signals. Federal Inland Rules, arts. 18, 31, 33 U.S.C.A. §§ 203, 231.

23. Collision ⇨149

In action for damage to plaintiff's fishing boat colliding with defendant's car float towed by tug, instruction that it is duty of master of vessel colliding with another vessel to stand by and render such aid thereto as may be requisite, was erroneous for use of word "requisite" instead of word "practicable" used in statute, and for omitting the condition "in the absence of proof to the contrary", since "requisite" is not the equivalent of "practicable". 33 U.S.C.A. § 367.

See Words and Phrases, Permanent Edition, for all other definitions of "Practicable" and "Requisite".

24. Collision ⇨95(1)

In action for damage to plaintiff's fishing boat colliding with defendant's car float towed by tug, instruction that fact that a tug is burdened with heavy and unwieldy tow imposes on tug duty of taking extraordinary care to keep her tow out of the way of other vessels was erroneous since as between vessels otherwise equal, a tug with a tow has right of way over vessel without tow.

25. Appeal and error ⇨1064(1)
Trial ⇨243

In action for damage to plaintiff's fishing boat colliding with defendant's car float towed by tug, wherein on question of proper conduct of vessels approaching on crossing courses jury was instructed in terms of California Harbors and Navigation Code that when steam vessels by continuing their respective courses face risk of collision, each shall give right rudder so as to pass on port of the other, and on same question jury was also instructed in terms of Federal Inland Rules, giving of such conflicting instructions constituted prejudicial error. St.1937, p. 800, § 284; Federal Inland Rules, arts. 19, 22, 23, 33 U.S.C.A. §§ 204, 207, 208.

26. Collision ⇨2

In action for damage to plaintiff's fishing boat colliding with defendant's car float towed by tug, instruction on question of proper conduct of vessels approaching on crossing courses in terms of provision of California Harbors and Navigation Code, was erroneous, since federal rules are paramount. St.1937, p. 800, § 284; Federal Inland Rules, arts. 19, 22, 23, 33 U.S.C.A. §§ 204, 207, 208.

27. Collision ⇨149

In action for damage to plaintiff's fishing boat colliding with defendant's car float towed by tug, instruction on applicable Federal Inland Rules was incomplete for refusal to give requested instruction based on inland rule that where, by any of the rules, one of the two vessels must keep out of the way, other shall keep her course and speed, where pivotal question in case was whether tug captain should have stopped and reversed tug or changed his course in time to prevent otherwise inevitable collision. Federal Inland Rules, arts. 19, 21, 22, 23, 33 U.S.C.A. §§ 204, 206, 207, 208.

28. Collision ⇨149

In action for damage to plaintiff's fishing boat colliding with defendant's car float towed by tug, wherein pivotal question was whether captain should have stopped and reversed the tug, or changed his course in time to prevent otherwise inevitable collision, failure to instruct jury that tug had to maintain her course and speed until danger of collision became manifest and was then under duty to take all reasonable action to prevent collision left jury without a governing standard by which to measure defendant's negligence. Federal Inland Rules, arts. 19, 21, 22, 23, 33 U.S.C.A. §§ 204, 206, 207, 208.

◆

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Joe Intagliata, as owner of the fishing vessel San Giuseppe, against the Shipowners & Merchants Towboat Company, Limited, for damages to such vessel as the result of a collision with defendant's car float or barge. From a judgment for plaintiff and from an order denying a new trial, defendant appeals.

Judgment reversed and appeal from order dismissed.

Prior opinion, 151 P.2d 133.

Derby, Sharp, Quinby & Tweedt, of San Francisco, for appellant.

Andersen & Resner, George R. Andersen, and Herbert Resner, all of San Francisco, for respondent.

TRAYNOR, Justice.

Plaintiff brought this action for damages for the harm to his fishing boat "San Giuseppe" resulting from a collision with a car float bearing thirteen railroad cars towed by defendant's tug "Sea Rover." The action was tried before a jury. Defendant appeals from a judgment awarding plaintiff $2,000 damages and from an order denying a motion for a new trial.

Plaintiff left Fisherman's Wharf in San Francisco alone in his fishing boat about 4:30 a.m., half an hour before the collision, and proceeded in a westerly direction. The boat displayed running lights. Since the night was clear there was good visibility, and an ebb tide favored plaintiff's movement. About ten minutes after leaving Fisherman's Wharf, plaintiff stopped his engine because of air in the fuel line. He testified that before working on the engine he looked around to see whether any other craft were in sight; that he did not see defendant's tug and car float; that he worked to clear the fuel line for about five or six minutes and then started the engine; that he then saw the car float 25 to 30 feet away and crashed into her bow because he could not change his course effectively at that distance. He claims that he heard no warning whistles and that when he called for help, as his boat was getting away from the car float under its own power, he received no response from defendant's tug or car float. With the assistance of another fishing boat plaintiff's boat reached the entrance of Fisherman's Wharf where it sank. It was subsequently raised and repaired.

Captain Edwards of defendant's tug "Sea Rover" testified that he left Tiburon about 4:10 a. m. bound for Pier 45, San Francisco, proceeding generally east by south; that he was standing on the tug's pilot house where he had an unobstructed view; that he observed plaintiff's boat and another fishing boat as they cleared Pier 45 and came into the bay; and that he continued to watch the two boats until the collision occurred. According to Captain Edwards, the collision occurred about a quarter of a mile from Aquatic Park; plaintiff fixed it at about 250 yards from the Yacht Harbor. Captain Edwards also testified that he blew one whistle when he was about a quarter of a mile from plaintiff's boat to indicate that he was going to change his course to the right in order to pass plaintiff on the port side; that since plaintiff did not answer or change his course, he gave the danger signal, a series of short blasts; and that when plaintiff continued on his course he gave the order to stop and reverse the tug so that the car float was at a standstill when plaintiff's vessel crashed into it. After the collision he called to plaintiff but received no answer from him, although the other fisherman who was near plaintiff's boat called back that he would try to ascertain plaintiff's condition. Captain Edwards testified that he did not see that one fishing boat left in tow of the other, and that he proceeded on his course under the impression that no damage had been done. He reported the collision to his employers, but not to the United States Steamboat Inspector.

Plaintiff's damages consisted of expenses incurred in repairing his boat and replacing the engine and nets, and of loss of earnings. The jury's verdict was for only part of the damages, indicating that it found both parties at fault. It was instructed to apply section 292(c) of the California Harbors and Navigation Code, St. 1937, p. 801, which provides that if both parties to a ship collision are at fault "the loss shall be equally divided, unless it appears that there was great disparity in fault, in which case the loss shall be equitably apportioned."

[1-3] Plaintiff's claim arises from a collision on navigable waters of the United States and thus involves a maritime cause of action (United States v. Appalachian Elec. Power Co., 311 U.S. 377, 61 S.Ct. 291, 85 L.Ed. 243), which in a federal court sitting as a court of admiralty would be determined under federal maritime law. Waring v. Clarke, 5 How. 441, 46 U.S. 441, 459, 12 L.Ed. 226; The Genessee Chief v. Fitzhugh, 12 How. 443, 53 U.S. 443, 13 L.Ed. 1058; Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469, 476, 42 S.Ct. 157, 66 L.Ed. 321, 25 A.L.R. 1008; Martin v. West, 222 U.S. 191, 197, 32 S.Ct. 42, 56 L.Ed. 159, 36 L.R.A.,N.S., 592. The federal maritime law provides for equal division of damages, if both parties were at fault, even though there was a disparity in fault. The Marian, 9 Cir., 66 F.2d 354; The Margaret, 3 Cir., 30 F.2d 923, 928 and cases there cited. Jurisdiction of the state court to try the action is based on section 24(3) of the Judicial Code, 28 U.S.C.A. § 41(3), which in "all civil causes of admiralty and maritime jurisdiction" saves to suitors "the right of a common-law remedy where the common law is competent to give it." The remedy afforded in the state court may be invoked to secure such rights "as readily admit of assertion and enforcement in actions in personam according to the course of the common law." Panama R. Co. v. Vasquez, 271 U.S. 557, 561, 46 S.Ct. 596, 597, 70 L.Ed. 1085; see Moore v. Purse Seine Net, 18 Cal.2d 835, 837, 118 P.2d 1; C.J. Hendry Co. v. Moore, 318 U.S. 133, 63 S.Ct. 499, 87 L.Ed. 663. Plaintiff's action is in personam to recover damages for tort and is "one of the most familiar of the common-law remedies." Panama R. Co. v. Vasquez, supra. "That there always has been a remedy at common law for damages by collision at sea cannot be denied." Schoonmaker v. Gilmore, 102 U.S. 118, 119, 26 L.Ed. 95. Since contributory negligence generally precludes a plaintiff from recovering damages at common law, defendant contends that the doctrine of contributory negligence is part of the common-law remedy and is therefore binding on a state court in a maritime cause as a limitation of the court's jurisdiction.

Defendant relies on Belden v. Chase, 150 U.S. 674, 14 S.Ct. 264, 37 L.Ed. 1218, in which the United States Supreme Court held that contributory negligence of the plaintiff would bar recovery in an action on a maritime collision in a state court. Other courts, including this court in an early decision, have reached the same conclusion. Kelly v. Cunningham, 1 Cal. 365, 367; Maleeny v. Standard Shipbuilding Corporation, 237 N.Y. 250, 142 N.E. 602; Smith v. Norfolk & S. R. Co., 145 N.C. 98, 99, 58 S.E. 799, 122 Am.St.Rep. 423; Steiner v. Mississippi River, etc., Co., 194 Iowa 647, 190 N.W. 9, 25 A.L.R. 1551; Johnson v. United States Shipping Board etc. Corp., 2 Cir., 24 F.2d 963; Puget Sound Nav. Co. v. Nelson, 9 Cir., 41 F.2d 356; Wolker v. Electric Ferries, Inc., 2 Cir., 82 F.2d 1023. These courts have sometimes stated that general principles of law would require a different conclusion. In re Pennsylvania R. R. Co., 2 Cir., 48 F.2d 559, 566; Wilkins v. Foss Launch, etc., Co., 20 Wash.2d 422, 147 P.2d 524; see Sprague, Divided Damages, 6 N.Y.U.L. Rev. 14.

Subsequent decisions of the United States Supreme Court, however, compel the conclusion that Belden v. Chase, supra, is no longer a binding precedent. The sole basis for the holding in Belden v. Chase is a dictum in Atlee v. Northwestern U. Packet Co., 21 Wall. 389, 88 U.S. 389, 395, 22 L.Ed. 619, that admiralty courts and common-law courts have their own set of rules for determining the effect of the fault of both parties in a collision case and that the applicability of either set of rules depends upon the forum selected by the plaintiff. Under this theory, the special rules of admiralty practice with respect not only to remedial but to substantive rights would apply only if the suit were brought in a court of admiralty. This theory has been repudiated in later cases.

[4-6] It is now settled that "The general rules of the maritime law apply whether the proceeding be instituted in an admiralty or common law court." (Carlisle

Packing Co. v. Sandanger, 259 U.S. 255, 259, 42 S.Ct. 475, 477, 66 L.Ed. 927; Chelentis v. Luckenbach S. S. Co., 247 U.S. 372, 380, 381, 38 S.Ct. 501, 62 L.Ed. 1171; Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 159, 40 S.Ct. 438, 64 L.Ed. 834, 11 A.L.R. 1145; Engel v. Davenport, 271 U. S. 33, 46 S.Ct. 410, 70 L.Ed. 813; Panama R. Co. v. Vasquez, 271 U.S. 557, 46 S.Ct. 596, 70 L.Ed. 1085; Messel v. Foundation Co., 274 U.S. 427, 434, 47 S.Ct. 695, 71 L. Ed. 1135), and that the state courts must preserve all substantial admiralty rights of the litigants. Garrett v. Moore-McCormack Co., 317 U.S. 239, 249, 63 S.Ct. 246, 87 L.Ed. 239; Messel v. Foundation Co., 274 U.S. 427, 434, 47 S.Ct. 695, 71 L.Ed. 1135. A state court having the same jurisdiction over a case that a federal court would have if the suit had been brought there, must determine the rights of the parties under the maritime law as a "system of law coextensive with, and operating uniformly in, the whole country." The Lottawanna, 21 Wall. 558, 88 U.S. 558, 575, 22 L.Ed. 654; Southern Pacific Co. v. Jensen, 244 U.S. 205, 215, 37 S.Ct. 524, 61 L.Ed. 1086, L.R.A.1918C, 451, Ann.Cas. 1917E, 900; Chelentis v. Luckenbach S. S. Co., supra, 247 U.S. page 382, 38 S.Ct. 501, 62 L.Ed. 1171; Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 159, 40 S.Ct. 438, 64 L.Ed. 834, 11 A.L.R. 1145; Carlisle Packing Co. v. Sandanger, 259 U.S. 255, 259, 42 S.Ct. 475, 66 L.Ed. 927; Messel v. Foundation Co., 274 U.S. 427, 434, 47 S. Ct. 695, 71 L.Ed. 1135. State law is inapplicable to a maritime cause "if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations." Southern Pacific Co. v. Jensen, 244 U.S. 205, 216, 37 S.Ct. 524, 529, 61 L.Ed. 1086; Occidental Ind. Co. v. Industrial Acc. Comm., 24 Cal.2d 310, 313, 149 P.2d 841; Knickerbocker Ice Co. v. Stewart, supra, 253 U.S. page 157, 40 S.Ct. 438, 64 L. Ed. 834, 11 A.L.R. 1145. Thus the common-law defense of assumption of risk is not available in either a state or federal court in a suit brought by a seaman under the Jones Act (41 Stats. 1007, 46 U.S.C.A. § 688; Paulsen v. McDuffie, 4 Cal.2d 111, 115, 118, 47 P.2d 709; Beadle v. Spencer, 298 U.S. 124, 56 S.Ct. 712, 80 L.Ed. 1082; The Arizona v. Anelich, 298 U.S. 110, 56 S.Ct. 707, 80 L.Ed. 1075), nor is contributory negligence a bar to plaintiff's recovery in such a suit. "Any rule of assumption of risk in admiralty, whatever its scope, must be applied in conjunction with the established admiralty doctrine of comparative negligence and in harmony with it. Under that doctrine contributory negligence, however gross, is not a bar to recovery but only mitigates damages." Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 431, 59 S. Ct. 262, 266, 83 L.Ed. 265; Beadle v. Spencer, supra, 298 U.S. page 131, 56 S.Ct. 712, 80 L.Ed. 1082. Any doubt as to whether the foregoing cases or Belden v. Chase governs maritime causes in the state courts is dispelled by the Supreme Court's declaration in Garrett v. Moore-McCormack Co., supra, 317 U.S. pages 244, 245, 63 S. Ct. at page 250, 87 L.Ed. 239, that: "In many other cases this Court has declared the necessary dominance of admiralty principles in actions in vindication of rights arising from admiralty law, Belden v. Chase, 150 U.S. 674, 14 S.Ct. 264, 37 L.Ed. 1218, an 1893 decision which respondent relies upon as establishing a contrary rule, has never been thus considered in any of the later cases cited."

Garrett v. Moore-McCormack Co., supra, involved a suit by a seaman against his master in a state court to recover damages for injury under the Jones Act and for maintenance and cure under the general maritime law. With respect to both the statutory and the nonstatutory cause of action, the court held controlling the rule of the general maritime law with respect to the validity of a release of claims of a seaman against his master that "the responsibility is on the defendant to sustain a release rather than on the plaintiff to overcome it," and reversed the state court, which had applied the state rule requiring proof by the plaintiff beyond a reasonable doubt. "The right of petitioner to be free from the burden of proof imposed by the Pennsylvania local rule inhered in his cause of action. Deeply rooted in admiralty as that right is, it was a part of the very substance of his claim and cannot be considered a mere incident of a form of procedure." 317 U.S. at page 249, 63 S.Ct. at page 252, 87 L.Ed. 239. In pronouncing the rule that state law cannot be applied in a maritime cause if it would substantially impair a right arising under federal maritime law, the court declared: "The source of the governing law applied is in the national, not the state, governments. If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the state would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less but more secure. * * * admiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State. So here, in trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected." 317 U.S. at page 245, 63 S.Ct. at page 251, 87 L.Ed. 239.

[7] There can be no doubt that the division-of-damages rule in maritime collision cases involving the fault of both parties is as binding on the state courts as the federal rule as to burden of proof with respect to the validity of releases in suits by seamen for maintenance and cure. The right of a plaintiff to a division of damages in a maritime collision case involving the fault of both parties is a substantial right deeply rooted in admiralty, inherent in his cause of action, and such a part of the substance of his claim that it "cannot be considered a mere incident of a form of procedure." It is indeed an essential characteristic feature of the substantive law of admiralty. The very basis of the plaintiff's cause of action, which is unquestionably a maritime cause of action, would be destroyed if recovery were denied because of his contributory negligence, for it is only under admiralty law that he has any claim for damages arising from a maritime collision caused by the fault of both parties. If the state court should apply state law rather than admiralty law "the remedy afforded by the state would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less, but more secure." Garrett v. Moore-McCormack Co., supra, 317 U.S. at page 245, 63 S.Ct. at page 251, 87 L.Ed. 239. That the United States Supreme Court regards the plaintiff's right in such a case as a substantial admiralty right clearly appears not only from its abandonment of Belden v. Chase, but from its references in the Garrett case to state doctrines of contributory negligence and assumption of risk as doctrines that must give way to admiralty principles in actions at law on maritime torts. "There is no dearth of example of the obligation on law courts which attempt to enforce substantive rights arising from admiralty law to do so in a manner conforming to admiralty practice. Contributory negligence is not a barrier to a proceeding in admiralty or under the Jones Act, and the state courts are required to apply this rule in Jones Act actions. Beadle v. Spencer, 298 U.S. 124, 56 S.Ct. 712, 80 L.Ed. 1082. Similarly state courts may not apply their doctrines of assumption of risk in actions arising under the Act. The Arizona [v. Anelich], 298 U.S. 110, 56 S.Ct. 707, 80 L.Ed. 1075; Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 59 S.Ct. 262, 83 L.Ed. 265. State courts, whether or not applying the Jones Act to actions arising from maritime torts, have usually attempted, although not always with complete success, to apply admiralty principles. The federal courts when treating maritime torts in actions at law rather than in suits in admiralty have also sought to preserve admiralty principles whenever consonant with the necessities of common law procedure."

The court cited with approval (317 U.S. 239, 244, note 8, 63 S.Ct. 246, 87 L.Ed. 239) Colonna Shipyard v. Bland, 150 Va. 349, 358, 143 S.E. 729, 731, 59 A.L.R. 497, as a state court decision applying federal maritime law with respect to the effect of contributory negligence in an action on a maritime tort. In the Colonna Shipyard case a ship carpenter was injured through the negligence of his master. In denying defendant's right to defeat recovery by the defense of contributory negligence, the Virginia Supreme Court of Appeals declared: "When one suffers an injury under such circumstances as to be a maritime tort, his rights are fixed by the admiralty law; but he may choose the forum in which to assert those rights. He has his remedy at common law, but his recovery and the precise relief to be afforded him are determined by the admiralty law which is applied, whether he sues in the common law or the admiralty court. He may pursue his remedy at common law in the state court, but that court must administer the admiralty law. He may select his court, but cannot add to or change his rights * * * which are the same in both forums." See, also, United States v. Norfolk-Berkley Bridge Corp., D.C., 29 F.2d 115, 128. A case holding that contributory negligence is not a bar to a proceeding in admiralty would not be invoked by the United States Supreme Court as an example of the obligation of law courts to enforce substantive rights arising from admiralty law in conformity with admiralty practice, in support of its holding that the same principles applied to the burden of proof in a maritime cause, if the court did not regard the right to divided damages a substantive right arising from admiralty law.

[8] Moreover, under accepted principles of conflict of laws the effect of contributory negligence is governed by the law under which the cause of action was acquired rather than by the law of the forum. Fitzpatrick v. International Ry. Co., 252 N.Y. 127, 134, 169 N.E. 112, 68 A.L.R. 801; Shaffer v. New York Central R. Co., 66 Ohio App. 417, 34 N.E.2d 792; Rest., Conflicts of Laws, § 385; 2 Beale, Treatise on Conflict of Laws, § 385.1; 11 Am.Jur. Conflict of Laws, § 189, p. 503; Robinson, Admiralty, 860. "The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded by the jurisdiction in which the right itself originates. Not so long ago we sought to achieve this result with respect to enforcement in the federal courts of rights created or governed by state law [Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487]." Garrett v. Moore-McCormack Co., supra, 317 U.S. at page 245, 63 S.Ct. at page 251, 87 L.Ed. 239. "The fact that a federal right is to be ascertained in a state rather than in a federal court does not make it any less the duty of the court to apply federal law. Chesapeake & O. R. Co. v. Martin, 283 U.S. 209, 212, 213, 51 S.Ct. 453, 454, 455, 75 L.Ed. 983; Awotin v. Atlas Exchange Nat. Bank, 295 U.S. 209, 55 S.Ct. 674, 79 L.Ed. 1393; Brady v. Southern R. Co., 320 U.S. 476, 479, 64 S.Ct. 232, 234 [88 L.Ed. 239] and cases cited; Illinois Steel Co. v. Baltimore & O. R. Co., 320 U.S. 508, 511, 64 S.Ct. 322, 324 [88 L.Ed. 259], and cases cited; Steele v. Louisville & N. R. Co., 323 U.S. 196, 65 S.Ct. 226, at page 233 [89 L.Ed. 173]." Chief Justice Stone, concurring in Prudence Realization Corp. v. Ferris, 65 S.Ct. 539, 542.

[9] Federal law governs not only the consequences of the fault of the parties but the question whether their vessels were operated in compliance with the rules governing navigation on navigable waters of the United States. The Federal Inland Rules of Navigation, 30 Stats. 96–102, 33 U.S.C.A. §§ 171–231, are controlling except as they permit the application of special local law. Plaintiff violated the Federal Inland Rules in several respects. While he was repairing his engine he failed to keep a lookout as required by article 29, 30 Stats. 102, 33 U.S.C.A. § 221, and was thus unable to see the tug and car float in time to avoid the collision. He gave no danger signal as required by article 18, rule III, 33 U.S.C.A. § 203, rule 3 and instead of reducing his speed (The Pennsylvanian, 9 Cir., 139 F.2d 478, 481) he started his motor just before the collision occurred. Although he was outbound he failed to keep to the starboard side of the channel, which the jury might have regarded as a narrow one within the meaning of article 25, 30 Stats. 101, 33 U.S.C.A. § 210. The Bee, 2 Cir., 138 F. 303, 70 C.C.A. 593; The Hokendauqua, D.C., 270 F. 270; 28 Words and Phrases, Perm.Ed., page 19. Although he followed generally a westerly direction, he failed to keep out of the way of defendant's vessels, which followed an east by south direction and were therefore on his starboard side. Arts. 19, 22, 23, 33 U.S.C.A. §§ 204, 207, 208.

[10-16] Defendant contends that it can be determined as a matter of law under the Federal Inland Rules that it was not negligent. The evidence shows without conflict that defendant's vessels proceeded on their course as prescribed by the rules applicable under ordinary circumstances. The question remains, however, whether sometime before the Captain of the "Sea Rover" gave the order to stop and reverse the ship, he knew or should have known that he could avoid a collision by stopping his vessels, or by changing his course, for the rules provide, "In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger." Art. 27, 30 Stats. 102, 33 U.S.C.A.

§ 212. A case of "special circumstances" requiring action outside the rules exists if the danger was manifest to the captain of the vessel faced with the problem of departing from the rules. "Where two courses are open to a vessel, and particularly to the privileged vessel, one to follow the prescribed rules and the other to depart from them, the duty is imperative to observe the rules and to assume that an approaching vessel will do likewise, until after the danger has become so manifest as to show that there is no proper choice of judgment other than that of departing from the rules. Any other course would lead to confusion and be a most prolific source of accidents." The Piankatank, 4 Cir., 87 F.2d 806, 810. Defendant's vessels were the privileged vessels, for they were on the starboard side of the approaching vessel. 30 Stats. 101, 33 U.S.C.A. § 204. They had a duty under the Federal Inland Rules to hold their course and speed, 30 Stat. 101, 33 U.S.C.A. § 206, while it was plaintiff's duty to keep out of their way. 30 Stats. 101, 33 U.S.C.A. §§ 207, 208. The decisive question, therefore, is when it became the duty of the Captain of the "Sea Rover" to stop and reverse his ship or to change his course. "The preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting, at least in the absence of some distinct indication that she is about to fail in her duty." Wilson v. Pacific Mail S. S. Co., 276 U.S. 454, 462, 48 S.Ct. 369, 370, 72 L.Ed. 651. "The privileged vessel is always in a difficult situation. The rule is that she must keep her course and speed until it becomes apparent that the burdened vessel cannot alone avoid the collision." The Boston Socony, 2 Cir., 63 F.2d 246, 248. In the present case the Captain of the "Sea Rover" watched plaintiff's boat after it cleared Pier 45 of the San Francisco Harbor. Visibility was good. There were indications that the fishing boat was in distress and that it would not follow navigation rules. Although the fishing boat showed running lights, it proceeded at a very slow speed, drifting with the ebb tide for about five or six minutes before the collision. The failure of the fishing boat to change her course or to answer the "Sea Rover's" signal that the latter was going to change her course indicated that plaintiff's boat was mismanaged or out of control, and that observance of the navigation rules by plaintiff was not to be expected. The jury could reasonably have concluded that the Captain of the "Sea Rover" should have known that a dangerous situation was developing when its signal indicating a change of course remained unanswered, and that the only safe procedure was not to maintain his course and speed but to stop and reverse the "Sea Rover" or to change his course at once. "The lesson that steam vessels must stop their engines in the presence of danger, or even of anticipated danger, is a hard one to learn, but the failure to do so has been the cause of the condemnation of so many vessels that it would seem that these repeated admonitions must ultimately have some effect. We cannot impress upon the masters of steam vessels too insistently the necessity of caution in passing or crossing the course of other vessels in constricted channels." The New York, 175 U.S. 187, 207, 20 S.Ct. 67, 75, 44 L.Ed. 126. The Captain of the "Sea Rover" should have exercised particular caution, for he did not maintain a special lookout on his vessel as required by article 29 of the Federal Inland Rules. 30 Stats. 102, 33 U.S.C.A. § 221. A tug with a tow does not comply with this rule simply because the officer in charge looks out from the pilot house. City of Philadelphia v. Gavagnin, 3 Cir., 62 F. 617, 618, 10 C.C.A. 552; The Williamsport, 1 Cir., 74 F. 653, 655, 20 C.C.A. 585; Dahlmer v. Bay State, etc., Co., 1 Cir., 26 F.2d 603, 605. Moreover, the captain did not know where the lookout on the tow was located, although he had in tow a barge about 280 feet in length and 40 feet in width. Although ordinarily it is the duty of the other ship to make allowance for the encumbered state of a tug (The Edward Chilton, D.C., 27 F.2d 624, 625), the captain of a tug with a barge in tow must give consideration to the special danger connected with such a tug in deciding whether the situation was so dangerous that he should stop the tug. As stated in Marsden, Collisions at Sea, ninth edition, page 185: "In taking measures to avoid a third vessel a tug has to consider her tow; and a step that would be right, and take her clear, if he were unencumbered, may bring about a collision between her tow and the ship which she herself has avoided."

[17-19] Defendant attempts to meet these considerations by asserting that un-

der the rule known as the "major and minor fault rule" any reasonable doubt as to its negligence had to be resolved in its favor. The rule has recently been restated and its limitations defined as follows: "It is well settled law that 'where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor.' Alexandre v. Machan (The City of New York), 1893, 147 U.S. 72, 85, 13 S.Ct. 211, 216, 37 L. Ed. 84, 85. Accord, The Victory (The Plymothian), 1897, 168 U.S. 410, 423, 18 S.Ct. 149, 42 L.Ed. 519; The Ludwig Holberg, 1895, 157 U.S. 60, 15 S.Ct. 477, 39 L.Ed. 620; The San Simeon, 2 Cir., 1933, 63 F.2d 798. However, this court long ago said that this rule that where one vessel was guilty of gross fault, the other is presumed not to have been in fault, was artificial and misleading unless very carefully applied. The Admiral Schley, 1 Cir., 1904, 131 F. 433, 439, affirmed on rehearing, 1 Cir., 1905, 142 F. 64, certiorari denied, sub. nom. Consolidation Coal Co. v. American Mail Steamship Co., 1906, 201 U.S. 648, 26 S.Ct. 762, 50 L.Ed. 905. Even though the first vessel is grossly at fault, a plain fault on the part of the other vessel is not excused. The Albert Dumois, 1900, 177 U.S. 240, 253, 20 S.Ct. 595, 44 L.Ed. 751; The Yamashita Kisen Kabushiki Kaisha v. McCormick Inter. S. S. Co., 9 Cir., 1927, 20 F.2d 25; The San Simeon, supra." General Seafoods Corp. v. J. S. Packard Dredg. Co., 1 Cir., 120 F.2d 117, 119. The major and minor fault rule must give way to the well-settled rule of maritime law that if one vessel, though correctly navigated some time before the collision, can perceive that a dangerous situation is developing through mismanagement of another vessel it becomes her duty with all means at her disposal to prevent the accident and that "the fault, and even the gross fault of one vessel, does not absolve the other from the use of such precautions as good judgment and accomplished seamanship require." The Albert Dumois, 177 U. S. 240, 253, 20 S.Ct. 595, 600, 44 L.Ed. 751; The New York, 175 U.S. 187, 207, 20 S. Ct. 67, 44 L.Ed. 126; The Yamashita Kisen Kabushiki Kaisha v. McCormick, etc., Co., 9 Cir., 20 F.2d 25, 27; The San Simeon, 2 Cir., 63 F.2d 798, 800; The Trim, D. C., 30 F.Supp. 283; General Seafoods Corp. v. J. S. Packard Dredg. Co., supra, 120 F.2d page 119; see Inland Rules, article 29, 30 Stat. 102, 33 U.S.C.A. § 221.

[20] Defendant contends that several instructions to the jury were prejudicially erroneous. It objects to certain instructions on the ground that they had no support in the evidence. The jury was instructed as to the legal consequences of confused signals by both vessels, although the evidence uniformly showed that all signals were given by the defendant. The jury was instructed as to the obligation of a vessel to avoid risk of collision with vessels at rest, although plaintiff's vessel, since it moved with the ebb tide, was never at rest. The jury was instructed that "a custom to the contrary cannot relieve a towing tug from the legal duty to maintain a proper lookout," although defendant did not claim that there was such a custom. These instructions on hypothetical facts were apt to be confusing.

[21] The jury was instructed that "a tug must keep a lookout at the bow of the tow alongside, where the tow projects beyond the tug. If in this case, you find from a preponderance of the evidence that the tug failed to keep a lookout in the bow of the barge, and that such failure proximately caused the collision then the defendant is liable." By instructing the jury that a lookout must be stationed at a particular place on the tow, the court invaded the province of the jury. There is no rule that the lookout must be stationed at a particular place; his station should be where he is in a "position best adapted to descry vessels approaching at the earliest moment." Inland Rules, art. 29, 30 Stats. 102, 33 U.S.C.A. § 221; The Catalina, 9 Cir., 95 F.2d 283, 285; Puratich v. United States, 9 Cir., 126 F.2d 914, 916; St. John v. Paine, 10 How. 557, 51 U.S. 557, 585, 13 L.Ed. 537; The Pennsylvania, Fed.Cas. No. 10,949; The A. P. Skidmore, D.C., 108 F. 972; The Patria, D.C., 92 F. 411; Yamashita Kisen Kabushiki Kaisha v. McCormick, etc., Co., 9 Cir., 20 F.2d 25, 29.

[22] The formula instruction with respect to the effect of the disabled condition of plaintiff's vessel was not erroneous in omitting the element of contributory neg-

ligence, for the reasons given above; but it was incomplete in omitting any reference to plaintiff's duty to indicate the disabled status of his vessel by giving danger signals or other distress signals. 30 Stats. 100, 102, 33 U.S.C.A. §§ 203, 231.

[23] Defendant also attacks the following instruction: "Whenever a collision between two vessels takes place, it is the duty of the master or person in charge of each vessel, so far as consistent with safety, to stay by the other to ascertain if she is in need of assistance, and render such aid as may be requisite and give the name and port of the vessel. Failure to do this, without reasonable cause shown, may raise a presumption that the collision was caused by his wrongful act, neglect, or default. The fact that a vessel, apprised of the collision, goes on without any attempt to render assistance is to be regarded as a suspicious circumstance." This instruction was based on section 367 of 33 U.S.C.A., 26 Stats. 425, which provides that under the circumstances described in the instruction, it is the duty of the master of each vessel "to render to the other vessel, her master, crew, and passengers (if any) such assistance as may be practicable and as may be necessary in order to save them from any danger caused by the collision, and also to give to the master or person in charge of the other vessel the name of his own vessel and her port of resgistry * * *. If he fails so to do, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default." The instruction provides that a vessel shall "render such aid as may be *requisite*" whereas the statute provides that the vessel shall render "such assistance as may be *practicable* and as may be necessary." Although "requisite" may be the fair equivalent of "necessary," it is not the equivalent of "practicable," for it may not be "practicable" to render the necessary aid. The instruction also omitted the condition, "in the absence of proof to the contrary." These omissions rendered the instruction incomplete.

[24] The court gave the following instruction: "The fact that a tug is burdened with a heavy and unwieldly tow imposes on the tug the duty of taking extraordinary care to keep her tow out of the way of other vessels." There is no such rule. It is established that as between vessels otherwise equal, a tug with a tow has the right of way over a vessel without a tow. The Edward Chilton, D.C., 27 F.2d 624, 625. The cumulative effect of the foregoing instructions and those considered below was to confuse the jury as to the real issues and the law governing the duties of vessels at sea.

[25–28] The instructions were conflicting on substantial matters. On the question as to the proper conduct of vessels approaching on crossing courses, the jury was instructed in terms of section 284 of the California Harbors and Navigation Code, St.1937, p. 800: "When steam vessels will inevitably or necessarily cross so near that by continuing their respective courses, there would be risk of collision, each shall give right rudder, so as always to pass on the port or left side of the other." On the same question the jury was also instructed in the terms of the Federal Inland Rules, 30 Stats. 101, 33 U.S.C.A. §§ 204, 207, 208, that "When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other." "Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other." "Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse." The giving of conflicting instructions on this vital issue was prejudicial error. Pipoly v. Benson, 20 Cal.2d 366, 369, 125 P.2d 482, 147 A.L.R. 515; Pittam v. City of Riverside, 128 Cal.App. 57, 16 P.2d 768; Torvend v. Patterson, 136 Cal.App. 120, 124, 28 P.2d 413. Moreover, the instruction under the California code section was in itself erroneous, for the federal rules are paramount. In the light of the evidence in this case we cannot say that it is improbable that the jury found defendant negligent because it failed to give right rudder in accordance with the California code section. Furthermore, the instruction on the applicable federal rules was incomplete, for the court refused to give an instruction requested by defendant based on the Federal Inland Rules, 30 Stats. 101, 33 U.S.C.A. § 206, that "where, by any of these rules, one of the two vessels is to keep out of the way, the other shall keep her course and speed." The pivotal question in the case is whether the Captain of the "Sea Rover" should have stopped and reversed the tug or changed his course in time to prevent an otherwise inevitable collision. The jury had to be properly instructed with respect to the captain's duties in this regard before it could determine the question of his negligence. The failure of the court to instruct the jury that the "Sea Rover" had to maintain her course and speed until the danger of collision became manifest, and was then under a duty to take all reasonable action to prevent a collision, left the jury without the governing standard by which to measure defendant's negligence. While we cannot say as a matter of law under the evidence in this case that a reasonable jury could not conclude that the Captain of the "Sea Rover" failed to stop and reverse the tug or to change his course after the danger or collision became manifest and in time to avoid the collision, neither can we say it is improbable that under proper instructions the jury would have reached a different conclusion.

The judgment is reversed and the appeal from the order denying the motion for new trial is dismissed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, and SPENCE, JJ., concurred.

SCHAUER, Justice.

I concur in the judgment. I agree with the holding of the majority opinion that the federal maritime law governs the cause of action and that the evidence is not insufficient, as a matter of law, to support a finding of negligence on the part of plaintiff as well as on that of the operator of defendant's tugboat. Where both vessels are at fault the damages are to be equally divided, irrespective of the degree of fault. (The Marian, 9 Cir., 1933, 66 F.2d 354, 357.) Since the damages were not equally divided here but were apparently assessed upon the theory of apportioning the loss in accordance with the fault, the judgment must be reversed.

Both plaintiff's and defendant's vessels were under way at all times concerned (see Preliminary Definitions, paragraph I, Inland Rules) but there is a conflict in the evidence as to whether, up to a few moments before the collision, plaintiff's vessel was under command and was making way through the water. According to plaintiff his boat had not been under command and had not been making way through the water for some five or six minutes prior to the time when the barge had approached within 25 or 30 feet of him. But the master of defendant's tug testified that he had watched plaintiff continuously during the closing of a gap of at least one-quarter of a mile; that plaintiff had "held his course and speed"; that before the collision the tug with its tow had lost way completely and that it was plaintiff's boat which ran into the barge.

Regardless of all other rules which may have been involved it is obvious that plaintiff could be found, either upon his own testimony or upon that of defendant's master, to have been guilty of negligence in failing to keep a proper lookout for approaching vessels. Likewise upon the testimony of either plaintiff or the tug's master it could be found that the latter was inattentive or unskillful or otherwise negligent in bringing his cumbersome and unwieldy tow so close to plaintiff's boat as to involve immediate risk of collision under any of the circumstances shown. If plaintiff's boat was not under command that fact should have been apparent to an experienced, competent, and attentive officer in the pilot house of defendant's tug in ample time to have permitted avoidance of the collision and if, on the other hand, plaintiff's boat was under command and making way through the water then it would seem to be a reasonable inference that the master of the tug was negligent in not having sooner recognized, or acted upon the fact, that risk of collision was involved in the holding of course and speed by both the tow and plaintiff's boat after the latter had failed to answer a crossing signal which called for it to cross the bow of the tow from starboard to port and where its compass bearing remained constant.

I do not see how the instruction quoting section 284 of the California Harbors and Navigation Code, St.1937, p. 800, could possibly have prejudiced the defendant. According to the master of defendant's tugboat he sounded one blast of the whistle calling for each boat to alter her course to starboard and to leave the other to port. This is in accord with the California code rule as well as with rule I of article 18 of the Inland Rules, 33 U.S.C.A. § 203, rule I. It does not necessarily appear, however, that the situation was controlled by such rule I.

Rule I of article 18 applies to passing vessels, that is, to vessels "approaching *each other* [italics added] head and head * * * or nearly so. * * * It does not apply by day to cases in which a vessel sees another ahead crossing her own course, or by night" where the same relative positions are shown by the running lights. It was the latter situation which almost certainly was present here. Plaintiff's boat was coming from Fisherman's Wharf, from the vicinity of Pier 45. Defendant's tow was coming from Tiburon on a course to dock at Pier 45 against an ebb tide. Necessarily, until they had crossed, plaintiff's boat was to starboard of defendant's tug and barge, and, as was to be expected, that is where the master of the tug said that he first saw plaintiff's boat. He said that he saw several fishing boats on his starboard side, "well inside, towards Aquatic Park" and that plaintiff's boat was one of two which "steered in such a direction as to cross my bow." At that time a distance of about one-half mile separated plaintiff's boat and defendant's tow. Plaintiff under article 19 (Inland Rules, 33 U.S.C.A. § 204) had the right of way. "When two steam vessels [under the statutory definition both plaintiff's boat and defendant's tug were "steam vessels"] are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

Apparently, it was at about the time that plaintiff's boat reached a position nearly dead ahead of the tow that plaintiff's engine stopped. Either his engine stopped or he altered his course from a crossing course to a passing course. In either event it is obvious that his angle on the bow of defendant's craft ceased to change and the preliminary provision of the Steering and Sailing Rules became applicable. That provision is (Inland Rules, § IV): "Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist." 33 U.S.C.A. § 201. The master of the tug apparently recognized this risk when the boats were about one-quarter mile from each other. He testified that he first signaled the fishing boat when they were "a good quarter of a mile" apart. He said, "When I saw that he had not altered his course [apparently meaning compass bearing], when I blew this one whistle, then naturally I gave orders to the men to come to the right."

The one blast of the whistle called for plaintiff to cross the bow of defendant's tow so that the vessel would cross or pass port to port. That signal was not answered. The failure to answer it, coupled with no change in compass bearing, should at once have been recognized as evidencing "risk of collision." Prompt action by defendant's master, at the distance then separating the vessels, it would seem, could have averted the collision.

Although certain instructions were erroneous I do not beleive that any of the instructions complained of were prejudicially erroneous except insofar as they authorized the jury to equitably apportion the loss if they found "that there was a great disparity in fault." As it is obvious that the jury did undertake to equitably apportion the loss the judgment cannot stand.

For the above stated reasons only I concur in the judgment of reversal.

26 Cal.2d 358

ALFAFARA v. FROSS.

S. F. 17108.

Supreme Court of California.
May 22, 1945.

1. Aliens 🔑6(1)

The Legislature has power to forbid taking and holding of realty by aliens ineligible for citizenship, as provided by Alien Land Act, in absence of contrary treaty. Gen.Laws 1937, Act 261, §§ 1, 2; Const.1849, art. 1, §§ 1, 17; Const.1879, art. 1, § 17.

2. Aliens 🔑6(1)

Under state and federal laws, a person must be not only an alien, but ineligible for citizenship, to be excluded from right to acquire and hold realty in state. Gen. Laws 1937, Acts 260, 261, §§ 1, 2.

3. Aliens 🔑12(4)

A native pure-blooded Filipino, who never served in United States armed forces, was not "eligible to citizenship" within Alien Land Act, authorizing aliens eligible to citizenship under federal laws to acquire realty in state. Gen.Laws 1937, Act 261, §§ 1, 2; Nationality Act of 1940, §§ 1–601, 303, 8 U.S.C.A. §§ 501–907, 703.

See Words and Phrases, Permanent Edition, for all other definitions of "Eligible to Citizenship".

4. Aliens 🔑1

A native pure-blooded Filipino is a "national", not an "alien," and hence not prohibited by Alien Land Act from acquiring and possessing land in state, though ineligible for citizenship of United States. Gen.Laws 1937, Act 261, §§ 1, 2; Nationality Act of 1940, §§ 101(b) (2), (e), 201–204, 303, 8 U.S.C.A. §§ 501(b) (2), (e), 601–604, 703.

See Words and Phrases, Permanent Edition, for all other definitions of "Alien" and "National".

5. Aliens 🔑1

The contemplated withdrawal of United States sovereignty over Philippine Islands in 1946 under federal statute does not bring native pure-blooded Filipino within provisions of Alien Land Act prohibiting aliens ineligible to citizenship from acquiring realty in state. Gen.Laws 1937, Act 261, §§ 1, 2; Nationality Act of 1940, § 204(a), 8 U.S.C.A. § 604(a); 48 U.S.C.A. § 1232.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Elmer E. Robinson, Judge.

Action by Celestino Alfafara against Bernice Fross for specific performance of a contract for sale of realty to plaintiff. Judgment for plaintiff, and defendant appeals.

Affirmed.

Winston Churchill Black, of San Francisco, for appellant.

Pillsbury, Madison & Sutro, Sigvald Nielson, and Charles F. Prael, all of San Francisco, for respondent.

SHENK, Justice.

The plaintiff, a native Filipino, sought specific performance of a contract of sale of real property in which he was named as the purchaser and the defendant as the seller. After a hearing on stipulated facts, the trial court entered a decree in favor of the plaintiff. Defendant appealed. The question for decision is whether, under the Alien Land Act (Stats. 1921, p. lxxxiii, as amended, adopted as an initiative measure, Deering's Gen. Laws, Act 261, the plaintiff is barred from acquiring real property in this state.

Plaintiff was born on May 19, 1899, in the Philippine Islands, of parents who were likewise born there. He is a pure Filipino race and is therefore not a white person. He resided in the islands until 1929 when he came to the United States and he has since resided in San Francisco. He is not a citizen of the United States, and has never served in the United States Army, Navy, Marine Corp, Coast Guard, or any of the armed forces of the United States. He has never resided in any country other than the Philippine Islands and the United States.

In June, 1944, plaintiff entered into a contract for the purchase from defendant for the sum of $65 of a parcel of land located in San Mateo County. When the purchase price was tendered pursuant to the terms of the contract defendant refused to convey. This action followed. Defendant asserted that performance by her would be contrary to the provisions of the Alien Land Act and unlawful. In refusing to uphold this defense, the trial court concluded that "plaintiff is a national of the United States of America and is not an alien and is not barred or prohibited from holding or receiving real property in the State of California by the Alien Property Initiative Act of 1920."

On the stipulated facts the plaintiff is entitled to acquire the real property and the judgment in his favor should be affirmed unless he is excluded from its acquisition by the Alien Land Act. That act provides (§§ 1, 2): "All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, use, cultivate, occupy, transfer, transmit and inherit real property, or any interest therein, in this state, and have in whole or in part the beneficial use thereof, in the same manner and to the same extent as citizens of the United States except as otherwise provided by the laws of this state. All aliens other than those mentioned * * * may acquire * * * real property * * * in this state * * * in the manner and to the extent, and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."

Section 1 of article I of the Constitution of 1849 declared that included in the inalienable rights of all men was the right of "acquiring, possessing, and protecting property." Section 17 of the same article provided: "Foreigners who are, or who may hereafter become bona-fide residents of this State, shall enjoy the same rights in respect to the possession, enjoyment, and inheritance of property, as native-born citizens." Pursuant to this provision the Legislature in 1872 enacted section 671 of the Civil Code, which provides that "Any person, whether citizen or alien, may take, hold, and dispose of property real or personal, within this state."

Section 17 of article I of the Constitution of 1879 provides that "Foreigners of the white race or of African descent, eligible to become citizens of the United States under the naturalization laws thereof, while bona fide residents of this State, shall have the same rights in respect to the acquisition, possession, enjoyment, transmission, and inheritance of property as native born citizens." This section was amended in 1894 but in no way affecting the problem here involved.

By an act of 1913 (Stats. 1913, p. 206, Deering's Gen. Laws, Act 260) the Legislature provided, among other things, that aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state.

[1] In 1920, through the medium of the initiative, the Alien Land Act was adopted and it has since been the law of California. By a long line of decisions in this state it has been held that it is within the power of the Legislature (in the absence of a treaty to the contrary and there is here none) to forbid the taking and holding of real property by aliens ineligible to citizenship. See People v. Osaki, 1930, 209 Cal. 169, 286 P. 1025; Mott v. Clyine, 1927, 200 Cal. 434, 253 P. 718; Porterfield v. Webb, 1924, 195 Cal. 71, 231 P. 554; In re Okahara, 1923, 191 Cal. 353, 216 P. 614; In re Akado, 1922, 188 Cal. 739, 207 P. 245; People v. Cockrill, 1923, 62 Cal.App. 22, 216 P. 78. And the Act of 1920 has been upheld by the Supreme Court of the United States. See Terrace v. Thompson, 1923, 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255; Porterfield v. Webb, 1923, 263 U.S. 225, 44 S.Ct. 21, 68 L.Ed. 278; Webb v. O'Brien, 1923, 263 U.S. 313, 44 S.Ct. 112, 68 L.Ed. 318; Cockrill v. People, 1925, 268 U.S. 258, 45 S.Ct. 290, 69 L.Ed. 944.

[2] Under the laws of this state and of the United States the plaintiff is entitled to acquire and possess real property unless he is an alien, and is ineligible to citizenship. The two factors must concur. In other words, he must not only be an alien but he must also be ineligible to citizenship in order that he be excluded from the right to acquire and hold property in this state.

[3] Considering the factors in the reverse order the law is plain that the plaintiff is not eligible to become a citizen of the United States. The Nationality Code of 1940 (effective ninety days after October 14, 1940, 54 Stats. 1137–1174, 8 U.S.C.A. §§ 501–907) provides in section 703 that "The right to become a naturalized citizen under the provisions of this chapter shall extend only to white persons, persons of African nativity or descent, and descendants of races indigenous to the Western Hemisphere: Provided, That nothing in this section shall prevent the naturalization of native-born Filipinos having the honorable service in the United States Army, Navy, Marine Corps, or Coast Guard as specified in section 724 * * *." Plain-

tiff, as already stated, has never served in any of the armed forces of this country and he does not come within any of the other classes mentioned in the foregoing section of the Nationality Code eligible to naturalization.

[4] It is likewise clear that the plaintiff is not an alien. In the early case of Lyons v. State of California, 67 Cal. 380, at page 382, 7 P. 763, at page 764, this court said: "According to Webster the word 'alien' means 'a foreigner; one born in or belonging to another country. * * * In American law, one born out of the jurisdiction of the United States and not naturalized * * *."

In Toyota v. United States, 1925, 268 U. S. 402, 411, 45 S.Ct. 563, 565, 69 L.Ed. 1016, in reviewing the naturalization statutes, the court said: "The citizens of the Philippine Islands are not aliens. See Gonzales v. Williams, 192 U.S. 1, 13, 24 S.Ct. 177, 48 L. Ed. 317. They owe no allegiance to any foreign government. They were not eligible for naturalization under section 2169 because not aliens and so not within its terms." Similar expressions are found in Gonzales v. Williams, 1904, 192 U.S. 1, 13, 24 S.Ct. 177, 48 L.Ed. 317, and Roque Espiritu De La Ysla v. United States, 9 Cir., 1935, 77 F.2d 988, and In re Rena, D.C. 1931, 50 F.2d 606.

In DeCano v. State, 1941, 7 Wash.2d 613, 110 P.2d 627, the court had under consideration an amendment to a law prohibiting the ownership of real property by aliens. The amendment, adopted in 1937, Laws 1937, c. 220, was entitled "An Act relating to the rights and disabilities of aliens with respect to land, and amending * * * Laws of 1921 * * *," but it added to the definition of "alien" in the earlier act, the clause: "* * * and [alien] does include all persons who are non-citizens of the United States and who ineligible to citizenship by naturalization. * * *" In reviewing the application of the amendatory statute to the situation of a Filipino who was a noncitizen ineligible to citizenship, the court held that the amendatory statute was unconstitutional because its title, which referred to "aliens," was not sufficiently broad to warrant inclusion of noncitizens such as native Filipinos. The court said 7 Wash.2d at page 633, 110 P.2d at page 633:

"'Alien' is commonly understood and has been judicially defined to be a person who owes allegiance to a foreign government. Ex parte Fung Sing, D.C., 6 F.2d 670. The 1937 law, as we have pointed out, applies to native Filipinos, although it is well known that, since the Spanish-American War, they have owed allegiance only to the United States. Regardless of whatever uncertainty may have existed as to their precise status, whether quasi-citizen or American nationals, the United States Supreme Court, in effect, held, as early as 1904, in the case on Gonzales v. Williams, 192 U.S. 1, 24 S.Ct. 177, 48 L.Ed. 317, that they are not aliens. In that case, it was decided that citizens of Porto Rico (whose status, with reference to United States nationality, is substantially identical with that of citizens of the Philippine Islands) were not aliens within the meaning of the Federal immigration laws. In Toyota v. United States, 268 U.S. 402, 45 S.Ct. 563, 565, 69 L.Ed. 1016, supra, decided in 1925, the same court said: 'The citizens of the Philippine Islands are not aliens. See Gonzales v. Williams, 192 U.S. 1, 13, 24 S.Ct. 177, 48 L.Ed. 317.' In 1935, the United States Circuit Court of Appeals for the Ninth Circuit squarely held, in Roque Espiritu De La Ysla v. United States, 77 F.2d 988, 989, supra, that citizens of the Phillipine Islands of the Filipino race are not aliens because, in the language of the opinion: 'They owe no allegiance to any foreign government, but do owe allegiance to the United States.'"

Since it must be concluded that the plaintiff is not eligible to citizenship but is not an alien the discussion might well end here. But as the question of plaintiff's status in his personal relationship to our government is discussed by the parties, it may well be deemed to be in the case, and should be resolved by classifying the plaintiff as a national.

Prior to the adoption of the Nationality Code of 1940 there was much confusion surrounding the identification of persons included in the term "non-citizen nationals." See McGovney, Cases on Constitutional Law, 2d Ed. (1934), p. 440; 22 Cal.L.Rev. (1934) p. 593; 11 Columb.L.Rev. (1911) pp. 231, 326. The adoption of that code, in the light of court decisions, disposed of many old problems. For example, section 703, providing for the naturalization of Filipinos who have served in the armed forces; section 602, clarifying the status of Puerto Ricans and giving citizenship to all born after April 11, 1899; section 603, according citizenship to all born in the Canal Zone or Republic of Panama after February 26, 1904; section 601, covering all classes of nationals and citizens; and section 604, covering all classes born nationals but not citizens.

Section 604 of the Nationality Code, covering "Persons born nationals but not citizens," provides: "Unless otherwise provided in section 601 [and that section does not, so far as this case is concerned], the following shall be nationals, but not citizens of the United States at birth.

"(a) A person born in an outlying possession of the United States of parents one of whom is a national, but not a citizen, of the United States."

Section 501 contains general definitions for the purposes of the code.

Section 501(e) defines "outlying possessions" to mean all territory, other than specified areas, "over which the United States exercises rights of sovereignty." The United States is now exercising and, since April 11, 1899, has exercised sovereignty over the Philippine Islands.

Subdivision (b) (2) of that section defines a "national of the United States" to be "a person who, though not a citizen of the United States, owes permanent allegiance to the United States. It does not include an alien." In view of this definition the term "alien" as used in our Alien Land Law cannot be broadened to include every class of noncitizen, whether alien or national.

[5] The Act of Congress of March 24, 1934 (chap. 84, Public Acts of the 73d Congress, Sess. II, 48 Stat. 456, 48 U.S.C.A. § 1232), provided for adoption by the Commonwealth of the Philippine Islands of a constitution specifically declaring (§ 2[a]) that "All citizens of the Philippines shall owe allegiance to the United States. Every officer of the government of the Commonwealth of the Philippine Islands shall, before entering upon the discharge of his duties, take and subscribe an oath of office, declaring, among other things, that he recognizes and accepts the supreme authority of and will maintain true faith and allegiance to the United States." The present constitution of the Islands (Constitution of the Philippines, § 1, subd. 1), was adopted pursuant to this act and provides that until complete withdrawal of the sovereignty of the United States "all citizens of the Philippine Islands shall owe allegiance to the United States." Assuming that the Act of Congress, supra, contemplates the complete withdrawal of sovereignty of the United States on July 4, 1946, the happening of that event should not affect the present rights of the plaintiff and bring him at this time within the prohibitory provisions of the Alien Land Act. The plaintiff was at birth in 1899 a national of the United States as defined by the provisions of section 604 (a) and that is his present status.

The trial court was therefore right in concluding that the plaintiff is a national, is not an alien as contemplated by our Alien Land Law, and is therefore not prohibited by that law from acquiring and possessing land in this state.

The judgment is affirmed.

GIBSON, C. J., and CARTER, TRAYNOR, and SPENCE, JJ., concur.

SCHAUER and EDMONDS, Justices (concurring).

As pointed out by Mr. Justice SHENK in his opinion it is wholly unnecessary to the conclusion reached to determine whether plaintiff is a national of the United States. It is sufficient that he is not an alien. Upon that ground only we concur in the judgment.

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26 Cal.2d 297

SEKT v. JUSTICE'S COURT OF SAN RAFAEL TP.

S. F. 17140.

Supreme Court of California.
April 27, 1945.

1. **Indictment and Information** 🔑3

The word "indictment" does not include information or complaint.

See Words and Phrases, Permanent Edition, for all other definitions of "Indictment".

2. **Indictment and Information** 🔑3

The term "information", as used in a statute relating to prosecution of offenses by information, includes "complaint", and vice versa.

See Words and Phrases, Permanent Edition, for all other definitions of "Complaint" and "Information".

3. Statutes ⟹165

Amendment of 1943 to statute relating to conspiracy which did not change the constituent elements of the offense but increased the possible punishment was not a repeal of the type to bring into operation the common law rule that the repeal of a criminal statute without a saving clause operates to terminate all pending prosecutions. Pen.Code, § 182; St.1943, p. 2121.

4. Criminal law ⟹15

The outright repeal of a criminal statute without a saving clause bars prosecution for violations of the statute committed before repeal.

5. Criminal law ⟹15
Statutes ⟹158

Repeals by implication are not favored, and, where a new statute is passed in a field already occupied by an older statute, the new statute will not be held to have repealed by implication the old statute as to crimes already committed at time new statute is passed.

6. Criminal law ⟹15

Where there is an outright repeal and a substantial reenactment, it will be presumed that Legislature did not intend that there should be a remission of crimes not reduced to final judgment.

7. Criminal law ⟹1207

Statutory amendment of 1943 increasing possible punishment for conspiracy was intended to operate prospectively, and past offenders should be punished under the old law, and, where such amendment was enacted pending appeal to superior court from conviction for conspiracy to violate the statute prohibiting compounding of crime, the court did not lose power to carry into effect or enforce the judgment of conviction. Pen.Code, §§ 153, 182; St.1943, p. 2121; p. 1008, § 9608.

◆

Petition by A. A. Sekt against Justice's Court of San Rafael Township for writ of prohibition to restrain respondent from carrying into effect a judgment and sentence imposed by it on petitioner.

Alternative writ discharged and petition denied.

Leo R. Friedman, of San Francisco, for petitioner.

Harold Jos. Haley, Dist. Atty., and Thomas P. Boyd, Deputy Dist. Atty., both of San Rafael, for respondent.

PETERS, Justice pro tem.

A. A. Sekt petitions for a writ of prohibition to restrain the Justice's Court of San Rafael township from carrying into effect a judgment and sentence imposed by it on petitioner. It is his contention that before the judgment against him became final the law under which he was convicted was repealed, with the result, so he urges, that there is no law under which he now may be lawfully imprisoned.

In February of 1943 petitioner and one Phillip Webster were charged by complaint with the misdemeanor of having violated section 182 of the Penal Code (conspiracy to commit a crime), in that in January of 1943 they conspired to violate section 153 of the Penal Code, prohibiting the compounding of crimes. The complaint charged that petitioner and Webster conspired to take money from Albert Tognoli and Robert Powers upon an agreement that petitioner and Webster would compound the crimes of assault and battery and disturbing the peace committed by Tognoli and Powers in January, 1943, abstain from prosecuting the charges and withhold evidence concerning them.

Petitioner was tried on this charge in March of 1943, found guilty, and judgment entered on the verdict. He appealed, and was released on bail. In September of 1944 the superior court affirmed the judgment of conviction. While this appeal was pending the Legislature amended section 182 of the Penal Code, the effective date of the amendment being August 4, 1943, St. 1943, p. 2121. Prior to this amendment section 182 provided that a conspiracy of the type here charged should be punished as is provided for the punishment of the crime that the accused conspired to commit. Inasmuch as section 153 of the Penal Code provides that the compounding of the crime here involved is a misdemeanor, under section 182, as it read prior to the amendment, the crime of conspiracy charged was a misdemeanor. By the 1943 amendment the Legislature in no way changed the constituent elements of the crime of conspiracy, but it did change the maximum punishment, by providing that conspiracies of the type here involved "shall be punishable by imprisonment in the county jail for not more than one year, or in the State prison for not more than three years, or by a fine not exceeding five thousand dollars ($5,000) or both.

"All cases of conspiracy may be prosecuted and tried in the superior court * * *."

Thus at the time this crime was committed and at the time of trial the offense charged was a misdemeanor, prosecution was instituted by the filing of a complaint, and it was triable in the justice's court. By the amendment the degree of the crime was changed to either a misdemeanor or felony, dependent upon the punishment imposed, and became triable in the superior court upon the filing of an indictment or information. The amendment to section 182 contained no express saving clause.

It is the theory of petitioner that where a criminal statute is repealed without a saving clause all proceedings against an accused not reduced to final judgment are terminated at the instant of repeal; that the 1943 amendment to section 182 changing the grade of the offense operated as a repeal of the section as it read prior to the amendment; that there is no general or specific saving clause that continued section 182 in force after its repeal; that as a result the respondent court has no power to carry into effect or enforce its judgment. The respondent argues that in the instant case there was not the type of repeal that compels the conclusion that such amendment operated so as to prevent the punishment of crimes committed before the amendment but not reduced to final judgment at the time of the amendment, and that, even if the amendment should be construed as a repeal of this type, there is a general saving clause in this state in section 9608 of the Government Code, St.1943 p. 1008, formerly section 329 of the Political Code.

Section 9608 of the Government Code provides: "The termination or suspension (by whatsoever means effected) of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so terminated or suspended, unless the intention to bar such indictment or information and punishment is expressly declared by an applicable provision of law."

Statutes of similar import have been passed in many states to avoid the strict common-law rule that the repeal of criminal statutes terminates all pending prosecutions not reduced to final judgment, so that under the common-law rule such past offenders, although guilty of criminal offenses, are not punishable. See, generally, 50 Am.Jur. § 573, p. 571; 22 C.J.S., Criminal Law, § 27, p. 81. The forerunner of section 9608 of the Government Code is to be found in Laws of California 1850–1853, page 920, passed in 1853. It provided: "That the repeal of any law creating a criminal offense, shall not be held to constitute a bar to the indictment and punishment of a crime already committed in violation of the law so repealed, unless the intention to bar such indictment and punishment is expressly declared in the repealing act." This statute was properly interpreted to be a repudiation of the common-law rule mentioned above, and under it, it was consistently held despite the repeal of a criminal statute making violation of it a felony that offenses against such statute occurring during the period it was in effect remained punishable after such repeal. People v. Quinn, 18 Cal. 122; People v. Barbour, 9 Cal. 230; People v. McNulty, 93 Cal. 427, 26 P. 597, 29 P. 61.

In 1872 the provisions of the 1853 statute were substantially embodied in section 329 of the Political Code. It will be noted that under the 1853 statute and under section 329 of the Political Code as enacted in 1872 it was provided that the repeal of a criminal statute does not "constitute a bar to the indictment and punishment" of an act already committed. By the use of the word "indictment" it is obvious that only the more serious prosecutions were saved and that ordinary misdemeanor prosecutions prosecuted by complaint were not. The law at the time made a strict distinction between prosecutions of major and minor offenses. Section 177 of the Criminal Practice Act of 1851 then provided that prosecutions in the district and session courts must be prosecuted by indictments, while section 608 of that act provided that all criminal prosecutions in the justices' and other inferior courts must be commenced by complaint. Substantially these same sections were embodied into the Penal Code in 1872 in sections 888 and 1426.

Until the adoption of the present Constitution in 1879 there was no constitutional authority for the prosecution of major criminal offenses by information. Article I, section 8, of that Constitution, as then adopted, provides that "Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment with or without such examination and commitment, as may be prescribed by law." Thus, for the first time, the Legislature was empowered to adopt a procedure by which one could be prosecuted by information in the superior courts. In a case decided in 1880 it was held that section 329 of the Political Code as adopted in 1872 did not save prosecutions instituted by information, that is, that the word "indictment" in section 329 of the Political Code did not include "information." People v. Tisdale, 57 Cal. 104. The facts of that case were that in May of 1880 the defendant was charged by information with a felony alleged to have been committed in December, 1879. After the offense had been committed but before the information was presented the statute involved was amended by reducing the offense from a felony to a misdemeanor. After the effective date of the amendment the information was presented charging a felony. In addition, when the crime was committed it could only have been prosecuted by indictment, but in April of 1880, the Legislature, pursuant to the constitutional provision above referred to, provided for informations as well. The trial court sustained a demurrer and the People appealed, contending that section 329 permitted prosecution under the old statute by the new procedure. The court held that section 329 only saved offenses prosecuted by "indictment"; that "indictment" did not include "information"; that section 329 did not operate as a saving clause for any act prosecuted by information, and that an act which could only be prosecuted by indictment when committed could not be prosecuted by a new procedure such as information set up after the commission of the act. The court expressly refrained from passing on the question as to whether the defendant could have been prosecuted under the amended statute reducing the degree of the crime.

As a result of this decision section 329 was amended in 1881, the very next session of the Legislature following the decision. The statute as then amended, and as it read until 1943 when the Government Code was adopted, provided: "The repeal of any law creating a criminal offense does not constitute a *bar to the indictment or information* and punishment of an act already committed in violation of the law so repealed, unless the intention to bar such *indictment or information* and punishment is expressly declared in the repealing act." (Italics added.) Thus, since this amendment, the saving clause clearly applies to all offenses prosecuted by indictment or information.

[1, 2] The theory of petitioner is that if the word "indictment" does not include "information," as was held in the Tisdale case, then the words "indictment or information" cannot properly be held to include "complaint." This conclusion does not inevitably follow. The word "indictment" has had a long legal history, and clearly does not include "information," or "complaint." The two are clearly distinct. But the term "information" has a much broader meaning. At common law every offense of less grade than a felony might be prosecuted by information. Hurtado v. California, 110 U.S. 516, 4 S.Ct. 111, 292, 28 L.Ed. 232. In other words, long before the adoption of the constitutional provision of 1879 misdemeanors could be prosecuted by information. All that the constitutional provision did was to extend the use of informations to capital and other serious offenses. See 14 Cal.Jur. § 5, p. 8. While it is true that as a result of the provision the term "information" is now usually connected with serious offenses, and not usually thought of as applicable to inferior court prosecutions, the Penal Code sometimes uses the word "information" in its broadest sense. Chapter III of that code, including sections 806 through 810, is headed "The Information." The very first section of that chapter—section 806—defines the "complaint" as "the allegation in writing made to a court or magistrate that a person has been guilty of some designated offense." The section goes on to provide that complaints "wherever applicable, shall be construed and shall have substantially the same effect as provided in this code for indictments and informations." There is substantial authority to the effect that the term "information" as used in a statute includes "complaint," and vice versa. State v. Woolworth, 148 Kan. 180, 81 P.2d 43; State v. Stafford, 26 Idaho 381, 143 P. 528; Evans v. Willis, 22 Okl. 310, 97 P. 1047, 19 L.R.A.,N.S., 1050, 18 Ann. Cas. 258; Newton v. People, 72 Ill. 507; State v. Ritzler, 17 Ohio App. 394; Ex parte Cheatham, 50 Tex.Cr.R. 51, 95 S.W. 1077.

These cases are authority for holding that included within the word "information" are all misdemeanor prosecutions. It is not at all inconceivable that the Legislature, when it amended section 329 in 1881, intended to save all criminal prosecutions, and used the word "information" in its generic rather than in its technical sense. Certainly a liberal construction of the statute would lead to this result, and there is some authority that the section should be liberally construed. People v. McNulty, 93 Cal. 427, 26 P. 597, 29 P. 61. Section 4 of the Political Code (in which code § 329 is to be found) provides that "The rule of the common law that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice." And section 4 of the Penal Code provides that: "The rule of the common law, that penal statutes are to be strictly construed, has no application to this code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice."

[3] However, whether or not the term "information" in section 329 includes misdemeanor prosecutions in the inferior courts, we think there is another and completely independent ground that supports the conclusion that the offense committed by petitioner may be punished under the law as it existed when the offense was committed, and that is, that the amendment of section 182 of the Penal Code was not of a repeal of the type to bring into operation the common-law rule that the repeal of a criminal statute, without a saving clause, operates to terminate all pending prosecutions.

[4] It was undoubtedly the rule at common law, and it is the rule in this and other states, that the outright repeal of a criminal statute without a saving clause bars prosecution for violations of the statute committed before the repeal. This rule was stated as follows in Spears v. County of Modoc, 101 Cal. 303, 305, 35 P. 869: "* * * it may be regarded as an established rule that the repeal of a penal statute, without any saving clause, has the effect to deprive the court in which any prosecution under the statute is pending of all power to proceed further in the matter. * * * The proceeding is arrested at the very point where it is at the date of the repeal; if before indictment, no indictment can be found; if after indictment, and before trial, no conviction can be had; if after conviction, and before judgment, no judgment can be rendered. If the judgment is appealed from, and its enforcement is suspended until the determination of the appeal, the power to enforce the judgment falls with the repeal of the statute, and the appellate court will direct a dismissal of the proceedings. * * * Until the determination of the appeal, the proceeding is pending in court, and the judgment does not become final until affirmed by the appellate court. If, during the interim, the legislature repeals the statute under which the prosecution is had, it operates as a discharge of the defendant. 'The repeal of the law imposing the penalty is of itself a remission.' Per Taney, C. J., State of Maryland v. Baltimore & Ohio R. R. Co., 3 How. 534, 552, 11 L.Ed. 714." See, also, People v. De Ferrari, 63 Cal.App. 671, 219 P. 1048.

This rule is well settled at common law and is accepted by most American jurisdictions. It is based on presumed legislative intent, it being presumed that the repeal was intended as an implied legislative pardon for past acts. See discussion, 22 C.J.S., Criminal Law, § 27, p. 81. This rule results, of course, in permitting a person who has admittedly committed a crime to go free, it being assumed that the Legislature, by repealing the law making the act a crime, did not desire anyone in the future whose conviction had not been reduced to final judgment to be punished under it. But this rule only applies in its full force where there is an outright repeal, and where there is no other new or old law under which the offender may be punished. There are at least three situations to which the above rule, according to the great weight of authority, does not apply.

1. Where the statute passed after the offense is committed but before final judgment mitigates rather than increases the punishment. In such a case the problem is not complicated by the prohibition against ex post facto laws, since it is well settled that beneficial legislation is not within the prohibition of the constitutional provision. Malloy v. South Carolina, 237 U.S. 180, 35 S.Ct. 507, 59 L.Ed. 905. Where the later statute reduces the punishment the cases quite uniformly hold that the offender may

be punished under the new law, and that the repeal by amendment of the old punishment does not operate to free the offender from all punishment. State v. Williams, 2 Rich., S.C. 418, 45 Am.Dec. 741, citing The King v. Mary Lewis, 2 Eng. Crim. Cases 373; People v. Hayes, 140 N.Y. 484, 35 N.E. 951, 23 L.R.A. 830, 37 Am.St.Rep. 572; Hernandez v. State, 43 Ariz. 442, 32 P.2d 25; Woo Dak San v. State, 36 N.M. 53, 7 P.2d 940; State v. Jones, 200 La. 808, 9 So.2d 42; Malloy v. South Carolina, 237 U.S. 180, 35 S.Ct. 507, 59 L.Ed. 905. All these cases, and the cases cited in them, base their conclusion that the offender who commits an offense before the amendment of the statute imposing the lighter sentence gets the benefit of the lighter punishment, upon the ground that it must have been the intention of the Legislature that the offender should be punished, and, since he can be constitutionally punished under the new statute, that should be done. This is, of course, the converse of the situation presented in the instant case where the later statute increased the maximum punishment, but it should here be mentioned that it would be anomalous indeed to hold that where the punishment is mitigated the offender before the enactment gets the lighter sentence, but is nevertheless punished, and then to hold that when the amendatory act increases the punishment the prior offender is entirely exonerated, and all this on the basis of presumed legislative intent. Reason and logic compel the conclusion that, since the problem involves the determination of the legislative intent, where the Legislature increases the punishment it could not possibly have intended to exonerate past offenders. Since legislative intent is the test there would be far more reason to let offenders off entirely where the punishment is lightened than where it is increased.

[5] 2. The second well-settled exception is that repeals by implication are not favored, and where a new statute is passed in a field already occupied by an older statute, the new statute will not be held to have repealed by implication the old statute as to crimes already committed at the time the new statute is passed. As to such crimes the offender will be punished under the old law and the new law will be held to be prospective in operation. This exception is based upon the presumed intent of the Legislature. See many cases collected and commented upon in majority and dissenting opinions in People v. Lowell, 250 Mich. 349, 230 N.W. 202—both opinions approving this rule.

[6] 3. The third well-settled exception is that where there is an outright repeal and a substantial reenactment, it will be presumed that the Legislature did not intend that there should be a remission of crimes not reduced to final judgment. This rule was stated as follows in Sobey v. Molony, 40 Cal.App.2d 381, 385, 104 P.2d 868, 870: "When a statute, although new in form, re-enacts an older statute without substantial change, even though it repeals the older statute, the new statute is but a continuation of the old. There is no break in the continuous operation of the old statute, and no abatement of any of the legal consequences of acts done under the old statute. Especially does this rule apply to the consolidation, revision, or codification of statutes, because, obviously, in such event the intent of the legislature is to secure clarification, a new arrangement of clauses, and to delete superseded provisions, and not to affect the continuous operation of the law.

"This is the rule of decision in California and in the other states, even in the absence of legislative declaration. The cases have clearly established the rule that such restatement, without substantial change, neutralizes any repeal, express or implied. No saving clause or other expression of legislative intent is necessary to accomplish this result. The intent is derived from the fact and purpose of a restatement without change. Estate of Martin, 153 Cal. 225, 94 P. 1053; Perkins Mfg. Co. v. Clinton Const. Co., 211 Cal. 228, 295 P. 1, 75 A.L.R. 439; Chambers v. Davis, 131 Cal.App. 500, 22 P.2d 27; Gastineau v. Meyer, 131 Cal.App. 611, 22 P.2d 31. The cases from other jurisdictions are in complete accord. They are so numerous and so completely in harmony that their enumeration is not necessary. Many of them are collected and referred to in 59 Corpus Juris, page 1058, section 624.

"This rule of construction, based as it is on the presumed legislative intent, applies whether the subject of the statute is civil or criminal law. It is well settled that, independently of a saving clause, a person may lawfully be prosecuted, under a repealed and re-enacted statute, for a crime committed prior to the date of the reenactment. Lewis' Sutherland Statutory Construction (2d ed.) vol. 1, p. 445, sec.

238; Black on Interpretation of Laws, (2d ed.) p. 421, secs. 124, 125; State v. Gumber, 37 Wis. 298; State v. Ware, 79 Or. 367, 154 P. 905, 155 P. 364; State v. Wish, 15 Neb. 448, 19 N.W. 686; Bauer v. State, 99 Neb. 747, 157 N.W. 968; State v. Brewer, 22 La.Ann. 273; Borough of Langhorne Manor v. Clayton, 129 Pa. Super. 557, 196 A. 584; see, also, Board of Dental Examiners v. Lazzell, 172 Md. 314, 191 A. 240."

[7] This brings us to the exact situation here present—the legal effect of an amendatory act increasing the punishment. On this precise problem there is a conflict of authority. There is substantial authority to the effect that such an amendment repeals the old law and acts as a remission of all offenses not reduced to final judgment. See many cases collected and discussed in People v. Lowell, 250 Mich. 349, 230 N.W. 202; Commonwealth v. McDonough, 13 Allen 581, 95 Mass. 581; Wilson v. Ohio & Mississippi Railroad Co., 64 Ill. 542, 16 Am.Rep. 565; Lindzey v. State, 65 Miss. 542, 5 So. 99, 7 Am.St.Rep. 674; see, generally, 31 Halsbury's Laws of England, p. 527, § 688. In practically all these cases the courts expressed great reluctance in exonerating the offender, but apparently felt that the basic common-law rule, above referred to, compelled such result.

There is substantial and well-reasoned authority to the effect that where the later statute increases the punishment the Legislature has clearly demonstrated its intent that the act should be punished, and since the offender cannot be punished under the new law because of the ex post facto provision of the Constitution, he will be held under the old law. It is presumed from the very purpose of the amendment that the Legislature intended that all offenders should be punished, and a saving clause is implied. State v. Broadway, 157 N.C. 598, 72 S.E. 987; State v. Perkins, 141 N.C. 797, 53 S.E. 735, 9 L.R.A.,N.S., 165; Murphy v. Commonwealth, 172 Mass. 264, 52 N.E. 505, 43 L.R.A. 154, 70 Am.St.Rep. 266; State v. Fisher, W.Va., 27 S.E.2d 581; Davis v. State, 142 Tex.Cr.R. 602, 155 S.W.2d 801; People v. Miller, 169 Misc. 709, 8 N.Y.S.2d 53; Teague v. Commonwealth, 172 Ky. 665, 189 S.W. 908, L.R.A. 1917B, 738; Ong Chang Wing v. United States, 218 U.S. 272, 31 S.Ct. 15, 54 L.Ed. 1040; see on the entire subject annotation, 55 A.L.R. 443.

The reasoning of these cases is that there is no constitutional prohibition against making the old statute applicable to offenses committed before its amendment (Ong Chang Wing v. United States, 218 U.S. 272, 31 S.Ct. 15, 54 L.Ed. 1040); that whether the old law has been repealed or is saved for past offenders depends upon legislative intent; that by increasing the punishment the Legislature has clearly indicated that it intended that particular offense to be punished; that to hold that the amendment operates to remit offenses not reduced to final judgment is technical and clearly violative of the legislative intent.

The reasoning of these cases is most persuasive. The basic common-law rule that the outright repeal of a criminal statute acts as a remission of all crimes not reduced to final judgment is sound, and is based on what obviously must have been the intent of the Legislature. Where the Legislature has seen fit to repeal a statute making certain acts a crime it is reasonable to assume that in the absence of a saving clause the Legislature would not have desired that anyone should be punished for what, by the repeal, it has now determined is not a crime. The cases that hold that this rule must be applied where by amendment the punishment has been increased, do so by blindly applying the common-law rule to a situation where the reason for the rule does not exist. Where the reason for the rule ceases the rule should not apply. This has been recognized by those courts that have adopted the three exceptions to the general rule outlined above. In the situations there involved it would obviously violate the legislative intent to refuse to punish acts admittedly criminal in nature when committed. The reasoning of these cases applies with even more compelling force to a situation where the amendment increases the punishment. In such a case, where the Legislature has seen fit to increase the punishment, it certainly cannot be argued that it intended to pardon and forgive those who had violated the less drastic statute. In such a situation the only reasonable assumption is that the Legislature intended the new punishment to be prospective in its operation and to apply only to offenses committed after its passage, but that the old law should apply to offenses committed before the effective date of the amendment. If there is no remission where the amendment mitigates the punishment, if there is no implied repeal where the new law operates in a field already occupied with an older inconsistent law, and if no remission takes place where there is an outright repeal and a substantial reenactment—and these exceptions are well-settled—how much more reason exists for holding that there is no implied pardon where the later statute increases the punishment.

In the instant case when petitioner committed the acts here challenged he violated the law. What he then did is now a violation of the law. Conspiracy is still a crime. The constituent elements of the crime have never been changed. At all time—at the time of the commission of the offense, at the time of trial, at the time the appeal was decided, and right up to the present moment—conspiracy has constituted a violation of the provisions of the Penal Code. In fact, the Legislature has now determined that a conspiracy to commit a misdemeanor of the type here involved is so serious an offense that it should be punished in some cases as a felony. To hold in such a case that by such an amendment increasing the possible punishment the Legislature intended to pardon and to forgive all offenses committed before the amendment where prosecutions were pending at the date of the amendment is to ascribe to the Legislature an intent that the very purpose of the amendment demonstrates could not have existed. Can it reasonably be argued that by amending the statute by increasing the punishment the Legislature intended that until the new statute took effect the crime of conspiracy could be committed with impunity? That is the practical result of the construction contended for by petitioner. Amendments to existing law take effect ninety days after the adjournment of the Legislature. It would be practically impossible to apprehend, try and convict, an offender and to determine his appeal during the ninety-day period. The result would be that the crime of conspiracy could be committed with absolute impunity during such period, and this in the face of the fact that at all times involved the Legislature had determined that conspiracy was a most serious crime. The very nature of the situation compels the conclusion that the Legislature must have intended that the amendment should operate prospectively, and that as to past offenders they should be punished under the old law. To imply a saving clause in such a situation is simply to give effect to the obvious intent of the Legislature.

The alternative writ heretofore issued is discharged and the petition for a peremptory writ of prohibition is denied.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

26 Cal.2d 346

BENNER v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 17093.

Supreme Court of California.

May 18, 1945.

Rehearing Denied June 14, 1945.

1. Workmen's compensation 🔑1939

Finding of Industrial Accident Commission that compensability and knowledge of industrial injury concurred on certain date was finding of fact, and could not be disturbed if supported by substantial evidence.

2. Workmen's compensation 🔑1302

In determining whether claim for workman's compensation was barred by statute of limitations, the Industrial Accident Commission had right to consider evidence favorable to claimant on issue of estoppel.

3. Workmen's compensation 🔑1302

Repeated requests by hospital and insurance carrier's representative for more time to complete their medical investigation, where nurse employed by hospital contracted tuberculosis, constituted conduct on which claimant nurse had right to rely and which operated as an estoppel to plea of statute of limitations against claim for workman's compensation since, where delay is induced by conduct of parties sought to be charged, he may not invoke such conduct to defeat recovery.

4. Estoppel 🔑53

An estoppel may arise although there was no designed fraud on part of person sought to be estopped.

5. Estoppel ⚷56

To create an "equitable estoppel" it is enough that party has been induced to refrain from using such means or taking such action as lay in his power by which he might have retrieved his position and saved himself from loss.

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Estoppel".

EDMONDS and SPENCE, JJ., dissenting.

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In Bank.

Proceeding under the Workmen's Compensation Law by Jean Laughlin Benner, claimant, opposed by St. Luke's Hospital, employer. The Industrial Accident Commission denied compensation, and claimant brings a proceeding for review.

Order annulled with directions.

Melvin M. Belli, of San Francisco, for petitioner.

Everett A. Corten and Dan Murphy, Jr., both of San Francisco, for respondents.

SHENK, Justice.

This is a proceeding to review an order of the Industrial Accident Commission denying compensation for injuries sustained by the petitioner in the course of her employment as a nurse in St. Luke's Hospital. The commission found that petitioner, while employed as a nurse from September 4, 1942, to and including March 15, 1943, sustained an injury arising out of and in the course of her employment when she contracted an occupational pulmonary tuberculosis, and further found that petitioner had knowledge of her condition on May 11, 1943. The application for adjustment of claim was filed on November 16, 1943, which was five days after the lapse of six months from the date, as found by the commission, of the concurrence of compensability and knowledge of the industrial injury. The commission therefore concluded that the application was barred by the statute of limitations.

The existence and nature of the injury, and the fact that it was suffered in the course of and arose out of the employment are not in dispute. Controversial matters concern the date on which petitioner had knowledge that her condition was compensable tuberculosis, and, if such knowledge was acquired more than six months prior to the filing of the application, whether respondents were estopped from setting up the defense of the statute of limitations under the circumstances here disclosed.

The facts surrounding the making of the claim are as follows: Petitioner, a nurse, was employed at St. Luke's Hospital from September 4, 1942, to March 15, 1943. In November, 1942, she was subjected to a tuberculin test which resulted in a negative reaction. On March 10, 1943, an X-ray examination was made of her chest and the doctor making the examination diagnosed her condition as "minimal tuberculosis." On March 12, 1943, petitioner entered a hospital for care and treatment and was placed in a tuberculosis ward. The husband of petitioner was an interne. On several occasions he made sputum tests which were negative. He testified that on June 3, 1943, tests were made which for the first time showed a positive reaction, and at that time petitioner first knew that she had contracted tuberculosis. He said that prior to that time the diagnosis was probable tuberculosis, which prompted him to write a letter to the superintendent of St. Luke's Hospital. That letter was dated May 11, 1943, and set forth the claim that the tuberculosis was industrially caused and compensable. The commission took the date of May 11, 1943, as the date when petitioner had knowledge of the culmination of the injury and as the basis for its conclusion that the claim was barred.

Petitioner contends that the knowledge of culmination of the injury was not acquired until the date when the result of the test of June 3d was known, which her husband stated was June 8th.

[1] The finding of the commission that compensability and knowledge of the industrial injury concurred on May 11, 1943, is a finding of fact, and under the rules governing these proceedings may not be disturbed if supported by substantial evidence. Taking into consideration the fact that petitioner was a trained nurse and her husband an interne, the commission drew the inference that knowledge of the injury and of its compensable character was available to them at a time prior to the positive tests now relied upon by petitioner as fixing the time of knowledge. It may be assumed that the inference so drawn was a permissible one under all of the circum-

stances of the case, especially when the date of the letter to the employer is considered.

[2] Petitioner contends, however, that even if the date of knowledge of the injury was more than six months prior to the filing of the application the evidence before the commission was such that the employer was estopped from setting up the statute of limitations as a defense. In support of this contention petitioner relies upon the following: On May 11, 1943, as above stated, the husband of petitioner advised the employer by letter of the disability of his wife. On May 17th the superintendent of the hospital replied by letter requesting information concerning the alleged contracting of the disease during the period of employment and inquiring whether there was definite evidence that the petitioner had tuberculosis and not a virus disease simulating tuberculosis, and as to what tests had been made. The tests of June 3d were made in response to that letter, and the positive result of the test was obtained on June 8th and was communicated to the employer. On August 3d the superintendent of the hospital wrote to petitioner's husband expressing a preference to settle the matter, advised him that Dr. Hill, chief of the hospital's medical service, was the man on whom they relied for advice and consultation with its insurance carrier, that Dr. Hill was on vacation for about a month, and gave the name and address of the insurance carrier. The husband thereafter had telephone conversations with the superintendent but was told that Dr. Hill was still away. In the early part of September he again communicated with the superintendent and with the insurance carrier, at which time the representative of the insurance company told him they would have to have more investigation before their portfolio on the case would be complete, requested him to return at the end of his vacation and stated that in the meantime someone from the company or the hospital would investigate the case and interview his wife. He waited for Dr. Hill to return and visit petitioner. He testified that he "let the case ride for a while" because they had requested time in which to investigate, and that the employer had asked him to wait until Dr. Hill had seen the patient. Neither Dr. Hill nor any other representative of the employer called on the petitioner or examined her prior to filing the application for adjustment. In the latter part of September the representative of the insurance carrier asked for "more time" in which to investigate the case. Apparently, the final decision of the employer or its insurance carrier was not communicated to the petitioner. Only when her husband, as he testified, saw that they were "not getting to first base," was the application filed with the Industrial Accident Commission. The commission made no finding on the issue of estoppel and was apparently of the opinion that the lapse of five days beyond the statutory period precluded it from deciding favorably to the petitioner. But the commission had a right to consider the evidence which was favorable to the petitioner on the issue of estoppel. In fact such evidence was without substantial conflict both as to the conduct of the hospital authorities and of the representative of the insurance company.

[3-5] In Farrell v. County of Placer, 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323, this court applied the doctrine of estoppel where the conduct of the party against whom the claim could be filed was such as to induce the claimant to delay the filing until after the expiration of the time limitation. Here, the repeated requests by the employer and the representative of the insurance carrier for "more time" to complete their medical investigation constituted conduct on which the claimant had a right to rely and which should operate as an estoppel to the plea of the statute of limitations. Where, as here, the delay in commencing action was induced by the conduct of the party sought to be charged the latter may not invoke such conduct to defeat recovery. Laraway v. First Nat. Bank of LaVerne, 39 Cal.App.2d 718, 730, 104 P.2d 95; Mitchell v. J. H. Roth & Co., 124 Cal. App. 96, 99, 12 P.2d 91. An estoppel may arise although there was no designed fraud on the part of the person sought to be estopped. Verdugo Cañon Water Co. v. Verdugo, 152 Cal. 655, 683, 93 P. 1021. To create an equitable estoppel, "it is enough if the party has been induced to refrain from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss." 3 Pomeroy Eq.Jur., 5th Ed., § 812, p. 233. In Adams v. California Mut. B. & L. Ass'n, 18 Cal.2d 487, at page 488, 116 P.2d 75, 76, it was said: "It is well settled that a person by his conduct may be estopped to rely upon these de-

fenses. Rapp v. Rapp, 218 Cal. 505, 509, 24 P.2d 161; Calistoga Nat. Bank v. Calistoga Vineyard Co., 7 Cal.App.2d 65, 72, 46 P.2d 246; 16 Cal.Jur. 575; 130 A.L.R. 8. Where the delay in commencing action is induced by the conduct of the defendant it cannot be availed of by him as a defense. Rapp v. Rapp, supra; Miles v. Bank of America N. T. & S. Ass'n, 17 Cal.App.2d 389, 398, 62 P.2d 177. * * *"

It follows that the employer and its insurance carrier cannot escape the consequences of their acts or conduct affirmatively engaged in to procure delay for purposes of settlement, or investigation or otherwise, upon which the employee has relied and by which he has been induced to delay the filing of a claim until after the expiration of the statutory period. Such conduct, so relied upon, becomes the basis of an estoppel against the party responsible for the delay and should, under the facts here presented, preclude the bar of the statute of limitations.

The order is annulled with directions to the commission to proceed in accordance with the foregoing views.

GIBSON, C. J., and CARTER and SCHAUER, J., concurred.

EDMONDS, Justice (dissenting).

I cannot agree that the record in the present case justifies only a determination that because of the acts of the employer, the insurance carrier is estopped from relying upon the defense of the statute of limitations. On the contrary, the evidence substantially supports the order of the Industrial Accident Commission denying the petitioner compensation upon the ground that her claim is barred.

The commission's conclusion that Mrs. Benner acquired knowledge of the compensable nature of her injury prior to six months before she applied for benefits is supported by the evidence, my associates agree. And although, according to fundamental principles, findings supported by substantial evidence may not be disturbed upon certiorari, Justice SHENK, to avoid the application of this rule, ignores those portions of the record which abundantly justify the implied finding of the commission that the insurance carrier was not estopped to rely upon the statutory bar. There was no finding upon this issue, he suggests, in effect, because the commission considered itself precluded by law from making such a determination. In my opinion, both the law and the facts compel a decision against the petitioner.

First, the express finding that the petitioner's claim was barred by the statute of limitations includes the subordinate finding that the essential features of an estoppel were lacking. The implied finding "results by necessary implication". Valencia v. Shell Oil Co., 23 Cal.2d 840, 846, 147 P.2d 558, 561. Moreover, the finding of the ultimate fact that the petitioner's claim was barred by the statute of limitations supports the award, and it was not necessary for the commission to make a negative finding upon the fact of estoppel. See 24 Cal.Jur. 974, and cases there cited.

In the second place, the record does not disclose that the commission considered itself precluded from considering the petitioner's evidence purporting to show an estoppel; on the contrary, it clearly appears, the commission was fully aware that the petitioner relied upon the doctrine. But there was no finding in her favor upon this issue because the evidence persuasively led to the conclusion that the essential features for an estoppel were lacking. Mrs. Benner unsuccessfully petitioned the commission for a rehearing, substantially upon the ground that the insurance carrier was estopped to rely upon the statutory bar, and the determination against her is vigorously defended in the present proceeding. In support of its decision the commission points to facts making clear that the application was filed more than six months after the injury. And considering the petitioner's contention that the insurer is estopped from setting up the defense of the statute of limitations because, when informed of the claim, it did not expressly deny liability but stated it would have to investigate the claim before any decision could be made on it, the commission says: "Rather than a promise to pay, this action on the part of the insurance company should have indicated to the applicant that it would not pay unless it had to. On the evidence, therefore, and on the defense being pleaded by the insurance company, the Commission was compelled to hold the claim barred by the statute of limitations."

Under these circumstances the question now presented for decision is whether the evidence supports the implied finding that the insurance carrier was not estopped to rely upon the defense of the statute of limitations. Considering the record upon that issue, the testimony and the correspondence afford ample support for a conclusion that during the period allowed for claiming compensation, the hospital considered its duty to Mrs. Benner fulfilled by reporting her demand to its insurance carrier and the insurer refused to admit any liability upon it. Certainly, the evidence does not compel a determination that, as a matter of law, only a finding favorable to the petitioner reasonably may be drawn from it concerning the plea of estoppel although it supports the commission's decision as to the untimely filing of the claim.

From May 11, 1943, the petitioner must be presumed to have known that the period of limitation was running. But no steps were taken either by her or her husband to avoid the consequence of its operation; they merely "let the case ride." Although it appears that the husband was endeavoring to settle the claim, there is no evidence of designed fraud or any attempt by the hospital or its insurer to lull the petitioner into a false sense of security. Nor does it appear that the employer or the insurer either expressly waived the tolling of the statute, or in any way requested the petitioner to refrain from legal action and rely entirely upon negotiations. In apparent good faith they merely asked for time within which to investigate the petitioner's claim, and there is no evidence from which it may be inferred that either the employer or the insurance carrier intentionally delayed an investigation of the circumstances relating to the illness.

In the latest of the cases relied upon by Justice SHENK to support his conclusions, the court considered a complaint which included allegations in much detail charging express representations upon the part of the defendants to the effect that delay in filing suit would not prejudice the plaintiffs' rights. About a month after the accident occurred, the pleading related, at a time when the injured woman was "in great pain and under opiates," an agent of the defendants who had called upon her to negotiate a settlement of her and her husband's cause of action, was informed "that she was not then in condition to discuss the matter of the extent of her damages and desired to recover her health before determining and specifying the extent of plaintiffs' damages; that defendants, through their said agent, then and there represented that it would be satisfactory to defendants for plaintiffs to so do; * * * Plaintiffs believed the said representations * * * and relied thereon and by reason thereof did not for several months [thereafter] employ an attorney * * * and did not take any steps or proceedings whatsoever relating thereto." Farrell v. County of Placer, 23 Cal.2d 624, 627, 145 P.2d 570, 571, 153 A.L.R. 323.

The decision in Adams v. California Mut. B. & L. Ass'n, 18 Cal.2d 487, 116 P.2d 75, was also based upon express representations of the defendant inducing delay in bringing suit. "There is uncontradicted evidence in the record," said this court, "that the office of the defendant Building and Loan Commissioner continuously indicated and represented, verbally and in writing, that the decision in the Martin case, which was first instituted and in which pursuant to agreement with him the issues were so framed as to cover the several types of investment here involved, should be determinative of the rights of all persons or groups similarly situated; and that it was in reliance on such representations that these suits were not earlier instituted." Page 488 of 18 Cal.2d, page 76 of 116 P.2d.

As authority for applying the doctrine of estoppel in the present case, Justice SHENK cites Verdugo Cañon Water Co. v. Verdugo, 152 Cal. 655, 93 P. 1021, 1033, in which the following from Thompson v. Simpson, 128 N.Y. 270, 289, 28 N.E. 627, 632, is quoted with approval: "'An estoppel may arise although there was no designed fraud on the part of the person sought to be estopped.'" But that statement was made in considering facts very different from those now before the court. In passing upon the plea of the statute of limitations invoked by the plaintiffs, this court declared that, "One who is embarking with others in a common enterprise, to use common property for the common benefit at common expense, owes to the others the duty, if he proposes or intends to reserve a part of the benefit to himself exclusively, to inform the others fully in regard to it. If he does not, he will be estopped to assert his claim after the others have incurred the expense" (page 682 of 152 Cal., page 1033 of 93 P.) There then follows the language quoted by Justice SHENK, which is lifted from its context in a discussion of the rule that in cases where there is a *duty to speak* an estoppel may arise from silence as well as words;

but the evidence then being considered, said the court, disclosed no basis for applying the doctrine. Certainly, there is no duty on the part of either an employer or an insurance carrier to procure the timely filing of a claim for compensation.

In further discussion of another phase of the doctrine of estoppel, the court followed reasoning which also fully justifies the denial of compensation now being challenged by Mrs. Benner. It said: "The facts stated are not sufficient to create estoppels against the plaintiffs. It does not appear that either Verdugo or Ross was induced to put down his well by any act, word, or tacit encouragement of the plaintiffs, or either of them, or relied upon their silence as evidence of his own right or of their consent. Nor does it appear that plaintiffs intended that either should act in reliance upon their silence, or expected that either would do so. It is not shown that plaintiffs were under any duty toward either to disclose any claim they might have to the water, nor that said defendants did not know, at least as well as the plaintiffs knew, that the pumping of the respective wells would decrease the west side stream and the underflow at the dam. The party estopped must always intend, or at least must be so situated that he should be held to have expected, that the other party shall act, and the other party must, by the words, conduct, or silence of the first party, be induced or led to do what he would not otherwise do. [Citations.] The mere fact that the defendants expended money in sinking the wells and putting in the pumps each upon his own land, with the knowledge of the plaintiffs and without objection by them, creates no estoppel. [Citations.]" Pages 673, 674 of 152 Cal., page 1029 of 93 P.

In the case of Laraway v. First Nat. Bank of La Verne, 39 Cal.App.2d 718, 104 P.2d 95, the continued representations of the defendant concerning the probabilities of realizing upon bonds sold to the plaintiff were said to have "created an equitable estoppel, for it is the rule that when a defendant electing to set up the statute of limitations has previously by deception or any violation of duty toward the plaintiff caused the latter to subject his claim to the statutory bar, he must be charged with having wrongfully obtained an advantage which the courts will not allow him to hold." Page 729 of 39 Cal.App.2d, page 101 of 104 P.2d. And a bank's promise, made both orally and in writing over a considerable length of time, to repurchase securities which it sold to the plaintiff, together with assurances that if he would be patient and wait and not "to start anything by going to any attorneys" the bank would carry out its agreement, were also held to estop the promisor from taking advantage of the statute of limitations. Miles v. Bank of America, 17 Cal.App.2d 389, 397, 62 P.2d 177. To the same effect is Calistoga Nat. Bank v. Calistoga V. Co., 7 Cal.App.2d 65, 46 P.2d 246, in which the aggrieved party was precluded from introducing evidence tending to show that he failed to commence action in direct reliance upon a promise of adjustment of his claim. The court concluded that the evidence should have been received as tending to prove facts justifying a finding of estoppel. Again, in the case of Mitchell v. J. H. Roth & Co., 124 Cal.App. 96, 12 P.2d 91, the delay was induced by the defendants' representations that they would make a voluntary adjustment.

The representations made by the defendants in each of the cited cases go much further than those of the hospital and the insurer in the present case. Here we have nothing except the statement that more time was necessary in which to complete the investigation of the petitioner's claim. The most that could be said for this evidence is that it would support a finding in favor of Mrs. Benner upon the ground that considering all the circumstances of her illness, she reasonably might have delayed filing her claim because of what was said to her husband concerning the progress of the investigation. But the commission reached the opposite conclusion, fully justified according to the decisions relied upon by Justice SHENK, and there is no basis whatever, in my opinion, for holding that the evidence compels the contrary finding as a matter of law.

Justice SHENK attempts to bring the present controversy within the rule of the cases upon which he relies to the effect that a party is estopped to assert the bar of the statute of limitations where he misled the other party by offering a voluntary settlement. He says that, "On August 3rd the superintendent of the hospital wrote to petitioner's husband expressing a preference to settle the matter." The statement is based upon a letter written by Dr. Johnson which, in my opinion, does not justify that summarization. The letter reads:

"I am very sorry that I have not written you personally since June 29, when I received a letter from you in reply to mine of May 17. In these times, when Staff Officers are away and with the necessity for my taking a vacation for my health, it is quite easy to understand that many things are not attended to as promptly as we might wish. However, there is very little to do in this instance other than report the facts to our insurance carrier where, as a matter of fact, the case must be handled with their consent and at their direction.

"From the personal side, however, I wish we could settle the matter between us to your satisfaction, as I realize your concern over the present situation and future welfare of your wife.

"Dr. H. P. Hill is Chief of our Medical Service and the one on whom we shall rely for advice and consultation with our insurance carrier. We expect Doctor Hill back on duty in perhaps another month. Our insurance carrier is the Pacific Employers' Insurance Company and our insurance broker, Johnson and Higgins, 311 California Street, in case you wish to communicate with either of them."

By this letter Dr. Johnson told Dr. Benner that, although he personally would like to see the petitioner compensated, the matter was out of his hands and entirely within the discretion of the insurance carrier; quite certainly, this conclusion reasonably may be drawn from it.

Of some signifiance in this regard is the fact that some time later Dr. Benner called on John M. Davis, claims examiner of the Pacific Employers Insurance Company. According to Dr. Benner, Davis told him that "he really couldn't tell anything about the merits of the case because he would have to go back and see how past cases had been handled, and he would have to investigate the case from the medical aspect and that St. Luke's would send a medical man to investigate the case and he asked me for time." A short time later Dr. Benner left on a vacation and as he testified, he did not return because he knew no medical men had examined his wife. "Did anybody at St. Luke's or anybody representing it, or the Pacific Employers Insurance Company, or anyone representing it, ever agree to pay your wife compensation or furnish her with medical treatment," counsel asked Dr. Benner. His reply was in the negative. To the question: "Dr. Johnson never promised to you to see that your wife was paid compensation or given medical treatment?", he answered, "That's correct." To the further question, "What did the doctor ever say to you or your wife about any promise or agreement?", the witness stated, "He made no promise." Counsel continued: "And he told you, did he not, in the very beginning, that there would have to be some investigation?" Dr. Benner's answer was: "That's correct."

Mr. Davis testified that Dr. Benner came to see him "on one occasion" to discuss his wife's case; Dr. Benner then told him he was going on a vacation and would drop in two or three weeks later, but he never returned. The witness did not remember having any discussion with Dr. Benner concerning an investigation to be made by him or his company.

The petitioner's testimony is in accord with that of her husband. She was asked: "Did you ask anyone in charge of St. Luke's Hospital or the Pacific Employers Insurance Company to pay you any compensation due to your tuberculosis?" "Did you ever ask either of them to pay you compensation?" "Have either one of them promised to pay you compensation because of such condition?" To each of these questions her reply was, "No."

If, as Justice SHENK suggests, the commission considered itself precluded from making a finding upon the evidence claimed to show an estoppel, and if, as is implicit from his opinion, there is no implied finding upon the issue, the award should be annulled with directions to make a determination in that regard. Clearly, however, the cases cited by Justice SHENK are not authority for the proposition that the evidence in the present case, as a matter of law, compels a finding upon the issue of estoppel in favor of the petitioner. The determination of the commission rests upon inferences reasonably to be drawn from it and for that reason should be affirmed.

SPENCE, J., concurred.

Rehearing denied; EDMONDS and SPENCE, JJ., dissenting.

69 Cal.App.2d 464

BANK OF ALAMEDA COUNTY v. McCOLGAN, State Franchise Tax Commissioner.

Civ. 12851.

District Court of Appeal, First District, Division 1, California.

June 4, 1945.

Hearing Denied Aug. 2, 1945.

1. Taxation 🔑533

The statute forbidding filing of certificate of dissolution of bank or corporation until franchise tax has been paid was inapplicable to bank which, having ceased to do business, paid prorated tax based on bank's figures, though commissioner later found unreported income and assessed additional tax, in view of statute continuing corporate existence if necessary for winding up. St.1937, p. 2344, § 29; Civ.Code, § 403c.

2. Statutes 🔑219

A practical interpretation of statute by governmental officer in adoption of reasonable rules to assist in procedural administration is entitled to great weight, but is not controlling.

3. Statutes 🔑219

Administrative construction of statute is considered when some uncertainty appears therein.

4. Statutes 🔑190
Taxation 🔑446½

The Bank and Corporation Tax Act contains no ambiguity or uncertainty requiring Franchise Commissioner to adopt rule providing for certificate of tax payment to facilitate corporate dissolution, and such rule without legislative sanction did not aid commissioner in taxing bank which had been practically but not formally dissolved. St.1939, p. 2967, § 29.

5. Corporations 🔑617(1), 618

Under statutes governing dissolution, corporation's power to conduct business by contract, incur debts, etc., may be ineffective, but corporation may still exist for purpose of winding up business. Civ.Code, §§ 399–404c.

6. Banks and banking 🔑64, 72

Where bank ceased to do business and filed certificate of election to dissolve and banking permit was canceled, its decision to wind up became irrevocable on distribution of assets to shareholders, and for practical purposes bank was "dissolved", and its dissolution was "effective" within statute relieving bank from liability for subsequent franchise taxes, notwithstanding failure to file statutory certificate of dissolution. St.1935, pp. 1247, 1248, §§ 4a, 5; St. 1937, p. 2334, § 13(k); St.1939, p. 2935, § 4(5); p. 2968, § 30; Civ.Code, §§ 399–400a, 403c.

See Words and Phrases, Permanent Edition, for all other definitions of "Dissolved" and "Effective Dissolution".

7. Taxation 🔑117, 126

The tax imposed by the Bank and Corporation Franchise Tax Act is not a "direct tax," "property tax", or tax for mere "privilege of being a corporation", but is a tax for "privilege of exercising corporate franchises," that is, "privilege of doing business" for purpose of gain or profit. St. 1935, p. 1248, § 5; St.1939, p. 2935, § 4(5).

See Words and Phrases, Permanent Edition, for all other definitions of "Direct Tax", "Property Tax", "Privilege of Being a Corporation", "Privilege of Exercising Corporate Franchises" and "Privilege of Doing Business".

8. Corporations 🔑617(1)

A corporation which is denied right to exist for all of taxable year and has irrevocably lost right to carry on business should not be held liable for full year's franchise tax merely because it neglects to file statutory certificate of dissolution, in absence of harm to tax commissioner. Civ.Code, § 403c.

9. Statutes 🔑174

The substance rather than mere form of statutes governs construction if strict adherence to form would result in injustice.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by the Bank of Alameda County against Charles J. McColgan, Franchise Tax Commissioner, to recover franchise taxes paid under protest after plaintiff had ceased to operate as a bank. From a judgment for plaintiff, the Commissioner appeals.

Affirmed.

Robert W. Kenny, Atty. Gen., and John T. Nourse and Daniel N. Stevens, Deputy Attys. Gen., for appellant.

George H. Koster and Bayley Kohlmeier, both of San Francisco, for respondent.

WARD, Justice.

The Franchise Tax Commissioner appeals from a judgment allowing plaintiff to recover taxes collected under the Bank and Corporation Tax Act, Stats.1939, p. 2968, sec. 30, for the years 1938, 1939 and 1940.

The construction of section 13(k) of the Act, Stats.1929, p. 19, as amended by Stats. 1937, p. 2334, presents the primary question for decision. It provides: "Any bank or corporation which is dissolved and any foreign corporation which withdraws from the State during any taxable year shall pay a tax hereunder only for the months of such taxable year which precede the effective date of such dissolution or withdrawal, according to or measured by such proportionate part of the net income of the preceding income year as the number of months of the taxable year prior to the effective date of such dissolution or withdrawal bears to the entire preceding income year; provided, however, that in the case of any bank or corporation which is dissolved, or which withdraws from the State during any taxable year, the offset from the tax for the months of such taxable year prior to the effective date of such dissolution or withdrawal shall not exceed that proportion of the offset computed under section 26 which the number of said months prior to the effective date of such dissolution or withdrawal bears to the number of months of the preceding income year; and provided further, that the taxes levied under this act shall not be subject to abatement or refund because of the cessation of business or corporate existence of any bank or corporation pursuant to a reorganization, consolidation, or merger. In any event, each such corporation shall pay a tax not subject to offset for such period in an amount equal to the minimum tax provided for in section 4 of this act."

Plaintiff was a California corporation, engaged in business as a bank in the City of Alvarado, Alameda County, from December, 1916, until April, 1938. On April 9, 1938, plaintiff ceased to operate as a bank. Its permit to do business as a bank was cancelled by the Superintendent of Banks on April 12, 1938. Assets were distributed to its shareholders on April 13th, and a certificate of election to dissolve was filed with the Secretary of State on or about April 25th.

Plaintiff did not file a certificate of dissolution as required by Civil Code, section 403(c). In 1938, section 403(c) provided: "(1) When a corporation has been completely wound up without court proceedings therefor, all of its known debts and liabilities actually paid or adequately provided for or paid as far as its assets permit, and its known property distributed, a majority of the directors or trustees shall sign and acknowledge a certificate stating that the corporation has been completely wound up, its known assets distributed, any tax or penalty due under the Bank and Corporation Franchise Tax Act paid, and its other known debts and liabilities actually paid or adequately provided for or paid as far as its assets permit, and that the corporation is dissolved. Such certificate shall be filed in the office of the Secretary of State and a copy, certified by him, shall be filed in the office of the county clerk of the county in which the principal office of the corporation is located. Thereupon corporate existence shall cease except for the purpose of further winding up if needed. * * * (2) In lieu of filing the certificate provided for in subdivision (1) of this section the directors or trustees, if the winding up has been accomplished without court proceedings, may petition the superior court of the county in which the principal office of the corporation is located for an order declaring the corporation duly wound up and dissolved. * * * Upon the making of such order, corporate existence shall cease except for the purposes of further winding up if needed and the directors or trustees shall be discharged from their duties and liabilities." Plaintiff's failure to comply with section 403c is the reason given by the commissioner for levying and collecting the taxes for the years designated.

Plaintiff took as the measure of its tax one-fourth of its net income for the year 1937, and computed the tax at 4% of this figure, thus estimating its tax to be $174. This sum was remitted with the return. In December, 1938, the commissioner under section 4a of the Bank and Corporation Franchise Tax Act, St.1935, p. 1247, determined that the rate of taxation on banks for 1938 should be 8%. On December 28th, plaintiff paid an additional tax of $174.

The commissioner subsequently decided that plaintiff had not effected a dissolution in April, 1938, within the meaning of section 13(k) of the Act, and therefore assessed an additional franchise tax for 1938 in the sum of $1,043.95, with interest thereon in the amount of $93.96. Plaintiff paid these assessments on June 12, 1940, under written protest.

Plaintiff filed a claim for refund on October 21, 1940, and the commissioner denied the claim on November 12, 1940. On March 31, 1941, the commissioner notified plaintiff that he had determined that its income for 1937 was $2,473.14 more than it had reported, and that he proposed to assess additional taxes for the year 1938 in the amount of $197. Payment was made under protest. In addition the commissioner assessed and collected the $25 minimum tax imposed by section 4, subd. (5) of the Act, St.1939, p. 2935, for the taxable years 1939 and 1940. He denied plaintiff's claim for refund after payment was made under protest.

It was stipulated that "Plaintiff's net income for Franchise Tax purposes for the income year 1937 was $19,873.14. If plaintiff was liable for Franchise Tax for only three-twelfths (3/12ths) of the taxable year 1938, its correct Franchise Tax liability for said year was $397.45. If Plaintiff was liable for Franchise Tax for the entire taxable year 1938, but was liable for tax at the eight percent (8%) rate imposed on banks for only three-twelfths (3/12ths) of the year, Plaintiff's correct Franchise Tax liability for said year was $993.65." It was further stipulated: "I. Since March 1, 1929, it has been the administrative practice of the Franchise Tax Commissioner of the State of California, when a domestic bank or corporation, which desires to dissolve within a taxable year and prior to a determination by said Commissioner of the tax rate applicable to banks for that year, applies for his certificate that all taxes imposed upon it by the Bank and Corporation Franchise Tax Act of California are paid, to accept from said bank or corporation a bond or other deposit of security in an amount which he determines will be sufficient to secure the payment of the tax which may become payable from said bank or corporation for the taxable year, and thereupon to issue his certificate that all taxes, penalties, and interest imposed by said Act upon said bank or corporation are paid or secured. II. There is no published ruling setting forth the practice described in paragraph I, and neither plaintiff nor plaintiff's counsel had knowledge of said practice. III. Plaintiff did not apply and has not yet applied to said Franchise Tax Commissioner for the issuance of his certificate that all taxes imposed upon it by said Act had been paid."

[1] The commissioner argues that "An effective corporate dissolution requires not only a winding up of the corporate affairs and a surrender of the corporation's right to do business, but also an acceptance by the state of the surrender." He contends that the effective date of dissolution is the date on which a corporation files a certificate under section 403c, and that since neither an order of dissolution has been made nor a certificate of dissolution filed respondent is not entitled to a refund for any portion of the taxable year 1938. The following provision of section 29 of the Bank and Corporation Franchise Tax Act, as it existed in 1938, is invoked by the Commissioner: "No decree of dissolution shall be made and entered by any court, nor shall the county clerk of any county or the Secretary of State file any such decree, or file any other document by which the term of existence of any taxpayer shall be reduced or terminated, nor shall the Secretary of State file any certificate of the surrender by a foreign corporation of its right to do intrastate business in this State until the tax, penalties, and interest shall have been paid." Stats.1937, p. 2344. It is argued that dissolution is an operative act terminating the existence of a corporation and that the purpose of the quoted provision is to require payment of taxes before the state assents to ending corporate existence.

The quoted portion of section 29 is not applicable to this case. The prorated amount of the tax, according to the bank's figures, was paid on or about April 13, 1938. In a statement attached to its tax return for the year 1938 appears the following: "Business sold April 9, 1938 and corporation dissolved." The fact that a discrepancy was subsequently found is of no consequence in view of the provisions of the Civil Code, sec. 403c, that the corporate existence shall continue, if necessary, for further winding up. In addition, Civil Code, section 399, provided for the continuation of a corporation after "dissolution," not for the purpose of "doing business" but, among other purposes, to "discharge obligations."

It should be mentioned that the interpretation of section 13(k) adopted by the commissioner might impose a condition which a bank could not meet. Under section 4a the rate of the tax applicable to such institutions is not fixed until December 31st of each year. This would in effect require a bank to remain in operation, or at least in existence, until the rate was determined by the commissioner.

[2-4] The theory adopted by the commissioner—that there should be a formal dissolution—may, as a matter of administration, be advisable. This is indicated by the adoption of a rule that in order to facilitate dissolution the commissioner shall issue a certificate to the effect that taxes, penalties and interest imposed by the "Act" have been paid. The last paragraph of the rule (Art. 29-1) provides: "Any certificate issued pursuant to this regulation will be issued on the assumption that dissolution or withdrawal of the bank or corporation will be effected on or before a specified date. The taxes required to be paid under (3) above will be computed accordingly. Generally, the date specified in the certificate will be the fifteenth of the month following the month in which the certificate is issued, although in special cases a longer or shorter period may be allowed. If, for any reason, dissolution or withdrawal is not effected on or before the date specified, the certificate shall be void, and a new certificate must be obtained." It is admitted that neither plaintiff nor his counsel had knowledge of the method devised by the commissioner to assist dissolution. A practical interpretation by a governmental officer in the adoption of reasonable rules to assist in the procedural administration is entitled to great weight, but is not controlling. Carter v. Commission on Qualifications, etc., 14 Cal.2d 179, 93 P.2d 140; Los Angeles County v. Superior Court, 17 Cal.2d 707, 112 P.2d 10. The rule is that administrative construction is considered when some uncertainty appears. Hammond v. McDonald, 49 Cal.App.2d 671, 122 P.2d 332. No ambiguity or uncertainty appears in the statutes that requires the adoption, without legislative sanction, of the rule formulated by the commissioner. The rule without statutory authorization, is of no assistance to the cause of the commissioner. Subsequent to 1938, the year in which we are interested, the substance of the rule was codified as part of section 29. Stats.1939, p. 2967. That amendment is not applicable to the 1938 taxes. Having eliminated the rule promulgated by the commissioner in 1938, any aid to sustain his position must come from the statutes above quoted.

[5] Chapter XV of the Civil Code, embracing sections 399 to 404c, provides the necessary legal steps to be followed in terminating corporate existence. A careful reading of the sections makes it plain that a corporation may exist for the purpose of winding up its business. Its power to conduct business by contract, or incur debts, etc., may be ineffective, but its existence is not completely terminated. "If it wishes to die, it may do so, but only in the way ordained by law." Elliott v. Superior Court, 168 Cal. 727, 731, 145 P. 101, 103. The provisions referred to are for the protection of both the corporation and the public. A way is set up to protect creditors, which would include the state as represented by its taxing authority. "In no case is extinction now instantaneous and complete; there is a continued existence of the company to liquidate its affairs." 6A Cal.Jur., p. 1427, sec. 838.

[6] A bank or corporation dissolved during any taxable year shall pay taxes "only for the months of such taxable year which precede the effective date of such dissolution." Section 13(k). Plaintiff sold its business and assets; its permit to do business as a bank was cancelled; it distributed its assets to the shareholders and filed a certificate of election to dissolve. All these acts occurred in April 1938. It is not contended that plaintiff has done any business since then. Its permit to do business as a banking corporation was formally cancelled on April 12th. When the assets were distributed to its shareholders on April 13th, plaintiff's decision to wind up became irrevocable. Civil Code, sec. 400a. Business had ceased prior thereto, but the Secretary of State was not notified of plaintiff's election to dissolve until April 25th. From a practical standpoint, a corporation may be considered dissolved when it irrevocably loses its right to do business other than that necessary to wind up its affairs. The dissolution of the corporation herein for tax purposes was "effective." A corporation which voluntarily dissolves continues to exist only for the purpose of winding up its business. Civil Code, sec. 399. A certificate stating the corporation's election to wind up must be filed with the Secretary of State and with the clerk of the county wherein the principal office

is located. Sec. 400. When the corporation has been wound up by a final distribution of its known assets a certificate of dissolution shall be filed and the directors or trustees discharged from their duties and liabilities. Sec. 403c. The latter provision appears to be for the convenience of the Secretary of State, the public and the protection of the directors and trustees. If the corporation ceases to do business and the taxes have been paid, the tax-finding body, the commission, should not be further interested.

[7] The payment of taxes under the Bank and Franchise Act, supra, is, as the statute provides, for the privilege of doing business. The notice to wind up or of dissolution is a notice of intended cessation of business but is not a dissolution of the legal entity of the corporation. A certificate that the corporation "has been completely wound up" is a formal end of corporate existence "except for the purpose of further winding up if needed. Sec. 403c. The tax under consideration is not a direct tax, nor a property tax, nor a tax for the mere privilege of *being* a corporation, but is a tax for the privilege of exercising its corporate franchises. The tax may not be imposed upon a corporation still in existence which no longer enjoys the privilege of exercising such franchises; that is, the privilege of doing business for the purpose of gain and profit.

In the present case the Superintendent of Banks cancelled plaintiff's permit to do business as a bank—that is for gain and profit—on April 12, 1938. Thereafter the bank could not exercise any privilege of its corporate franchise for the purpose of "financial or pecuniary gain or profit" (sec. 5, St.1935, p. 1248) and was therefore not subject to the tax.

The minimum tax of $25 per year is also imposed for the privilege of exercising the corporate franchise as that term has been previously defined, and could not be imposed against plaintiff after its right to do business as a bank was cancelled.

Appellant contends that the benefits arising from sec. 13(k) are computed upon the basis of the effective date of dissolution, not the date upon which the corporation ceases to do business or loses its right to do so, citing Hise v. McColgan, 24 Cal.2d 147, 148 P.2d 616. The case is not in point. In the Hise decision the business was being "liquidated," as that word appears to be used in the Building and Loan Association Act. Stats.1931, p. 483, sec. 13.11. The "liquidator" controls the business "for the *purpose* of financial or pecuniary gain or profit." (Italics added.) Bank and Corporation Franchise Tax Act, sec. 5. In the present case after the cancellation—in fact before—no business was transacted.

Irrespective of whether the tax is a tax upon the right to exercise its corporate franchise, or upon the actual exercise thereof, in the event of dissolution during any taxable year a bank or corporation "shall pay a tax hereunder only for the months of such taxable year which precede the effective date of such dissolution." Sec. 13(k). There is no evidence herein that the practical discontinuance of corporate existence by cessation of business was pursuant to any plan of reorganization, consolidation or merger. It was not a case of suspension, but of cessation of business. In the absence of any direct provision that the tax should continue, or that "dissolution" necessitates a strict compliance with the statutory conditions (sec. 403c) as a prerequisite to going out of business or relinquishing the privilege of corporate existence, cessation of business, distribution of assets and official cancellation of license rights to do business are in effect a "dissolution" as that word is used in sec. 13 (k).

[8, 9] It may be appropriate to state that whatever is said herein as to the law as it then existed, is applicable to the facts in this particular case, and should not be understood as an indication that the same legal views would hold upon issues factually different. However, this should be plain —unless the legislature ordains otherwise, a corporation which is denied the right to exist for the entire year and has irrevocably lost its right to carry on business for profit and gain, should not be held liable for a full year's tax, People ex rel. Mutual Trust Co. v. Miller, 177 N.Y. 51, 69 N.E. 124, because it neglected to file "a certificate stating that the corporation has been completely wound up, its known assets distributed, any tax or penalty due under the Bank and Corporation Franchise Tax Act paid," etc., when it appears that the state department, as represented by the commissioner, has not been injured by the failure of the taxpayer to comply with sec. 403c. It is the substance rather than mere form that often governs in the construction of statutes if strict adherence to form would result in an injustice. Carpy v.

Dowdell, 129 Cal. 244, 61 P. 1126; Leo v. Board of Medical Examiners, 36 Cal.App. 2d 490, 97 P.2d 1046; Edson v. Southern Pacific R. R. Co., 144 Cal. 182, 77 P. 894.

The judgment is affirmed.

PETERS, P. J., and BRAY, Justice pro tem., concur.

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69 Cal.App.2d 311

FORRESTER v. FORRESTER.

Civ. 14753.

District Court of Appeal, Second District, Division 3, California.

May 24, 1945.

1. Divorce 🔑252

Award of divorce decree to plaintiff established that she was not the party at fault and that she was therefore entitled to not less than half of the community property. Civ.Code, § 146.

2. Divorce 🔑249(2)

The mere informality of settlement of property rights between husband and wife in process of contested divorce case does not detract from effectiveness of settlement to carry out intention of parties and to accomplish their purpose.

3. Divorce 🔑254

Where wife brought separate maintenance action and husband cross-complained for divorce, and final settlement of property rights was not reached until case arrived in a trial department for trial as a contested case, and interlocutory judgment of divorce entered for wife incorporated oral agreement between parties respecting property rights, providing among other things for payment by husband to wife of $50 per month until wife should remarry, interlocutory decree constituted a contract between the parties and could not be amended except by consent of parties.

4. Divorce 🔑254

Where monthly payments ordered by divorce decree are in effect and essence a phase of property settlement agreement rather than merely alimony, court has no power to reduce amount of such payments except by consent of parties.

◆

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by Wilma Dorothy Forrester against Lee Barxtel Forrester for separate maintenance, wherein defendant cross-complained for divorce, and at the trial of the case, pursuant to stipulation, plaintiff amended her complaint to seek a divorce and cause was tried as a default, and a divorce decree providing for certain monthly payments was entered in favor of plaintiff. From an order granting defendant's motion to modify and reduce monthly payments provided in divorce decree, plaintiff appeals.

Reversed.

Paul G. Breckenridge and Dorthick, Cusack & Ganahl, all of Los Angeles, for appellant.

Vernon M. Brydolf, of Pasadena, for respondent.

FOX, Justice pro tem.

This is an appeal by the plaintiff from an order modifying and reducing the monthly payments provided in the prior divorce decree of the parties from $50 to $25 per month.

In 1940 plaintiff filed an action for separate maintenance against defendant. He answered the complaint and also filed a cross-complaint for divorce which plaintiff answered. The case came on for trial on March 10, 1942. At the conclusion of the trial judgment was rendered for the plaintiff. The judgment, which was signed and filed the next day, recites that: "The parties hereto through their respective counsel having stipulated in open Court that they had entered into an agreement covering their mutual rights in respect to property and support and maintenance, which said agreement was to be made a part of the judgment herein, and defendant and cross-complainant having dismissed his cross-complaint; and the parties through their respective counsel having stipulated that plaintiff's complaint be amended so as to pray for a decree of divorce in place of a decree for separate maintenance; and evidence having been introduced on behalf of plaintiff * * * and written findings of fact having been waived by the parties hereto * * * it is adjudged that plaintiff is entitled to a divorce from defendant * * *." The judgment contained the following provision: "It is further ordered and adjudged that defendant shall pay to plaintiff the sum of Fifty ($50.00) Dollars per month, payable on the first day of each and every month, commencing April 1, 1942, and continuing each month thereafter until such time as plaintiff shall remarry; * * * that all the household furniture of the parties be awarded to plaintiff herein and defendant is ordered to pay off the balance due on the purchase price of said furniture as heretofore ordered, said balance being in the approximate amount of $305.00; that defendant hold any proceeds from or interest in the Police Retirement or Pension Fund of the City of Pasadena which he may receive or be entitled to receive, in trust as security for the payments herein provided to be paid to plaintiff." The settled statement on appeal recites that: "The agreement of the parties referred to in said judgment covered their mutual rights in respect of property and support and maintenance, and was oral. The property referred to therein was the community property of the parties set forth and described in the pleadings upon which said action was based." No appeal was taken from said interlocutory decree. The final judgment was entered March 16, 1943. It confirmed the provisions of the interlocutory decree.

On March 17, 1944, plaintiff was ordered to show cause why the judgment should not be modified by relieving defendant from any obligation to make further payments to her. Defendant's affidavit in support of said order to show cause stated, among other things, that defendant had remarried and plaintiff was employed and unmarried. In her affidavit in opposition to the motion plaintiff stated: "That in open court plaintiff and defendant stipulated as to the distribution of their property rights, including a stipulation contained in the minutes of this court and in the judgment herein that defendant would pay to plaintiff the sum of $50.00 per month until she remarried; that said judgment and stipulation provided that the payments would be made to plaintiff until such time as plaintiff should remarry, and did not provide for modification * * *." She also alleged: "That the judgment and order herein attempted to be modified were based upon a contract and property settlement and the stipulation of the parties and their respective counsel, and are not subject to modification."

The matter was heard upon the affidavits of the parties without other evidence except "the stipulation that the amount of plaintiff's current earnings were substantially as alleged in defendant's affidavit." The court made its order modifying said interlocutory and final decree and reduced the payments to $25 per month. It is from this order that plaintiff appeals.

It is plaintiff's contention that the monthly payments provided by said decree were part of a property settlement and were incorporated therein pursuant to an agreement of the parties and therefore said decree is not subject to modification in that respect. We agree with this contention.

[1] It appears that the parties did have certain community property, though we are not informed as to either the character or extent thereof. It also appears that the parties had lived together some nineteen years and that defendant was or had been a member of the police department of the city of Pasadena and had or would have an interest in the Police Retirement or Pension Fund of said city. Any proceeds, however, which defendant might receive from said fund were not to be divided or otherwise shared with plaintiff but to be held "in trust as security for the payments herein provided to be paid to plaintiff." From the fact that plaintiff was awarded the divorce decree it follows that she was not the party at fault and therefore she was entitled to not less than half of the community property. Civ.Code, sec. 146; Quagelli v. Quagelli, 1929, 99 Cal.App. 172, 176, 277 P. 1089; Tipton v. Tipton, 1930, 209 Cal. 443, 288 P. 65; Shapiro v. Shapiro, 1932, 127 Cal.App. 20, 14 P.2d 1058; Falk v. Falk, 1941, 48 Cal.App.2d 762, 770, 120 P.2d 714.

The parties were in court with their respective counsel apparently ready to try a contested case—the plaintiff seeking separate maintenance and the defendant seeking a divorce. The result was a settlement, the case proceeding as a default, evidence being offered only in behalf of plaintiff. As a part of that settlement the parties through their respective counsel stipulated, so says the judgment, in open court that "they had entered into an agreement covering their mutual rights in respect to property and support and maintenance, which said agreement was to be made a part of the judgment herein * * *." The judgment then proceeds to provide that "defendant shall pay to plaintiff the sum of Fifty ($50.00) Dollars per month * * * until such time as plaintiff shall remarry." The affidavit of plaintiff is to the effect that the said stipulation as to the distribution of their property rights included a stipulation that defendant would pay to plaintiff $50 per month until she remarried; that this stipulation was a part of the settlement of their property rights; and that the judgment and order requiring defendant to make said monthly payments was based upon said stipulation and property settlement. Plaintiff's affidavit is not denied. It supports, as does the background of the case and the situation of the parties as herein briefly sketched, the recital in the judgment that the parties had agreed upon a settlement of their property rights, that the provision for said monthly payments contained in said decree was pursuant to and in accordance with said agreement and that said provision was a part of the adjustment of the property rights of the parties.

[2, 3] The parties were obviously trying to solve their marital problem and settle their property rights. It is apparent that final settlement was not reached until the case arrived in a trial department for trial. This no doubt accounts for the informality of the settlement. The fact, however, that it was less formal than in most cases should not detract from its effectiveness to carry out the intention of the parties and to accomplish their purpose. This is particularly true since under the circumstances here disclosed the interlocutory decree may be regarded also as, in effect, constituting a contract between the parties. It is to be remembered that plaintiff sued for separate maintenance, that defendant answered and filed a cross-complaint for divorce, that upon the trial plaintiff's complaint was amended to pray for a divorce, defendant offered no evidence, and the judgment was awarded the plaintiff. This is precisely what took place in Franklin v. Franklin, 1945, 67 Cal.App.2d 717, 155 P.2d 637. In that case it is said (67 Cal.App.2d at page 720, 155 P.2d at page 639): "There is ample support for the proposition that a decree of divorce constitutes a contract between the parties where the defendant defaults by reason of the limited demands for relief made by the plaintiff." In London G. & A. Co. v. Industrial Acc. Comm., 1919, 181 Cal. 460, at page 465, 184 P. 864, at page 867, the court said: "An interlocutory judgment of divorce is therefore, so far as it determines the rights of the parties, a contract between them." See, also, to the same effect, Brown v. Brown, 1915, 170 Cal. 1, 5, 147 P. 1168. From a consideration of the entire proceedings it seems clear, under the foregoing rule, that when plaintiff came to terms with defendant and was allowed to proceed without opposition to her demands she would have been in no position later to increase them. For the same reason, defendant should be held bound by his agreement which was carried into and evidenced by the decree.

It is significant that in neither the portion of the decree which recites that the parties "had entered into an agreement covering their mutual rights in respect to property and support and maintenance" nor in the portion of the decree wherein defendant is ordered to make the monthly payments to plaintiff is there any provision that says the payments shall be made until the further order of the court or which indicates that the court shall have the right to later modify the decree in that respect. The affidavit of plaintiff says there was no provision for modification. It is also significant that the decree does not designate the monthly payments as alimony or for plaintiff's support and maintenance. If said monthly payments had been intended as alimony or it had been intended that said payments might be modified and changed from time to time it seems reasonable that some expression of such intent would be found in either the stipulation of the parties or in the decree. The definite provision that the payments were to continue until plaintiff should remarry is to be understood as meaning exactly what it says, and so construed it allowed for no modification by the court.

The case therefore falls within the principle of such cases as Ettlinger v. Ettlinger, 1935, 3 Cal.2d 172, 44 P.2d 540; and Puckett v. Puckett, 1943, 21 Cal.2d 833, 136 P.2d 1. In both of these cases the monthly payments were to continue, as here, until the plaintiff remarried. In the latter case the Supreme Court said that (21 Cal.2d at page 840, 136 P.2d at page 5): "if there is a property settlement agreement providing as a part thereof for perodical payments to be made to the wife by the husband and the agreement is approved by the court and the payments ordered by the decree to be paid pursuant to the agreement, that order will not be subsequently modified, except by the consent of the parties." In Henzgen v. Henzgen, 1944, 62 Cal.App.2d 214, at page 217, 144 P.2d 428, at page 430, this court said: "It is now settled that if a husband and wife enter into a contract disposing of their property and include as an integral part of the agreement a provision that the husband shall pay the wife a sum fixed, monthly or otherwise, whether identified as alimony or unidentified, not only is she entitled to be paid that sum because of the contract, but if the agreement is approved and by some suitable means made a part of a subsequent judgment of divorce, she is entitled to it by virtue of the judgment as well. In such event, notwithstanding the words of Section 139 [Civil Code] that 'the court may from time to time modify its orders in these respects' it may not do so."

[4] The application of these principles to this case leads to the conclusion that since the monthly payments ordered by the decree are in effect and essence a phase of the property settlement rather than merely alimony the court had no power to reduce the amount of said payments, except by consent of the parties. Ettlinger v. Ettlinger, supra; Puckett v. Puckett, supra; Moran v. Moran, 1935, 3 Cal.2d 342, 44 P.2d 546; Kohl v. Kohl, 1944, 66 Cal.App.2d 535, 152 P.2d 494.

Plaintiff relies on Plummer v. Superior Court, 1942, 20 Cal.2d 158, 124 P.2d 5. In that case there was a property settlement agreement but the interlocutory divorce decree did not order or direct defendant to do or perform any act or carry out any provision or stipulation provided for in the agreement. The interlocutory decree simply by way of recital stated that a copy of the contract "annexed hereto and made a part hereof * * * is hereby ratified, approved and confirmed." 20 Cal.2d at page 164, 124 P.2d at page 6. The final decree contained a similar recital. Consequently the court decided that defendant could not be held in contempt for failure to make certain payments under the agreement. Obviously the case has no application to the problem before us. The factual situation in each of the other cases relied on by defendant is so different from the instant case that none of them are of any assistance.

The order appealed from is reversed.

DESMOND, P. J., and SHINN, J., concur.

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69 Cal.App.2d 285

PEOPLE v. PIERSON.

Cr. No. 628.

District Court of Appeal, Fourth District, California.

May 22, 1945.

1. Criminal law 🔑**780(3), 1172(2)**

Instructions in prosecution for abortion on question of corroboration telling jury that evidence must be produced other than testimony of woman involved which tends to implicate defendant, and that there must be some evidence other than that of accomplice which tends to implicate him, were not prejudicially erroneous. Pen.Code, § 274.

2. Criminal law 🔑**775(6)**

Instruction on defense of alibi, in prosecution for abortion, to effect that testimony offered to prove defense should be subject like all evidence in the case to rigid scrutiny for the reason witnesses when truthful may be honestly mistaken in or forgetful of times and places, was erroneous.

3. Criminal law 🔑**778(8)**

Instruction on defense of alibi, to effect that burden of proof was on defendant to show by preponderance of evidence that at time and place in question it was impossible for defendant to have been there, was erroneous.

4. Criminal law 🔑**780(3)**

In prosecution for abortion, refusal of instructions to effect that the women involved and husband of one of them were accomplices as a matter of law, and were liable to prosecution for same offense as charged against defendant, was not error. Pen.Code, § 274.

5. Criminal law 🔑829(13), 1172(2)

In prosecution for abortion, refusal of instruction to effect that defendant must not be convicted upon statements made to him by woman involved as to her condition and purpose of her visit, in that such statements were hearsay and that such evidence was admitted only to establish woman's condition, was not prejudicial error particularly in view of other instructions fully informing jury as to elements which must be proved. Pen.Code, § 274.

6. Criminal law 🔑703, 1037(1), 1171(2)

Statement by prosecuting attorney, in opening statement in prosecution for abortion, that he thought evidence would show that woman on whom alleged abortion was performed came to defendant for relief because she had heard of him by reputation, which statement was supported by evidence, and also statement that he thought he would be able to produce instruments used, with evidence showing that instruments similar to those taken from defendant's office were used, did not constitute prejudicial misconduct particularly in absence of objection at time statement was made.

7. Criminal law 🔑706, 1170½(1)

Action of district attorney in prosecution for abortion in asking questions relating to articles which had been taken from defendant's office, and which defendant himself testified could be used in performing an abortion, did not constitute prejudicial misconduct as asking questions knowing that evidence was inadmissible.

8. Criminal law 🔑729, 1171(1)

In prosecution for abortion, statement made by prosecuting attorney, in argument to jury, respecting knowledge of agents of State Board of Medical Examiners of situation which was withdrawn after objection thereto, was not prejudicial misconduct.

9. Criminal law 🔑722(2), 723(1), 1171(1, 6)

Reference in argument by prosecuting attorney in prosecution for abortion to atrocities perpetrated on women and children in Axis countries, and finding in the present case the lives of unborn children being taken for the purpose of getting a fee, was not prejudicial misconduct although such statement might better have been omitted.

10. Criminal law 🔑665(1)

Exclusion of witnesses in prosecution for abortion was within discretion of trial court. Pen.Code, § 274.

11. Criminal law 🔑655(1), 1166½(1), 1170½(5½)
Witnesses 🔑246(2)

Trivial or unimportant rulings of trial judge in prosecution for abortion in intervening in questioning of witness in attempt to save time, and stating that a certain question was a double question and requesting counsel on objection to question to make objection for ruling thereon, and other incidental matters, did not constitute prejudicial misconduct.

12. Criminal law 🔑404(3)

In prosecution for abortion, admission in evidence of surgical instruments and a number of empty collapsible tubes, which had been taken from defendant's office and shown by testimony to be instruments which could have been used in producing an abortion was not error. Code Civ.Proc. § 1954.

13. Criminal law 🔑1134(3)

Assignments of error in connection with rulings on evidence need not be considered where reviewing court has concluded that there must be a reversal for other reasons.

14. Abortion 🔑9

In prosecution for abortion, the admission in evidence of a conversation between woman on whom alleged abortion was performed and defendant, which was overheard by witness, was not error where presence of witness in office at time was fully established and admitted and conversation referred to was fully brought out. Pen.Code, § 274.

15. Criminal law 🔑511(10)

Although husband of woman on whom alleged abortion was performed testifying that he had paid for the operation was an accomplice, his evidence might be accepted as further corroboration of testimony of woman involved. Pen.Code, § 274.

16. Abortion 🔑11

In prosecution for abortion, evidence *held* sufficient to sustain conviction as to one count and insufficient as to another count. Pen.Code, § 274.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Clyde A. Pierson was convicted of abortion, and he appeals.

Affirmed as to one count and reversed with directions as to other two counts.

Jerome L. Richardson and Miguel Estudillo, both of Riverside, for appellant.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Jerome B. Kavanaugh, Dist. Atty., and C. O. Thompson, Deputy Dist. Atty., both of San Bernardino, for respondent.

BARNARD, Presiding Justice.

The defendant was charged with the crime of abortion in each of three counts of an indictment. In Count 1, it was charged that on December 17, 1943, he administered a drug to a Mrs. Brown and used an instrument with the intent to procure a miscarriage when it was not necessary to preserve her life. In Count 2 a similar offense was alleged to have been committed on December 27, 1943, in connection with an unmarried woman. In Count 3, a similar offense involving another unmarried woman was alleged to have been committed on December 28, 1943.

The general facts in relation to Count 1, as disclosed by the People's evidence, are as follows: On December 17, 1943, Mrs. Brown and her husband came from their home in Los Angeles to the office of the defendant, who is a physician and surgeon in San Bernardino. They had never met the defendant but knew of him by reputation. They waited in the reception room a few minutes, and then the defendant took Mrs. Brown into one of several smaller rooms in the rear of the office. Mrs. Brown told the defendant that she believed she was pregnant and that she would like to be relieved of her pregnancy. The defendant told her he would relieve her as soon as he dismissed a lady in an adjoining room. The defendant then told her that his fee would be $50. He returned in a few minutes and told Mrs. Brown to lie down on an operating table, which she did. It is sufficient here to say that if her testimony as to what was then done by the defendant, including the use of certain surgical instruments, is true there can be no doubt that an abortion was performed or at least attempted.

Mrs. Brown then walked to the reception room and told her husband that the defendant wanted to see him. Mr. Brown walked back to one of the rear rooms and paid the defendant $50. Mr. and Mrs. Brown then returned to Los Angeles.

Mrs. Brown began to have pains that night and, without going into details, her conditions grew progressively worse until she called in a Dr. Levin, five days later. He took her to a hospital, gave her an anaesthetic and removed certain tissues which remained. This doctor's testimony leaves no doubt that an abortion had been performed, or partially performed, on Mrs. Brown within a few days theretofore. Mrs. Brown remained in the hospital twenty-three days.

The woman involved in Count 2 testified that she went to the office of the defendant on December 27, 1943, at about 2:30 o'clock in the afternoon, that she told the defendant that she was pregnant and wanted him to help her, and he told her that he would do so and that the fee would be $50. She then testified as to what the defendant did, including the use of instruments, and her testimony, if true, sufficiently shows a violation of section 274 of the Penal Code. She had never seen the defendant before but had heard of him. After the operation the defendant asked her to pay him $50. She told him that she did not have the money with her and he said she should have told him before he performed the operation.

Late that night she had pains and took some pills the defendant had given her, but got no relief. About one o'clock on the morning of December 28, 1943, she was taken to the Redlands Community Hospital where she passed a baby about five o'clock A. M. Thereafter, she was treated by another doctor. Two or three days later at the hospital, in the presence of the defendant, she told two special agents for the State Board of Medical Examiners that she had gone to the defendant for the purpose of having him give her relief for her pregnancy, told them what the defendant had done, and in response to a question told them that she had not paid the defendant the $50. The defendant then asked her if she was going to pay him his $50.

The woman involved in Count 3 testified that she called at the office of the defendant between nine and ten o'clock A.

M. on December 27, 1943; that she had never met the defendant prior to that time; that she told the defendant she was pregnant and asked him if he could get rid of the child for her and the defendant replied that he could, but that it would be dangerous because she was so far along; that the defendant told her it would cost her $50 and she told him she would come back when she got the money; that she returned to the defendant's office on the morning of December 28, 1943; and that she paid the defendant $50. She then testified as to what the doctor did, including the use of instruments, and said that she had no pain and could feel little of anything; that she returned on the 29th because she had had no results and the defendant injected something into her leg with a syringe and needle; and that she returned on December 30, because there were still no results. At that time, she testified, the defendant told her that they had him under $1000 bail for illegal surgery, and then he gave her money back. After reading in a newspaper an account about the condition of the women involved in Counts 1 and 2 she went to the district attorney's office and told her story. She then went to another doctor, who took care of her, and a child was born to her on March 5, 1944.

A jury returned a verdict of guilty on all three counts and the defendant has appealed from the judgment and from an order denying his motion for a new trial.

It is first contended that several instructions given to the jury were prejudicially erroneous. Two of these are very similar. Peoples' instruction No. 7, after stating that in such a case a defendant cannot be convicted upon the testimony of the woman involved unless she is corroborated by other evidence, contains the following:

"In this connection you are instructed that the corroborating evidence, however, need not in degree be such as to establish guilt. All that is required in such a case is that there be produced some testimony other than that of the woman upon whom the abortion, or attempted abortion, was made which tends in some slight degree at least to implicate the defendant in the commission of the crime of which he is on trial."

Peoples' instruction No. 15, after stating that a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by other evidence tending to connect the defendant with the commission of the offense, contains the exact language above quoted except that it refers to "testimony other than that of the accomplice" instead of "testimony other than that of the woman (involved)."

[1] It is argued that these instructions omit the essential element that the corroborative evidence, standing alone and without the aid of the testimony of the accomplice, must tend to connect the defendant with the commission of the crime. Appellant relies on People v. Compton, 123 Cal. 403, 56 P. 44, 47, where the jury was told that it is sufficient if the corroborative evidence "tends in any way" to connect the defendant with the commission of the crime charged. It was there pointed out that the language used, "tends in any way," might be taken by the jury as authorizing it to consider the other evidence in connection with the testimony of the accomplice. The instruction with which we are here concerned differs materially from the one there considered. The jury was here told that all that is required in this regard is that evidence be produced other than the testimony of the woman involved which tends to implicate the defendant and, in the other instruction, that there must be some evidence other than that of the accomplice which tends to implicate him. This language excludes from consideration in this connection the testimony of the women or of the accomplices, and the jury was rather clearly told that there must be evidence, other than the testimony of these persons, which tends to connect the defendant with the commission of the crime. While these instructions could have been better worded it is not probable that the jury was in any way misled and it cannot be held that the instructions as given were prejudicially erroneous.

[2] Complaint is also made of two other instructions bearing on the defense of an alibi. This defense relates to the offense charged in Count 2, and to some extent to that charged in Count 3 since the woman there involved said she talked to the appellant at his office after nine o'clock on that day. While the evidence is conflicting, there is very substantial evidence to the effect that the appellant was suffering from flu on December 27, 1943, that he spent most of the day at home in bed, and that he was not in his office after 9:00 o'clock A. M. on that day. Peoples' instruction No. 11, after stating that one of

the defenses claimed with respect to Count 2 was that of alibi, that is that the defendant was elsewhere when this offense was alleged to have been committed, then reads: "The testimony offered to prove this defense should be subject, like all evidence in the case, to rigid scrutiny for the reason witnesses when truthful may be honestly mistaken in or forgetful of times and places." Similar instructions have been repeatedly criticized and it has frequently been held that instructions of that nature should not be given in cases where there is substantial evidence supporting a defense of alibi. The respondent argues that this instruction is not erroneous since it included the phrase "like all evidence in the case" and thus directed the jury to apply the same rule in this connection as that applied in considering other evidence, and that any possible error was cured because in other instructions the jury was told that it was sufficient if the evidence raised a reasonable doubt of the appellant's presence at the time and place in question. There was substantial evidence of an alibi which the jury should have been left free to consider on its merits. The attention of the jury was specially called to the evidence to the effect that the appellant was not in his office at that particular time, and it would naturally understand that it was expected to carefully scrutinize that evidence because witnesses might easily be mistaken in such matters. Clearly, this instruction should not have been given.

[3] Peoples' instruction No. 14 is also obviously erroneous. This reads:

"The jury is instructed that when the people offer evidence and make out a prima facie case of guilt against the defendant and the defense of alibi is relied on, then the burden of proof is on the defendant to show by a preponderance of the evidence offered that at the time and place in question it was impossible for the defendant to have been there."

The respondent concedes that this instruction was erroneous, as it must, but argues that it was not prejudicial since in several other instructions the jury was told that it was sufficient if the evidence in this connection raised a reasonable doubt as to the presence of the defendant, that if there was a reasonable doubt as to his presence he should be given the benefit of the doubt, that all elements in the case must be proved beyond a reasonable doubt, and other instructions of similar import. Not only does it thus appear that the instructions in this connection were conflicting, but even when all of the instructions are read together No. 14 stands out as more definite and puts a burden on the appellant which is not warranted by our law. It would seem probable that the jury would naturally pay greater attention to this instruction, which pointed out definitely what the appellant must do in this regard, than to other general instructions which were more or less connected with reasonable doubt and other matters. In People v. Costello, 21 Cal.2d 760, 135 P.2d 164, 167, under circumstances which seem less prejudicial to the defendant than those with which we are here concerned, especially in view of the two erroneous instructions on the subject of alibi which here appear, the court said:

"A suggestion may not be made to the jury that an alibi must be proved by a preponderance of the evidence, or that alibi evidence must satisfy the jury of the defendant's innocence, or that the jury must give less credit to testimony of alibi witnesses, or more careful scrutiny or less weight to alibi than to other evidence in the case. It is obvious that in cases where the defendant's own testimony supports the verdict of guilty (People v. Hammer, 74 Cal.App. 345, 240 P. 56), or where there is no evidence in support of the alibi (People v. Smith, 189 Cal. 31, 207 P. 518; People v. Johnson, 203 Cal. 153, 263 P. 524), the giving of an erroneous instruction on the subject of alibi should not be held to prejudice the rights of the defendant. But in cases where the evidence raises a conflict it may not properly be said that the harm resulting from the giving of such an instruction is overcome by general instructions so as to justify on that ground alone an affirmance pursuant to section 4½ of article VI of the California Constitution."

Under these circumstances, it must be held that these two instructions are so prejudicial as to require a reversal insofar as the conviction of the offense alleged in Count 2 is concerned.

[4] The appellant next contends that the court erred in refusing to give two instructions offered by him. The first of these was to the effect that Mr. and Mrs. Brown and the two women involved in the other two counts were all accomplices as a matter of law, and that they were all liable to prosecution for the identical offense

charged against the appellant. In his closing brief the appellant admits that this instruction was properly refused in view of the decisions in the cases of People v. Clapp, 24 Cal.2d 835, 151 P.2d 237, and People v. Wilson, Cal.Sup., 153 P.2d 720.

[5] It is further urged that the court erred in refusing to give another instruction to the effect that the appellant must not be convicted upon the statements made to him by Mrs. Brown as to her condition and the purpose of her visit, as such statements are hearsay, and were admitted only to establish Mrs. Brown's condition and the avowed purpose of her visit. The appellant cites People v. Wright, 167 Cal. 1, 138 P. 349; People v. Northcott, 45 Cal. App. 706, 189 P. 704, and People v. Thomas, 51 Cal.App. 731, 197 P. 677, but makes no argument other than that he was entitled to have this instruction given under these authorities. In the instruction here in question the statements referred to were made to the defendant himself. Moreover, in other instructions the court fully informed the jury with respect to the elements which must be proved and upon which they could base a conviction. No prejudicial error appears in refusing to give this instruction.

[6-9] It is next contended that the district attorney was guilty of prejudicial misconduct. In his opening statement the district attorney stated that he thought the evidence would show that Mrs. Brown was a stranger to the appellant and came to him for relief because she had heard of him by reputation. Later on he said: "I think we will be able to produce before you the instruments that were in the office at that time, and, no doubt, the one which was used." The first statement is fully supported by the evidence later produced, no objection was made to the statement when made, and no argument is here made as to why it indicates misconduct. With respect to the second statement, it is argued that the district attorney knew that he could not prove which instrument was used. No objection was made at the time and there is evidence that instruments similar to those taken from the appellant's office were used. It is then charged that the district attorney asked four questions knowing that the evidence was inadmissible. These questions related to articles which had been taken from the appellant's office and the appellant himself testified that these articles could be used in performing an abortion. Three charges are made in connection with the argument to the jury. The first is that the district attorney stated that Mrs. Brown was not an old patient of the appellant but came to him through reputation. This was fully supported by testimony. In the second instance, the district attorney stated that the two agents of the State Board of Medical Examiners had learned of the situation when Dr. Levin called them in regard to Mrs. Brown. An objection was made and the court asked the district attorney if he was sure he was within the evidence. The district attorney replied: "I think I am; but I withdraw the statement, if there is any question on the part of the court or counsel about it." The court replied that he did not recall any such testimony and the matter was dropped. In the other instance, the district attorney referred to the atrocities perpetrated on women and children in the Axis countries which we rightfully look upon with horror and then stated that here we find the lives of unborn children, who have the right to be born and live, being taken for the purpose of getting a fee of $50. While it may be conceded that this statement had better have been omitted we find nothing in this or the other matters referred to which sufficiently disclose prejudicial misconduct.

[10] Some nine charges of misconduct on the part of the court are then made. The first is that he refused to exclude the witnesses on the request of the appellant. It is argued that while the district attorney did not object to the request he really indicated that he thought this course unnecessary, and that since the witnesses were not excluded the jury must have thought the court was in favor of the prosecution. No such conclusion can be drawn and the matter was entirely within the discretion of the court. Another assignment is made in connection with a question asked of a laboratory technician as to how she knew that a certain solution was a "4%" solution. The court intervened after she had answered the question two or three times and then, in reply to a question by appellant's counsel as to whether they were being limited in questioning the witness, stated that he was merely trying to save time, that he was not limiting them and that they could ask any questions they wanted to. It is argued that this was an essential point and the court took the People's part against the ap-

pellant. The entire matter was immaterial and the court was extremely patient. In one instance, the court stated that a certain question was a double question. In another, in overruling an objection, the judge stated he was doing so because of a certain case which he cited. During the cross-examination of Dr. Levin counsel for appellant objected to a certain question and started to argue. The court said: "Make your objection and I will rule on it." At another point in the examination of the same witness a motion to strike an answer was made and a colloquy ensued between court and counsel which takes up several pages in the transcript. It is argued that this discloses impatience, on the part of the court, with counsel for the appellant. The record indicates considerable patience on the part of the court and that he was correct when he finally remarked: "We are wasting a lot of time on matters entirely irrelevant." In another instance the court remarked: "Counsel, ask the question and lets not comment on the effect of it." It is argued that the court thereby reprimanded appellant's counsel. The record discloses that this remark was addressed to counsel for the People. At another time, the court told the appellant while on the stand to confine himself to the questions asked and not to volunteer. In connection with an objection to a question asked of the appellant on cross-examination appellant's counsel stated that he had not been qualified as an expert in chemistry. The court remarked "You qualified him as a doctor." It is contended that the court was thereby arguing for the People.

[11] Most of these matters were trivial or unimportant and we find nothing in the record in connection with any of them which would justify a finding of prejudicial misconduct on the part of the court.

[12] It is next contended that the court committed prejudicial error in admitting in evidence various articles, consisting mostly of surgical instruments and a number of empty collapsible tubes, which had been taken from the appellant's office at the time he was arrested. It is argued that these articles were not admissible since section 1954, C.C.P., provides that before any object cognizable by the senses is introduced in evidence it must not only relate to the facts in dispute but must be identified as being the instrument with which the alleged crime was committed. That section provides that when such an object "has such a relation to the fact in dispute as to afford reasonable grounds of belief respecting it, or to make an item in the sum of the evidence" it may be shown to the jury or its existence and character proved. These articles were found in the possession of the appellant, were a part of the surrounding circumstances, and had such a relation to the matter that they might well afford reasonable grounds of belief respecting it. In general, the objection is made that there is no evidence here positively identifying any one of these instruments as one that was actually used on the occasions here in question. They were taken from the appellant's office, there is testimony that at least some of them could have been used in producing an abortion, and in connection with Count 1 Mrs. Brown testified that two instruments were used which were similar to two of those taken from the appellant's office. Similar evidence was held admissible in People v. Marineau, 55 Cal.App.2d 893, 132 P.2d 22; People v. Lee, 81 Cal.App. 49, 252 P. 763, and People v. Watanebe, 91 Cal.App. 290, 266 P. 1000. The appellant argues that in those cases the persons in whose possession the articles were found were not doctors. However, in People v. Murphy, 60 Cal.App.2d 762, 141 P.2d 755, it was held that the court properly instructed the jury that the defendant was lawfully entitled to have such instruments in his possession since he was a doctor and since the instruments might have a legitimate use. A similar instruction was given by the court in this case, which sufficiently protected the rights of the appellant. It was proper to show that the appellant had access to such instruments and the possession of such instruments and equipment was a circumstance which might be considered, which had a relation to the fact in dispute, and which would naturally constitute one of the items in the sum of the evidence. We find no error in this connection.

[13, 14] The appellant next makes thirty-three assignments of error in connection with rulings on the admission of other evidence. Nine of these relate to evidence which affected only the second and third counts. Not only are these unimportant in themselves, but they need not be considered in view of our conclusion that there must be a reversal as to those counts. Ten of these assignments are based upon appellant's theory that the articles taken from his office were not admissible in evidence

and are sufficiently covered by what we have already said in that regard. Two assignments relate to the presence of a Mrs. Taylor in the office of the appellant at the time Mrs. Brown first went in, and to a conversation between Mrs. Brown and the appellant which Mrs. Taylor overheard. The presence of Mrs. Taylor in the office at that time was fully established, and was admitted by all, and the conversation referred to was fully brought out. No possible error appears in this connection. The remainder of the assignments are to the effect that certain matters were not proper cross-examination of the appellant and of a doctor who testified in his behalf. These contentions are without merit.

We have carefully examined and considered all of these assignments of error, but it would serve no useful purpose to set them forth and analyze them in detail. In few, if any, can any error be found and any possible error in these few is either immaterial or of such small importance that it could not possibly have prejudiced the rights of the appellant or affected the result.

The final contention is that the verdict is contrary to the evidence and the law in that it was brought about by the misconduct of the court and of the district attorney, and because the testimony of the women involved in the respective counts was not sufficiently corroborated by other evidence. The first of these matters has already been covered.

[15, 16] In our opinion, there is sufficient corroboration of the testimony of Mrs. Brown, who was involved in the first count. That an abortion was performed or attempted in her case was thoroughly established by the testimony of Dr. Levin, who was called in to care for her a few days later. There is other evidence which tends to connect the appellant with her condition as found by Dr. Levin. The appellant admitted on the stand that Mr. and Mrs. Brown were in his office at the time in question. Mrs. Taylor, who was in another room when Mrs. Brown first went in, heard the appellant talking with a woman whom the doctor identified as Mrs. Brown and heard this woman say that she thought she was pregnant. The appellant admitted that he talked with Mrs. Brown, and also that he talked with Mr. Brown in one of the back rooms immediately after Mrs. Brown had gone into the front office, although he says that nothing was paid to him. Mr. Brown testified that his wife returned to the reception room twenty or twenty-five minutes after she went back to the rear rooms; that when she returned she gave him a message; that he then went back into one of the rear rooms and asked the appellant how much he owed him; that the appellant replied, "$50"; and that he then paid the appellant $50 in currency. While Mr. Brown was an accomplice, his evidence may be accepted as further corroboration of the testimony of Mrs. Brown (People v. Clapp, 24 Cal.2d 835, 151 P.2d 237; People v. Wilson, Cal.Sup., 153 P.2d 720), and his testimony was also corroborated to some extent by other evidence tending to connect the appellant with the offense charged. It cannot be held that there is an entire absence of evidence, other than the testimony of Mrs. Brown, which tends to implicate the appellant with the commission of the crime charged in the first count.

A different situation appears in connection with the offense charged in the third count. The testimony of the woman there involved is in itself far from satisfactory. Dr. Lashley, to whom she went a few days later, testified that he examined her and found nothing abnormal, that there was "no evidence of trauma" and that the mucous plug in the cervix was in place. Later, this woman gave birth to a baby.

The only evidence, aside from the testimony of this woman, which in any way connects the appellant with her, is the fact that the appellant went to see Dr. Lashley some days after he was arrested and asked Dr. Lashley whether this woman was a patient of his. Dr. Lashley testified that he took a card from his files marked with the name of this woman and read from it to the appellant "Said injected by Dr. Pierson two days ago," and that the appellant had then denied that he had done anything of the kind. Dr. Lashley further testified that the appellant then told him that under a certain section of the Penal Code any doctor who sent a woman to another doctor for the purpose of having an abortion performed was an accomplice. There is no evidence that Dr. Lashley had sent this woman to the appellant for that purpose and that statement, as made by the appellant, has little, if any, evidentiary value in connecting the appellant with the offense charged in this count. After carefully reviewing the evidence, we are of the opinion, and so hold, that sufficient corroboration of the testimony of the woman involved in Count 3 does not appear. Moreover, this count is affected by the erroneous instructions on alibi.

For the reasons given the judgment is affirmed insofar as it relates to Count 1 of the indictment, and is reversed insofar as it relates to the other two counts. The order denying a new trial is affirmed insofar as it relates to Count 1, and is reversed insofar as it relates to the other two counts, with directions to grant the same as to those counts.

MARKS and GRIFFIN, JJ., concur.

LOHMAN v. LOHMAN et al.*

Civ. 14835.

District Court of Appeal, Second District,
Division 2, California.

June 7, 1945.

Hearing Granted Aug. 2, 1945.

1. Execution 🔑73

One seeking issuance of execution more than five years after entry of judgment must show he has exercised due diligence in locating and levying upon the property owned by debtor or in following available information to point where reasonable person would conclude that there was no property subject to levy within such time. Code Civ.Proc. § 681.

2. Executors and administrators 🔑454

Where wife obtained final decree of divorce in 1929, and decree approved property settlement providing for $150 per month alimony, and wife who claimed husband paid only $125 per month beginning in 1935, after husband's death in 1942 filed motion for issuance of execution to enforce judgment for the difference, court did not abuse discretion in denying motion on ground that wife did not exercise due diligence, and that wife could not have testified regarding facts occurring before husband's death. Code Civ.Proc. §§ 681, 1880, subd. 3.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Motion by Jennie A. Lohman for the issuance of execution to enforce a judgment for alimony against Theodore G. Lohman, deceased, opposed by Zalla Lohman, executrix of the last will and testament of Theodore G. Lohman, deceased. From the order denying plaintiff's motion, she appeals.

Affirmed.

Freston & Files, of Los Angeles (Sydney Wetzler and Bion B. Vogel, both of Los Angeles, of counsel), for appellant.

McLaughlin & McGinley, of Los Angeles, for respondent.

W. J. WOOD, Justice.

On this appeal plaintiff contends that the trial court abused its discretion when it denied her motion for the issuance of execution to enforce a judgment for alimony.

Plaintiff obtained a final decree of divorce from Theodore G. Lohman on April 16, 1929. Thereafter Mr. Lohman remarried. He died on February 4, 1944. The motion for the issuance of execution is dated September 5, 1944. The second wife is the executrix of Mr. Lohman's will, which made no provision for plaintiff.

Before plaintiff was divorced from Lohman she made a property settlement with him providing for the payment to her of $5,500 in cash and the further sum of $10,000, of which $2,000 was payable on March 27, 1930, $2,000 on March 27, 1931, and $6,000 on March 27, 1932. These sums were evidenced by three promissory notes. Lohman further agreed to pay her the sum of $150 per month for her support. This property settlement was approved by the court and made a part of the interlocutory decree.

In the affidavit which she filed in support of her motion for the issuance of execution plaintiff stated that Lohman had not paid to her the sums evidenced by the three promissory notes and had not paid her more than $125 per month from the period beginning with February 2, 1935. She attempts to excuse her delay in seeking enforcement of the decree by stating that she did not desire to harass her former husband, in whom she had confidence; that from time to time she had requested payment but that Lohman had assured her that "she would get her money". She states further in her affidavit that he had left "a large estate, including a large wholesale plumbing establishment, with adequate sums for the purpose of discharging this debt". She relies upon a letter dated April 5, 1932, a copy of which she attached to her affidavit and which is as follows: "The reason I am writing this to you is that you can use this letter in the event I do not meet my obligation. I will go on record and say you have been very considerate and used good judgment in not forcing payment on the last note. It would only have meant one result at the present time we are doing the best we can hoping a change will come soon at one time we employed sixty or more with a fair profit and now only twenty on one half time we have cut wages from top to bottom 20% to keep the overhead down we took a heavy loss in 1931 and from all indication it will repeat in 1932. I am not telling you this as a hard luck story it is simply telling you facts as they are. I have been very weak in some things but I can assure you I will play square with you in a financial way, if you give me a chance."

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* Subsequent opinion 173 P.2d 657.

[1] Under the ruling in Butcher v. Brouwer, 21 Cal.2d 354, 132 P.2d 205, a party seeking to obtain the issuance of execution more than five years after the entry of a judgment must show to the court that he has exercised due diligence in locating and levying upon property owned by the debtor or in following available information to the point where a reasonable person would conclude that there was no property subject to levy within that time. Plaintiff has not shown any diligence whatever in enforcing her judgment. In the property settlement agreement she was given a lien upon defendant's corporate stock having a value of $20,000. She makes no pretense that she did not know of the amount of the property owned by defendant or of his ability to make payments to her. A fair inference, on the other hand, may be drawn from her affidavit and the counter affidavit of Zalla Lohman that plaintiff was at all times aware of her ability to enforce the payments of sums due her by taking legal action. She relies upon her confidence in her former husband and her desire not to harass him and upon the letter written in 1932. In refusing the issuance of the execution the trial court in exercising its discretion doubtless took into account the fact that in the letter of April 5, 1932, Lohman referred to the fact that plaintiff had been considerate in not enforcing payment "on the last note". The letter naturally leaves the impression that the other two notes had been paid.

Plaintiff insists, however, that regardless of the question of her right to the issuance of execution for payments due more than five years before Lohman's death, she had the right to have execution issued for the payment of $25 per month during the last five years before Lohman's death, this sum being the difference between the amount which she claims she actually received for her support and the sum awarded by the decree. Plaintiff relies upon Cochrane v. Cochrane, 57 Cal.App.2d 937, 135 P.2d 714, 715. In that case no counter showing was made, as in the present case, to the showing made by the plaintiff. The Cochrane case does not go so far as to hold that the issuance of execution under section 681 of the Code of Civil Procedure covering the last five years may be demanded as a matter of right, but it refers to the rule that execution may be refused where "some contingency has arisen under which she has no longer any right to exact alimony."

[2] Unquestionably some discretion is reposed in the trial court when such a motion is presented. In the exercise of its discretion the trial court doubtless took into consideration the fact that plaintiff had waited until after the death of Lohman to claim that she had received $125 per month for her support instead of $150 per month, and that subdivision 3 of section 1880 of the Code of Civil Procedure prohibits her from giving testimony of the facts occurring before Lohman's death. Manifestly a claim against the estate would have been rejected by the executrix, and in any subsequent litigation plaintiff would be confronted with the rule prohibiting her from testifying concerning facts necessary to establish her claim. We find no abuse of discretion on the part of the trial court.

The orders appealed from are affirmed.

MOORE, P. J., and McCOMB, J., concur.

NEUSTED v. SKERNSWELL.
Civ. 12494.

District Court of Appeal, First District, Division 1, California.

May 29, 1945.

As Modified on Denial of Rehearing June 28, 1945.

Hearing Denied July 26, 1945.

1. Partition 🔑55(2)
Trusts 🔑371(1)

Complaint in action seeking to establish a trust in real property and for partition and sale thereof merely alleging that plaintiff and defendant were owners of certain described real property was demurrable for failure to state proportionate interests of the respective parties. Code Civ.Proc. § 753.

2. Pleading 🔑8(11)

Allegation in complaint seeking to establish a trust in real property and for partition and sale thereof that defendant holds the property "as trust" was a naked conclusion of the pleader.

3. Partition 🔑55(2)
Trusts 🔑371(2)

In action to establish a trust in real property and for partition and sale thereof, allegations immediately following statement that defendant holds the property "as trust" that "plaintiff furnished the money with which to buy the same and performed the work and labor to put the said property in good and rentable condition" was not sufficient to support the pleaded conclusion of a trust.

4. Trusts 🔑77

In order to create a resulting trust, the purchase price must either be paid by the cestui que trust before the title is conveyed or he must assume an obligation to pay it before the conveyance.

5. Trusts 🔑371(1)

In action to establish oral trust in realty, allegation of complaint that plaintiff seeks decree that plaintiff is the owner of an undivided one-half interest in the property was merely a misplaced prayer for relief, not an allegation of ownership, and was demurrable.

6. Appeal and error 🔑1009(4)

Weight of testimony in respect to a trust in real property is for trial court, and if there is substantial evidence to support finding of a trust, it is for the trial court to determine whether it is clear, satisfactory and convincing.

7. Trusts 🔑77

Payment of consideration by a third party at any time before transfer of realty to a contract vendee is sufficient to raise a resulting trust, since although contract vendee has an equitable title, it is one subject to be defeated if he fails to pay the purchase price and the payment by a third party results in the defeasible equitable title being converted into a legal title by the subsequent conveyance.

8. Trusts 🔑79

Person paying a part of purchase price can in no event secure a greater interest in the property by way of resulting trust than the proportion that the amount paid by or for him bears to the whole amount paid.

9. Trusts 🔑373

In the case of a resulting trust it is essential that the court find the amounts actually paid or agreed to be paid by the respective parties with certainty in order to determine the respective interests of each.

10. Trusts 🔑77

Contributions to improvement of property after title was acquired may not be relied upon to raise a resulting trust.

11. Trusts 🔑75

An oral agreement after conveyance of property respecting nature of title would be without consideration and ineffective to change existing rights of parties, whether in the nature of a resulting trust or otherwise.

12. Trial 🔑395(6)

If allegations of complaint are insufficient to state a cause of action, findings that those allegations are true will likewise be insufficient to support the judgment.

13. Appeal and error 🔑460(1)

An appeal from an interlocutory decree in partition operates as a stay without bond.

14. Appeal and error 🔑466

On appeal from an interlocutory decree in partition, court was without right to require a bond conditioned that appellant would indemnify against all loss, harm, damage or injury which might occur by virtue of the staying of proceeding and sale of real property involved. Code Civ.Proc. § 949.

Appeal from Superior Court, City and County of San Francisco; George W. Schonfeld, Judge.

Action by Julius Neusted against Joseph Skernswell seeking to establish a trust in an undivided one-half interest in a parcel of real property and for an accounting of income therefrom and for a partition and sale thereof. Decree for plaintiff, and defendant appeals.

Reversed, with directions.

See, also, 151 P.2d 857.

Marcel E. Cerf, Robinson & Leland, of San Francisco, for appellant.

Joseph A. Brown, of San Francisco, for respondent.

DOOLING, Justice pro tem.

This action was one seeking to establish a trust for plaintiff in an undivided one-half interest in a parcel of real property in San Francisco, for an accounting of the income therefrom, and for a partition and sale thereof. An interlocutory decree was entered adjudging plaintiff and defendant, Skernswell, to be each the owner of an undivided one-half interest in the property, subject to a mortgage lien, appointing a referee to take an accounting, appointing the same person receiver to take charge of the property and sole referee in partition and directing him to sell the property. From this interlocutory decree defendant appealed on July 18, 1941. On the appeal from this decree appellant attacks the sufficiency of the complaint and the sufficiency of the findings and of the evidence.

The action was commenced by the filing of a complaint which alleged:

"That the plaintiff and defendants are the owners of the following real property situate, lying and being in the City and County of San Francisco * * *

"That the title to the said property was taken in the name of Joseph Skernswell and he holds the same as Trust for plaintiff and defendant and that plaintiff furnished the money with which to buy the same and performed the work and labor to put the said property in good and rentable condition.

"That the plaintiff seeks this court to decree and determine that plaintiff is the owner of an undivided one-half interest in said property and plaintiff desires the same partitioned and sold by reason of the fact that it cannot be divided in kind, it being that the same consists of a hotel building erected upon the above described real property."

A demurrer, general and special, was interposed by defendant and appellant. The demurrer was overruled. It should have been sustained.

[1] The allegation that "the plaintiff and defendants are the owners" of the property fails to state the proportionate interests of the respective parties. Regarded as a pleading in an ordinary quiet title action it should at the very least state the proportionate undivided interest in the property owned by the plaintiff, and in an action for partition the statute expressly requires the proportionate interests of all parties to be alleged or if any of them are unknown that fact must be expressly pleaded. Code Civ. Proc. sec. 753; 20 Cal.Jur. 624, 625.

[2-4] The attempted allegation of ownership is furthermore qualified by the allegations of the succeeding paragraph. It appears therefrom that the full legal title stands in the defendant Skernswell who is alleged to hold the property "as Trust for plaintiff and defendant." This allegation is equally subject to the vice heretofore noticed in the preceding paragraph in that it fails to allege the proportionate interests of the parties. The allegation that defendant holds the property "as Trust" is a naked conclusion of the pleader. The allegation immediately following that "plaintiff furnished the money with which to buy the same and performed the work and labor to put the said property in good and rentable condition," is not sufficient to support the pleaded conclusion of a trust. To create a resulting trust the purchase price must either be paid by the cestui que trust before the title is conveyed or he must assume an obligation to pay it before the conveyance. Woodside v. Hewel, 109 Cal. 481, 485, 42 P. 152; Viner v. Untrecht, 26 Cal.2d 261, 158 P.2d 3, 8; 2 Restatement, Trusts, sec. 457. The complaint fails to allege either of these necessary facts.

[5] The allegation that "the plaintiff seeks this court to decree and determine that plaintiff is the owner of an undivided one-half interest" adds nothing to the previous allegations. This is not an allegation that plaintiff is the owner of an undivided one-half interest, but only that he seeks the

court to so decree. It is, as appellant says, only a misplaced prayer for relief, not an allegation of ownership.

In the absence of a special demurrer, if the complaint in this case had alleged the proportionate interests of the parties, it might have been sufficient to allow proof of an express trust under the rule laid down in Knapp v. Knapp, 15 Cal.2d 237, 241, 100 P.2d 759. Because the proof failed to satisfy the statute of frauds the question of express trust is not involved, and the complaint was not sufficient as a pleading of a resulting trust even against a general demurrer. In Knapp v. Knapp, 15 Cal.2d at page 241, 100 P.2d at page 761, the Supreme Court said of a pleading somewhat less defective: "However, such pleading is not to be commended * * *; it adds difficulties and delay to litigation and tenders issues framed with scant facts. One who has a cause of action should frankly state the facts upon which he relies and not bring them out of a fog of doubt and uncertainty only if required by the lash of a special demurrer."

In the case before us the appellant applied the lash not once, but four times. He demurred generally and specially to the complaint. He objected to the introduction of any evidence on the ground of the insufficiency of the complaint. He raised the point again on motion for non-suit at the close of plaintiff's case, and he argued it the fourth time on the final submission. In the face of this persistent attack the complaint stood unamended and as a result the case comes to us still shrouded in a fog of doubt and uncertainty.

[6] The evidence was in sharp conflict and plaintiff's own testimony was in many respects uncertain and contradictory. However, applying the now settled rule, that the weight of such testimony is for the trial court and, if there is substantial evidence to support the finding of a trust, it is for the trial court to determine whether it is clear, satisfactory and convincing (Viner v. Untrecht, supra, 26 Cal.2d 261, 158 P.2d 7 and concurring opinion of Traynor, J., at page 286 of 26 Cal.2d, page 9 of 158 P.2d), the evidence would support a finding of a resulting trust in plaintiff's favor as to an undivided one-half interest in the property. The trial court might have found that respondent advanced $2,000 to appellant to make the down payment upon the property under an oral agreement that appellant should take the title and hold an undivided one-half thereof in trust for respondent.

Appellant argues that there could be no resulting trust in any event because the money was not advanced to make the down payment until after appellant had a binding contract to purchase the property in his own name. He cites in support of this argument Musselman v. Myers, 240 Pa. 5, 87 A. 425; 3 Scott on Trusts, sec. 457, p. 2302; Woodside v. Hewel, supra, and 2 Restatement, Trusts, sec. 457, p. 1397. The case of Musselman v. Myers and the text of Scott support the point. However, so far as we have been able to discover the Musselman case stands alone among court decisions which have passed upon the precise question. The classic statement of the rule is found in Woodside v. Hewel, supra, 109 Cal. 485, 42 P. 153, quoting from Botsford v. Burr, 2 Johns. Ch., N.Y., 405: "The trust must have been coeval with the deed, or it cannot exist at all."

Bogert states the rule in the following language (2 Bogert on Trusts and Trustees, § 456, p. 1380):

"If a contract vendee of land has entered into possession, made payments, and agreed to pay the balance of the price to the vendor, and then a third person makes payments on the price with the consent of the vendee, and later a deed is made to the contract vendee, without mentioning any rights of the third party, there is a presumption of a resulting trust in his favor. His payment was made before the delivery of the deed. That it was made after the making of a contract for the sale of the land, in which the contract vendee alone had promised the vendor to pay the balance of the price, is not material. The date of delivery of the deed is the crucial date for fixing the rights of the parties, and not the date of the making of the land contract. True, the contract vendee, in the case supposed, at the time of the making of the land contract, gets an equitable interest in the land solely for his own benefit; but when the deed is delivered to him as the sole grantee, after the payment on the price has been made by the third person with the knowledge and consent of the grantor and grantee, both grantor and grantee, as well as the third party payor, are assumed to intend that the third party's payment shall give him a beneficial interest in the land pro tanto."

The text of Scott (3 Scott on Trusts, 2302) after stating the contrary rule in support of which the author cites only Musselman v. Myers, supra, continues: "In several cases, however, it has been held that if B makes a valid contract to purchase land, and subsequently makes an oral contract with A that if A will pay the whole or a part of the purchase price, he shall receive a whole or a part of the land, and A does thereafter pay the whole or a part of the purchase price and legal title is conveyed to B, B will hold upon a resulting trust in whole or pro tanto for A. In these cases it is said to be sufficient that A's payment was made before the legal title was conveyed to B although made after B had acquired an equitable interest in the property."

The rule was succinctly stated in Lynch v. Herrig, 32 Mont. 267, 80 P. 240, 242: "To establish the existence of a resulting trust, where the land sought to be charged therewith is purchased under an executory contract, the legal title only passing upon full payment of the purchase price, it is sufficient if the money is paid by the person claiming the existence of the trust at any time before such legal title passes."

[7] To the same effect are Feeley v. Feeley, 72 Mont. 84, 231 P. 908, 910; Moore v. Moore, 74 Miss. 59, 19 So. 953; Brown v. Cave, 23 S.C. 251, 257; Murry v. Sell, 23 W.Va. 475, 479; Heiskell v. Powell, 23 W.Va. 717, 721; Rexburg Lumber Co. v. Purrington, 62 Idaho 461, 113 P.2d 511; 1 Perry on Trusts, 7th Ed., sec. 133, p. 208. The language of sec. 457, Restatement, Trusts, is entirely consistent with the rule that payment by a third party at any time before transfer to a contract vendee is sufficient to raise a resulting trust. On principle we are satisfied with the prevailing rule. While the contract vendee has an equitable title it is one subject to be defeated if he fails to pay the purchase price as agreed and the payment by a third party results in the defeasible equitable title being converted into a legal title by the subsequent conveyance.

[8-10] There is evidence which, if believed, would support the finding that the full down payment was made with respondent's money and that the balance was to be paid from the earnings of the property or by equal contributions of the parties. The respondent testified that by oral agreement an undivided one-half interest was to be held for him in trust. In no event under this evidence could a trust for a greater interest than one-half result. The rule is that one paying a part of the purchase price can in no event secure a greater interest in the property by way of resulting trust than the proportion that the amount paid by or for him bears to the whole amount paid (3 Scott on Trusts, sec. 454.1, pp. 2286, 2287; 2 Bogert on Trusts and Trustees, § 462, pp. 1413, 1414; 2 Restatement, Trusts, sec. 454, comment i., p. 1381; Juranek v. Juranek, 29 Cal.App.2d 276, 84 P.2d 195), but that if he agrees to take a lesser undivided interest than would result normally from the portion of the purchase price paid by him a trust will result only for the lesser interest agreed upon. 3 Scott on Trusts, sec. 254.2, pp. 2289, 2290; 2 Bogert on Trusts and Trustees, § 462, pp. 1411, 1412; 2 Restatement, Trusts, sec. 454, Comment h, p. 1380. It is essential that the court find the amounts actually paid or agreed to be paid by the respective parties with certainty in order to determine the respective interests of each. Woodside v. Hewel, supra, 109 Cal. at page 486, 42 P. 152; Breitenbucher v. Oppenheim, 160 Cal. 98, 104, 116 P. 55; 25 Cal.Jur. 190. It should also be observed that contributions to the improvement of the property after title was acquired may not be relied upon to raise a resulting trust. Dimity v. Dixon, 74 Cal.App. 714, 722, 241 P. 905; 2 Restatement, Trusts, sec. 454, comment o, pp. 1385, 1386.

[11] Appellant points to evidence of the respondent that at some time, in conversation with appellant, appellant said that he should have $5,000 more than respondent on the sale of the property because he (appellant) carried the responsibility, and that respondent told appellant that woud be all right, and argues that such an agreement would not give rise to a trust, citing Stewart v. Nevins, 50 Cal. 276, 279. Without passing further on the point it is sufficient here to note that respondent also testified that "I realized the building was in his name at that time," and if the conversation occurred after the conveyance to appellant (a factual matter that may be determined on the new trial) an oral agreement of the sort testified to would be without consideration and ineffective to change the existing rights of the parties, whatever they may have been.

[12] While the evidence would have supported findings from which the conclusion that a resulting trust was raised in favor of respondent would legally follow, no such findings were actually made by the

court. The findings were made by reference to the complaint and are subject to all of the vices hereinabove noted in the discussion of the allegations of the complaint. If the allegations of the complaint are insufficient to state a cause of action, findings that those allegations are true will likewise be insufficient to support the judgment. County of San Luis Obispo v. Gage, 139 Cal. 398, 409, 73 P. 174; McCarthy v. Brown, 113 Cal. 15, 17, 18, 45 P. 14; Miller v. Gusta, 103 Cal.App. 32, 37, 38, 283 P. 946; 24 Cal.Jur. 969.

Since we are satisfied that the complaint did not state a cause of action and that the findings do not support the interlocutory decree, that decree must be reversed.

After the appeal was taken from the interlocutory decree on July 18, 1941, a series of subsequent proceedings were had in the trial court, over the objection of defendant, that the appeal from the interlocutory decree stayed all further proceedings in the trial court. As a result of these proceedings we have before us for review on subsequent appeals taken by defendant Skernswell the following orders made after July 18, 1941: Order setting time for hearing accounting; order directing referee to take possession of real property and to collect all rents and income; order directing referee to sell real property; order requiring bond on appeal; order denying motion to set aside report of referee; order denying exceptions and objections to report of referee; order overruling objections to sale of property; and order confirming sale and fixing fee of referee. There is also an appeal from the final decree in partition.

[13] The validity of the several orders appealed from and of the final decree is attacked by appellant upon the ground, among many others, that the appeal from the interlocutory decree operated as a stay of further proceedings in the trial court. The point is well taken. An appeal from an interlocutory decree in partition operates as a stay without bond. Born v. Horstmann, 80 Cal. 452, 22 P. 169, 338, 5 L.R.A. 577; Williams v. Wells Fargo Bank, 17 Cal.2d 104, 109 P.2d 649. All further proceedings were stayed by the appeal under these decisions unless the order requiring a bond on appeal next to be noticed was valid.

On August 1, 1941, the trial court made an order requiring a bond on the appeal from the interlocutory decree as a condition of a stay. It was therein provided that "if any stay of proceedings is desired by appellant * * * the appellant shall give and provide a good and sufficient bond to be approved by this court in the sum of five thousand dollars ($5000.00) conditioned that he shall indemnify the plaintiff against all loss, harm, damage or injury which may occur by virtue of a stay of proceedings and the sale of said real property, if judgment appealed from be affirmed or dismissed (sic)." This is one of the orders from which appellant has appealed.

[14] Respondent points to no decision or Code section giving the court power to exact a bond of this character on appeal from this type of judgment. The applicable section is 949, Code of Civil Procedure. Williams v. Wells Fargo Bank, supra; Zappettini v. Buckles, 167 Cal. 27, 138 P. 696. It is true, as pointed out in the Williams case, that under section 949, as it now reads, the court may in its discretion in certain cases require an undertaking to stay proceedings pending such an appeal, the condition of such undertaking being, as provided in section 949, "for the performance of the judgment or order appealed from." It is clear that the order for undertaking here in question was not of the character authorized by this section. It seems equally clear that the facts of this case did not fall within the ambit of cases in which such an undertaking may be required in any event, as the following quotation from Williams v. Wells Fargo Bank, supra, 17 Cal.2d 107, 109 P.2d 650, demonstrates: "And although that section allows the court in its discretion to require an undertaking in an amount to be fixed by it 'conditioned for the performance of the judgment or order appealed from,' this language has been expressly interpreted to mean 'that a bond may be ordered in such of those cases where the appellant was adjudged to have money or other property in his possession belonging to the respondent, or was required to perform some act for the benefit of the respondent or in pursuance of the directions of the judgment or order appealed from, and that in all other cases the provisions of the section should operate as a stay of proceedings without bond.' "

The conclusion that the appeal from the interlocutory decree operated to stay all further proceedings in the trial court, and the further fact that the several orders appealed from and the final decree depend for their validity on the interlocutory decree, which we are now reversing, necessitate their reversal as well.

The interlocutory decree, the final decree and the several orders appealed from are all reversed, with directions to the trial court to sustain appellant's demurrer to the complaint with leave to respondent to amend.

PETERS, P. J., and WARD, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

COLONIAL INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.*

Civ. 14836.

District Court of Appeal, Second District, Division 2, California.

June 7, 1945.

Rehearing Denied June 27, 1945.

Hearing Granted Aug. 2, 1945.

1. Workmen's compensation 🔑1269

A claim for compensation for an industrial injury is barred by limitations unless it is filed within six months from date of injury, last payment of compensation, or agreement therefor, or expiration of any period covered by such payment. St.1937, p. 295, § 5405(a).

2. Workmen's compensation 🔑1279

The statute of limitations start to run when claimant for an industrial injury knows or by exercise of reasonable care and diligence should know that an accident has resulted in a compensable injury. St. 1937, p. 295, § 5405(a).

3. Workmen's compensation 🔑1279

The statute of limitations commenced to run on day, two days after claimant sustained a hernia, that examining doctor told claimant he had a hernia, and a claim filed more than seven months after claimant had knowledge of his injury was barred. St. 1937, p. 295, § 5405(a).

◆

Petition by the Colonial Insurance Company, a corporation, against the Industrial Accident Commission of the State of California and another, for a writ of review to annul an order of named respondent.

Order annulled.

Garratt B. Sargent, of Los Angeles, for petitioner.

Everett A. Corten and R. C. McKellips, both of San Francisco, for respondent Commission.

McCOMB, Justice.

Petitioner seeks to annul an order of the Industrial Accident Commission on the ground that respondent Nickles' claim was barred by the statute of limitations, section 5405(a) of the Labor Code, St.1937, p. 295.

The essential facts are these:

On January 3, 1944, respondent Nickles sustained an injury, arising out of and occurring in the course of his employment, consisting of a right inguinal hernia. On January 5, 1944, respondent Nickles was examined by Dr. Hull, who told him that he had a hernia. The following day he was examined by a doctor for the petitioner. On January 18 and 20, 1944, respondent Nickles was examined by Dr. John D. Gillis, who reported as follows:

"This man [referring to respondent Nickles] still states that he is not going to accept surgery, at least not temporarily, and is going to continue wearing the truss and continue working. Under the circumstances I have no further recommendations to make."

The claim of Mr. Nickles was not filed until August 31, 1944.

This is the sole question necessary for us to determine:

Was respondent Nickles' claim barred by the statute of limitations, section 5405(a) of the Labor Code, since it was not filed until more than six months after the date of the injury?

This question must be answered in the affirmative and is governed by this rule:

[1] A claim for compensation for an industrial injury is barred by the statute of limitations unless the same is filed within six months from the date of the injury or from the date of the last payment of any compensation, or agreement therefor, or the expiration of any period covered by such payment. (Section 5405(a) of the Labor Code.)

[2] It is likewise established that the statute of limitations starts to run when

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* Subsequent opinion 164 P.2d 490.

the claimant knows or by the exercise of reasonable care and diligence should know that an accident has resulted in a compensable injury. (Travelers Ins. Co. v. Industrial Accident Commission, 32 Cal. App.2d 643, 646, 90 P.2d 327.)

[3] In the present case the undisputed evidence discloses that on January 5, 1944, respondent Nickles knew that he had suffered a compensable injury. There is a total absence of any evidence that any compensation was paid him or agreed to be paid to him, therefore the statute of limitations commenced to run on January 5, 1944. The present claim was not filed until August 31, 1944, more than seven months after he had knowledge of his injury. The claim not having been filed within six months from the date Mr. Nickles learned of his injury, the statute of limitations had run when the claim was filed and barred any award. (Section 5405 (a) of the Labor Code.)

For the foregoing reasons the order is annulled.

MOORE, P. J., and W. J. WOOD, J., concur.

WAGNOR v. BLUME et al.*

No. 12573.

District Court of Appeal, First District, Division 1, California.

June 1, 1945.

1. Quieting title ⇨44(4)

In action to quiet title to land, evidence supported trial court's finding that plaintiff owned land under mesne conveyances from a realty syndicate, to which parties' common source of title conveyed all his interest in land before conveying it to defendants' predecessor in title.

2. Deeds ⇨115, 118

In action to quiet title to 10 feet wide strip of land parallel to railway company's right of way, evidence was sufficient to show that right of way was 40 feet, not 60 feet, wide, so that quitclaim deed to defendants' predecessor in title from parties' common source of title after his conveyance of land to plaintiff's predecessor in title by deed erroneously excepting 60-foot right of way did not pass title to disputed strip to defendants' predecessor.

3. Appeal and error ⇨1008(1)

The discrepancy arising in deeds in plaintiff's chain of title was matter for determination by trial court, whose implied finding for plaintiff thereon is controlling on appeal from judgment quieting her title.

4. Quieting title ⇨44(4)

In action to quiet title, plaintiff's failure to produce in evidence judgment and execution needed to support commissioner's alleged certificate of mortgage foreclosure sale of disputed land or commissioner's deed to purchasers as link in plaintiff's chain of title from parties' common grantor did not defeat plaintiff's claim of title, as deeds in such chain were prima facie evidence of title. Code Civ.Proc. § 1928.

5. Quieting title ⇨44(1)

Proof by one party to action to quiet title that he has better title from common source than other party makes out prima facie case for party offering such proof and casts on other party burden of establishing superior title from some other source.

6. Quieting title ⇨35(2)

One suing to quiet title to land under common grantor rule need not plead her intent to rely on such rule.

7. Quieting title ⇨10(2)

The fact that corporation, owning another parcel of land than that involved in suit to quiet title, joined previous owner of land claimed by plaintiff in executing single deed of both parcels for convenience, did not render common grantor rule inapplicable in plaintiff's favor.

8. Quieting title ⇨10(2)

Where first deed in chains of title of parties to action to quiet title is a grant, existence of several quitclaim deeds in such chains does not render common grantor rule inapplicable in plaintiff's favor.

9. Stipulations ⇨18(4)

Where defendants' counsel stipulated, during trial of action to quiet title, that plaintiff would not have to locate any exceptions in deeds in parties' chains of title, except that of railway company's right of way, defendants could not complain of plaintiff's failure to locate other exceptions.

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* Subsequent opinion 161 P.2d 1001.

10. Estoppel ⚿25

One suing to quiet title to strip of land parallel to railway right of way was not estopped to assert that right of way was only 40 feet wide because of erroneous references to 60-foot right of way in certain deeds, maps, and other instruments, parties to which were not before court, as such references could not prevail over 40-foot right of way itself. Code Civ.Proc. § 1962, subd. 2.

11. Deeds ⚿38(1)
Quieting title ⚿36, 47(2), 52

Descriptions of land in deeds or in complaint, findings, and judgment in suit to quiet title thereto are sufficient, if competent surveyor can locate land on ground from such descriptions, with or without aid of extrinsic evidence.

◆

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Lila Wagnor against N. A. Blume and others to quiet plaintiff's title to a strip of land. Judgment for plaintiff, and defendants appeal.

Affirmed.

Robert E. Knowlden, of Berkeley, and Johnson & Harmon, of San Francisco, for appellants.

T. P. Wittschen and Matt Wahrhaftig, both of Oakland, for respondent.

KNIGHT, Justice.

This is an appeal from a judgment quieting plaintiff's title to a 10 foot strip of land 3000 feet long running parallel to and lying east of the Atchison, Topeka and Santa Fe Railway Company right of way in the city of Albany, county of Alameda. The real issue presented, upon which the question of title depends, is whether the right of way granted to the Santa Fe's predecessor in 1884 was 40 or 60 feet wide; and that issue has been twice previously litigated, first in a case involving two 10-foot strips along both sides of the right of way, and including the present land, MacGregor v. Knowlden, 102 Cal.App. 42, 282 P. 438, and again in a case involving part of the strip lying west of the right of way. Blume v. MacGregor, 64 Cal.App.2d 244, 148 P.2d 656. A reading of the decisions in those two cases will give a full comprehension of all the background facts of the present case, except for certain matters which will be hereinafter noted. In the first case, there were four parcels of land involved, No. 1, the strip north of Main Street (now Solano Avenue) and west of the right of way; No. 2, the strip north of Solano Avenue and east of the right of way; No. 3, the strip south of Solano Avenue and east of the right of way (part of which was again involved in Blume v. MacGregor); and No. 4, the strip south of Solano Avenue and east of the right of way, involved in the present case. In the first case it was held that the right of way was 40 feet, and the plaintiff MacGregor prevailed as to Parcels 1, 2 and 3 (with one exception not here involved); and as against MacGregor, the defendant Knowlden prevailed as to Parcel 4, this holding being based on the fact that MacGregor's title stopped on the west side of the right of way, and such holding is not determinative of the issues presented in the present case. In the second case the plaintiff therein relitigated the issues presented in the first case, and it was again held that the right of way was 40 feet wide. The same evidence was introduced in the present case, and for the third time it has been held that the right of way is 40 feet wide.

Both parties herein trace their title back to a common grantor, Sterling, and the dispute has its roots in the original grant of the right of way to the Santa Fe's predecessors. After the right of way was created, the land, excepting the right of way, without describing it except by acreage, was conveyed to Sterling, in two identical deeds. Sterling later conveyed the land to others, and in some of the deeds he excepted a right of way which he referred to as a 60-foot strip of land. From this discrepancy arose the litigation over the title to the property. Incidentally, the Santa Fe, owner of the right of way, agrees that it is 40 feet wide and is not a party to this action.

Tracing the two chains of title in more detail, and going back of the title of Sterling: in 1884 the Pacific Improvement Company, owner of two-thirds, and Maria Hall, owner of one-third (her interest later being acquired by H. W. Carpentier) made identical deeds conveying to the California and Nevada Railroad Company a right of way over lands of which the grantors were then the owners. Certain calls in the description were omitted from those two deeds, but in the two cases above cited it was determined that the right of way was fixed at 40 feet. In 1906 Pacific Improvement Company and Carpentier conveyed their interests to George Sterling in lands on both sides of the right of way previously granted, including the lands in dispute, and excepting 5.73 acres "for right of way to The California and Nevada Railroad Company Feb. 23, 1884." In 1906 Sterling and his wife conveyed by deed to the North Berkeley Land Company a 52.30 parcel of land which ran from Cordonices Creek (the southern boundary of the property in dispute) north to Main Street, under a description which read in part as follows: "Beginning at a point formed by the intersection of the center line of Cordonices Creek with the easterly line of the Right of Way of the Atchison, Topeka and Santa Fe Railway * * *" and excepting therefrom a 300 foot strip "parallel to the right of way of the Atchison, Topeka and Santa Fe Railway * * *." In 1908 Sterling and his wife and the North Berkeley Land Company conveyed to the Realty Syndicate 25.67 acres, part of which had been included in the former deeds, and which also included the 300 foot strip which had been excepted from the former conveyance. The point of beginning in this deed is "the most southern corner of that certain 52.30 acre tract of land heretofore conveyed to the North Berkeley Land Company by George and Carrie R. Sterling."

It is under this 1908 deed from Sterling to the Realty Syndicate that plaintiff deraigns her title. As will be noted, the point of beginning in the description in that deed is by reference the same as that in the North Berkeley Land Company deed quoted above; therefore the point of beginning in the description in the deed under which plaintiff deraigns her title is actually "a point formed by the intersection of the center line of Cordonices Creek with the easterly line of the Right of Way of the Atchison, Topeka and Santa Fe Railway." The remaining deeds in plaintiff's chain of title, according to plaintiff, all tie to the same western line of the 25.61 acre tract, which, in turn, is the eastern line of the right of way. The devolution of title from the 1908 deed is as follows: The Realty Syndicate conveyed a smaller parcel of 3.24 acres, including the strip in dispute, to San Francisco-Oakland Terminal Railways in 1914, which mortgaged the property to Mercantile Trust Co. in that year, and when this mortgage was foreclosed a certificate of sale was issued and later a deed to Messrs. Goodfellow, Olney and Brobeck, who in 1923 conveyed to Key System Transit Co. The latter conveyed the land to The Oakland Bank as trustee to secure a bond issue in 1923, and the lien created thereby was in turn foreclosed and a commissioner's certificate and then a deed were issued in 1931 to Railway Equipment and Realty Co. Ltd. The Key System Transit Co. also quitclaimed to the property to the Railway Equipment and Realty Co. in 1930. This company then conveyed the property described in the second cause of action to plaintiff herein, and the property in the first cause of action to National Service Co., which thereafter conveyed it to plaintiff.

Defendants' chain of title starts with a quitclaim deed executed in 1925 by Sterling to Bertha McKenzie Knowlden. The latter in 1930 conveyed to Bernice Kump, who in 1939 conveyed to N. A. Blume, one of the defendants herein. The other defendants are encumbrancers claiming under Blume. Thus, if Sterling's grant to plaintiff's predecessor extended to a 60 foot right of way, while the right of way owned by the Santa Fe was 40 feet, then Sterling retained possession of a 10 foot strip which passed to defendants in 1925 by the quitclaim deed.

[1] The trial court found that plaintiff had proved title to the property involved in the present action; that Carpentier and Pacific Improvement Company and Sterling were, and each of them was, a common source of title under which plaintiff and defendants claim, and that they claimed from no other source; that prior to the deed from Sterling to Bertha McKenzie Knowlden, defendants' predecessor, Sterling had parted with all of his right, title and interest in and to said property, to the Realty Syndicate, and that by mesne conveyances from the latter the title now vests in plaintiff.

Defendants contend that there is no evidentiary support for the findings of ownership in plaintiff, or the other findings of the trial court; that "even a cursory examination of plaintiff's alleged 'chain of title'" will show missing links, and that plaintiff failed to meet the burden of proof.

There is no merit in any of the contentions.

As already stated, the determinative question in the case is whether the Santa Fe right of way was 40 or 60 feet—if it was 40 feet, plaintiff of course prevails; if it was 60 feet, then Sterling retained title to the 10 feet in question, which would be included in the quitclaim deed to defendants' predecessor.

[2] The evidence is amply sufficient to show that the right of way as originally granted, as shown by the railroad records, and as it presently exists on the ground, is 40 feet. The evidence in this regard is almost identical with that in the two former cases, wherein it was so held. The same two deeds creating the right of way in 1884 are involved here, that is, the deeds from Pacific Improvement Company and Maria Hall to California and Nevada Railroad Company. These deeds and pertinent maps were produced by Santa Fe officials, and all the Santa Fe maps and their original deed records show a right of way of 40 feet. And all the evidence shows that the right of way as it presently exists is in the same position as it was in 1906, and that it has not been moved. Further, the center line of the single track of the Santa Fe right of way was located on the ground, and the eastern boundary of the right of way was located 13½ feet easterly of the center line. Therefore, once the right of way is located on the ground and its eastern boundary fixed, all descriptions which tied to that eastern boundary, either directly, or by reference, or through an omnibus clause, were likewise fixed and located.

[3, 4] Furthermore, plaintiff traced her title back to a common grantor, as set forth above. Defendants contend that there are missing links in this chain of title—one, that one of the deeds named as grantee the Mercantile Trust Company of San Francisco, whereas the next documents, a commissioner's certificate of sale and commissioner's deed, refer to the Mercantile Trust Company of California. This discrepancy was a matter for the determination of the trial court, and its implied finding thereon is controlling here. Defendants also contend that plaintiff failed to produce the judgment and execution needed to support the alleged commissioner's certificate of sale or the commissioner's deed; but these deeds were prima facie evidence of title. Sec. 1928, Code Civ.Proc.

Defendants also contend that the plaintiff failed to meet the burden of proof because there is no evidence to show that the property described in the quitclaim deeds (the last link in plaintiff's chain, by which she acquired title) was conveyed by any other deed in the chain. This question again depends on whether the right of way was 60 or 40 feet, and the determination that it was 40 feet ties it in with the other deeds.

[5] Defendants further contend that plaintiff failed to prove a proper case for the "common grantor" rule to apply, one point being that the trial court erred in finding that the parties claimed under a common source of title. The same point was made in Blume v. MacGregor, supra, and it was held that a plaintiff makes a prima facie case by evidence connecting the defendant with a common source of title and proving in himself a better title from that source; and that where both parties derive title from a common source the burden is placed upon the party having the inferior title from the common source, if he relies upon title from another independent source, to prove that the title acquired from the independent source is paramount to the title in the common source; the proof by one party of better title from a common source makes out a prima facie case for him, and the burden of establishing a superior title from some other source is then cast upon the other party.

[6] Defendants also contend that plaintiff should have pleaded that she was going to rely on the rule of common grantor. Such would not appear to be necessary, as no authority has been cited so holding, and in Blume v. MacGregor, where the cross complainant relied upon the rule of common grantor, there was no such pleading.

[7] Defendants also claim that because the North Berkeley Land Company is a party to one of the deeds, the rule of common grantor cannot be applied; but as plaintiff points out, the parties owned separate parcels of land, and apparently joined in giving a single deed simply for convenience. Under such circumstances no reason appears why plaintiff would be denied the application of the common grantor rule.

[8] Defendants further contend that the rule of common grantor does not apply because there are several quitclaim deeds in the alleged chains of title. How-

ever, as plaintiff points out, although there is some authority for the statement that when the first deed out is a quitclaim, the rule should not apply, here the first deed out was a grant, and therefore the rule can be applied.

[9] Also in this regard defendants seem to contend that plaintiff's failure to locate some of the exceptions in the deeds prevented the application of the common grantor rule. The record shows that during the trial counsel for defendants stipulated that plaintiff would not have to locate any exceptions other than the exception of the right of way. Defendants therefore are in no position to complain of the failure to locate any other exceptions.

[10] Defendants claim that plaintiff is estopped under the provisions of section 1962, subdivision 2 of the Code of Civil Procedure, which provides as follows: "The following presumptions * * * are deemed conclusive: * * * 2. The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title." The reason for this argument is that in certain deeds and maps the right of way is referred to as being 60 feet wide. However, as plaintiff states, the various parties to the written instruments to which defendants allude are not the parties here before the court. There are erroneous references to a 60 foot right of way in the various maps and instruments, but these cannot prevail over the actual located monument, the right of way itself.

[11] Defendants also contend that the descriptions in the complaint, findings and judgment are so uncertain and ambiguous that the extent of the land adjudged to plaintiff cannot be ascertained. However, as held in Blume v. MacGregor, supra [64 Cal.App.2d 244, 148 P.2d 661], "In general if a competent surveyor can take the deed and locate the land on the ground from the description contained therein, with or without the aid of extrinsic evidence, the description will be held to be sufficient." Such was the case here; therefore there is no merit in the contention.

Various other contentions of lesser importance are made by defendants, but they do not call for any extended discussion. Suffice it to say that the points raised are either incidental to those already discussed and decided, or have been examined and found to be wholly without merit.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

69 Cal.App.2d 331

PEOPLE v. McBRIDE.

Cr. 3859.

District Court of Appeal, Second District, Division 1, California.

May 28, 1945.

1. Criminal law 🔑1159(3)

Contradictions and inconsistencies in testimony alone will not constitute inherent improbability requiring reversal of judgment obtained on such testimony, and it is not sufficient that the testimony may disclose circumstances which are unusual.

2. Criminal law 🔑553

A statement to bear on its face the brand of improbability, so as to be unbelievable per se, must involve a claim that something has been done, that it would not seem possible could be done under the circumstances described, or involve conduct that no one but a person of seriously calentured mentality would be likely to do.

3. Infants 🔑20

Evidence sustained conviction of committing an immoral act upon a 7½-year-old girl. Pen.Code, § 288.

4. Criminal law 🔑369(1), 371(9)

In crimes involving illicit sexual relations or acts, evidence of similar acts may ordinarily be shown, not as proof of independent substantive offenses, but as corroborative evidence to show a disposition on part of accused and as tending to support specific offense for which he is being tried, and ordinarily conduct of accused with person other than one connected with offense charged is inadmissible unless accused's acts are parts of same transaction.

5. Criminal law ⟹1168(4)

In prosecution for committing an immoral act upon 7½-year-old girl, failure to strike off court's own motion girl's testimony with respect to similar acts committed by accused upon girl's five and four year old companions at the same time was not prejudicial. Pen.Code, § 288.

◆

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Marion Oscar McBride was convicted of violating section 288 of the Penal Code, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Defendant was charged in an information filed by the district attorney with a violation of section 288 of the Penal Code committed upon a seven-year-old girl. A jury trial having been duly waived, the court found defendant guilty as charged, denied his application for probation and sentenced him to state prison for the term prescribed by law. From the judgment of conviction which was thereafter entered, defendant prosecutes this appeal on the grounds that (1) the judgment is contrary to the law and the evidence; and (2) the court committed errors of law.

The evidence adduced at the trial herein discloses that on July 3, 1944, the complaining witness, hereinafter referred to as Alberta, was approximately seven and a half years old and resided with her mother and two brothers in the city of Los Angeles; that Rose Marie, aged five, lived next door, and Leah, aged four, lived in the house on the other side of Alberta's house; that the three children played together often. For a year and a half prior to July, 1944, appellant had lived in a house on the rear of the lot on which Alberta lived, and during July, 1944, he was living there alone. His house contained a bed-living room in which there was a regular bed, a kitchen, a bathroom, a small back room and a screened porch. The three girls often went to appellant's house to play.

On the day in question, the three girls went into appellant's house where he was in the kitchen preparing his lunch. While they were there, Alberta's mother was away from home fifteen minutes or half an hour. During this time, Alberta, who was wearing a bathing suit, went home to see if her mother had returned and finding her still away, the child returned to appellant's house, where she saw appellant in bed in the bed-living room under the covers. The three girls went into the bed-living room and Alberta sat on the bed. They talked for a while, and then appellant got out from under the covers and lay on top of Alberta, who was then lying on her back on the bed, and put "the thing that a man goes to the bathroom with" between her legs, under the skirt of her bathing suit, but outside the panties thereof. Alberta testified that when appellant did this, Rose Marie and Leah were on the porch, but both girls testified that they were in the bed-living room watching him do it. In Alberta's presence, appellant then repeated the act with the other two girls. Appellant told the girls not to tell and they left his house together each returning to her own home. Alberta's mother was not at home when Alberta reached there, but she did return between two and three o'clock in the afternoon of July 3, 1944, when she discovered Alberta in the bathroom crying, at which time Alberta made a complaint to her regarding the occurrence which took place in appellant's house.

In connection with his first point, appellant urges that the testimony of the prosecutrix and that of the two small girls, aged five and four, in whose presence the alleged acts were committed, is so improbable as to be unbelievable, and so filled with uncertainties and inconsistencies, that it "amounts to no evidence at all."

[1, 2] In People v. Becker, 140 Cal.App. 162, 165, 35 P.2d 196, 198, in which it was urged that the testimony of the complaining witness was so inherently improbable in essential features as to render it valueless, the court stated:

"Notwithstanding contradictions and inconsistencies, it cannot be said that the latter's testimony 'is so obviously and so inherently improbable as to leave the court no recourse, without self-stultification, except to reverse the judgment'; and this must 'plainly appear before the reviewing court should assume the functions of the trial jury.' People v. Antunez, 28 Cal. App. 740, 742, 153 P. 963, 964.

"'Contradictions and inconsistencies in the testimony of a witness alone will not constitute inherent improbability' (People v. Amadio, 25 Cal.App. 729, 145 P. 151, 152), and 'it is not sufficient that the testimony may disclose circumstances which are unusual' (People v. Collier, 111 Cal. App. 215, 226, 295 P. 898, 902). 'It is the peculiar and exclusive province of the jury to decide upon the credibility of witnesses; and although impeaching evidence, in the nature of contradictions or otherwise, has been received, it is still not only the right but the duty of the jury to determine to what extent they will believe or disbelieve the testimony of the witness thus assailed.' People v. Raich, 26 Cal.App. 286, 146 P. 907, 908."

See, also, People v. Asavis, 27 Cal.App.2d 685, 688, 81 P.2d 595, 596, where the following statement appears: "We are not directed to, nor do we find in this record, anything that would justify this court in stamping the story of the prosecutrix as inherently unbelievable or even improbable. As was said in People v. Haydon, 18 Cal. App. 543, 123 P. 1102, 1108, 1114, 'A statement, to bear upon its face the brand of improbability, or which may be said to be unbelievable per se, must involve, we think, a claim that something has been done that it would not seem possible could be done under the circumstances described, or involve conduct that no one but a person of a seriously calentured mentality would be likely to do.'"

[3] While minor discrepancies and lack of memory as to details concerning unessential matters appear in the testimony of Alberta, her version of the occurrence is not so inherently improbable as to require or justify a reversal of the judgment. Her description of appellant's acts is sufficiently clear and direct to establish the commission of acts prohibited by section 288 of the Penal Code. Moreover, her testimony with respect to the act which appellant performed on her was corroborated by the testimony of Leah and Rose Marie, and while it is true that some inconsistencies and contradictions appear in the testimony of these two children, aged four and five years, their description of what occured at the time in question and appellant's participation therein is entirely consistent. Suffice to say that, tested by the rules of law hereinbefore enunciated, the testimony of these witnesses was not of that type which could be characterized as so uncertain and inconsistent as to amount to no evidence. To the contrary, the evidence so presented sufficiently and substantially supports the judgment of conviction.

As justification for a reversal of the judgment herein, appellant also urges the point that, in striking from the record the testimony of Leah and Rose Marie concerning acts which appellant committed against them, the court erred in that it did not strike from the record the testimony of Alberta concerning such alleged offenses against the two other children, citing People v. Huston, 45 Cal.App.2d 596, 597, 114 P.2d 607. In that case the court held "that the trial court committed prejudicial error in permitting the prosecution to introduce over objection evidence that on prior occasions defendant with minor female children other than the prosecuting witness had committed or attempted to commit offenses prohibited by section 288 of the Penal Code."

The testimony of Alberta, to which attention is here directed and as to which no objection was interposed at the trial, is as follows:

"Q. Now, where were you when you say he put his thing next to you? A. On the bed.

"Q. And where was Rose Marie? A. They were on the back porch. * * *

"Q. You say you were on the bed. * * * Was Rose Marie with you when you sat on the bed? A. They were on the back porch.

"Q. Did Rose Marie come in the bed room? A. Yes. * * *

"Q. What position were you in when he did that to you? A. I was lying on my back.

"Q. By the Court: Was (he) standing up or sitting down somewhere, or what was he doing at that time? A. I can remember that he laid on top of me.

"Q. He laid on top? A. Yes.

"Q. On top of what? A. On us.

"Q. On us? A. Yes.

"Q. Who was us that you are talking about now? A. Me and Leah and Rose Marie.

"Q. By Mr. Russell: You mean that he did that to all three of you? A. Yes.

"Q. Who did he do it to first? A. Me.

"Q. And was Rose Marie there on the bed when he did it to you? A. They were on the back porch.

"Q. When did he do it to Rose Marie? A. Right after he got through doing it to me, and then he did it to Leah.

"Q. What? A. Right after he got through doing it to me.

"Q. Were you still on the bed when he did it to Rose Marie? A. Yes.

"Q. Where were you? A. At the door.

"Q. What door was that? A. The front door.

"Q. Did you see him do it to Rose Marie? A. Yes.

"Q. And did you see him do it to Leah? A. Yes, and then we went home.

"Q. Wait a minute. Where were you when you say you saw him do it to Leah? A. At the front door.

"Q. You were still at the front door? A. Yes.

"Q. Where was Rose Marie? A. At the front door too."

Both Leah and Rose Marie testified that they were present in the bedroom and saw appellant commit the offense against Alberta.

[4] With respect to the admissibility of evidence of other acts of the same character, it is stated in 22 C.J.S., Criminal Law, § 691, p. 1160, that "In the case of crimes involving illicit sexual relations or acts," such evidence "may ordinarily be shown, not as proof of independent substantive offenses, but as corroborative evidence to show a disposition upon the part of accused and as tending to support the specific offense for which he is being tried. It is ordinarily held, under this rule, that the conduct of accused with a person other than the one connected with the offense charged is not admissible, unless * * * his acts are parts of the same transaction * * *."

In People v. Hunt, 17 Cal.App.2d 284, 286, 61 P.2d 1208, 1209, a prosecution for violation of section 288 of the Penal Code: "It was testified that at the same time and place as the commission of the acts charged in the information, appellant committed similar acts with two of the playmates of the prosecutrix. To the introduction of this testimony appellant objected, but, inasmuch as the evidence shows that the three little girls involved were all present at the same time, and that appellant then and there, in their presence, committed the same acts upon all of the children, such acts were part of the res gestæ and, under such conditions, the testimony was admissible. People v. Ciulla, 44 Cal.App. 719, 187 P. 46; People v. MacDonald, 53 Cal.App. 488, 491, 200 P. 491."

[5] Applying the foregoing principles of law to the facts presented in the instant prosecution, appellant suffered no prejudice when the trial court failed to strike of his own motion the testimony of Alberta with respect to similar acts committed by appellant upon the other two children.

For the reasons stated, the judgment is affirmed.

DORAN, J., and DRAPEAU, Justice pro tem., concur.

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69 Cal.App.2d 426

ABRAMS v. AMERICAN FIDELITY & CASUALTY CO.

Civ. 14683.

District Court of Appeal, Second District, Division 1, California.

May 31, 1945.

1. New trial 🔑6

The granting or refusal of new trial rests largely within trial court's discretion, which is extremely wide.

2. Appeal and error 🔑979(1)

The trial court's ruling, granting or refusing new trial, will not be disturbed by appellate court, especially where new trial was granted for insufficiency of evidence to sustain jury's verdict, in absence of clear, affirmative showing of gross, manifest or unmistakable abuse of discretion.

3. Appeal and error 🔑977(3)

A reviewing court will set aside order granting new trial only in rare instances and on very strong grounds.

4. Appeal and error ⚿979(2)

An order granting new trial for insufficiency of evidence to sustain jury's verdict will not be set aside on appeal, if reasonable or fairly debatable justification therefor appears or reasonable minds might differ in their deductions from evidence, though appellate court might take different view than trial court or believe evidence sufficient to support judgment if new trial were denied.

5. New trial ⚿21, 70

Where principal questions in action against automobile liability insurer to recover amount of judgment against insured were whether insured's failure to give notice of accident until 41 days thereafter absolved insurer of liability, and whether insurer waived compliance with timely notice requirement, and evidence adduced was sketchy and inconclusive and trial was had in a hurry, granting insurer a new trial was not an abuse of discretion. St. 1935, p. 510, § 554.

◆

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Paul Abrams against the American Fidelity & Casualty Company to recover the amount of a judgment obtained against a truck owner to whom defendant had issued an automobile liability policy. From an order granting a new trial to defendant, plaintiff appeals.

Affirmed.

Joseph D. Taylor and Charles A. Son, both of Los Angeles, for appellant.

Reginald I. Bauder, of Los Angeles, for respondent.

YORK, Presiding Justice.

Plaintiff appeals from an order by which a new trial was granted to defendant. The appeal is presented upon an engrossed bill of exceptions which purports to show all the evidence adduced at the trial. From this it appears that on December 25, 1940, appellant Abrams sustained personal injuries as a result of the alleged negligent operation of a motor vehicle by A. Visser, named as the assured in a policy of liability insurance issued by respondent insurance company. In an action to recover damages for such injuries, appellant was awarded $3,910 in a default judgment entered on April 29, 1941, against said A. Visser. The judgment remained unsatisfied and on December 4, 1941, appellant commenced the instant action against the insurance company which defended on the ground of failure on the part of the assured to comply with provisions of the policy (1) concerning notice, and (2) with respect to forwarding pleadings promptly to said insurance company, to-wit:

"(A) Upon the occurrence of an accident or an alleged accident, covered under this Policy, the Assured shall give immediate written notice thereof with the most complete detailed information obtainable at the time to the Company, at its Home Office in Richmond, Virginia, or to its nearest Branch Office or to its duly authorized agent; if a claim is made on account of such an action or if any suit is brought against the Assured to enforce such a claim the Assured shall forward to the Company immediately every written communication, or information as to any verbal communication, and every process, pleading and paper relating to any claim and/or proceeding. The words 'Immediate' or 'Immediately' as used herein shall be construed to mean not exceeding five days. * * *

"(B) The Assured shall co-operate with the Company in securing information and evidence and the attendance of witnesses and in the settlement or defense of any suit or prosecution of any appeal. * * * The Assured shall at all times render to the Company all co-operation and assistance within his power. Failure to co-operate in any of the foregoing respects shall render this Policy null and void."

It appears that the assured, A. Visser, purchased the truck here involved from C. Fred Kerr, an insurance broker, who wrote the policy of liability insurance covering the truck. On the day of the accident, the assured sent a postal card to Mr. Kerr on which was written: "I had an accident this morning 14 miles north of Beaver, Utah, on Hiway 91. Please inquire at the Sheriff's Office in Beaver, Utah, for all particulars. My policy No. is No. 36803. I remain as ever A. Visser."

Mr. Visser did not return to Los Angeles until January 31, 1941, at which time he called on Mr. Kerr, who in turn reported the accident to Markel Service, Inc., Los Angeles agents for respondent insurer. Again on February 13, 1941, Mr. Kerr communicated with said service giving th name of the only witness to the accident. On March 10, 1941, Mr. Kerr indited the following letter to Mr. J. Donald Young, Markel Service, Inc., it being stipulated herein that Mr. Young was an employee of the respondent insurer:

"In answer to your inquiry about the reporting of the above accident to your company, Mr. Visser sent us the attached card from Utah soon after the accident happened. The card is dated Dec. 25, and postmarked Dec. 26. You will note that the card contains no information as to the accident. Upon reciept of the card we wired the Sheriff's Office at Beaver for information but got no reply.

"We heard no more from Mr. Visser until a few days before, or shortly after our letter of Jan. 31, 1941, when Mr. Visser came back from Utah and gave us the full details of the accident, and upon receipt of this information we wrote to your company and gave them what information we had. Until Mr. Visser came back and told us we had no knowledge that any other vehicle was involved. We had supposed that he just ran off the road or upset or something like that inasmuch as he had told us nothing about any other vehicle. Consequently we did not notify Markel Service until we learned from him that another car was involved.

"We trust this is the information you want.

"C. Fred Kerr
"By R. J. Albright.
"Wit: J. D. Young"

Thereafter, in May of 1941, a "Reservation of Rights Agreement" was executed by the assured and the insurer by which it was agreed that "by receiving notice of this accident and by investigating or adjusting or attempting to investigate or adjust, or by filing any answer or other pleading in the said law suit, or taking any action whatsoever for the defense or settlement of the said claim and law suit, the insurer shall not be deemed or construed to waive the insurer's rights to disclaim coverage by reason of these and certain other breaches of the policy conditions; and the defense of the said suit or any action which the insurer may take in connection with the defense or settlement of the said suit, shall not be construed as an admission that the said American Fidelity and Casualty Company and/or Markel Service, Inc., is in any way responsible for any verdicts or judgments which may be rendered in said suit."

At the time the last-mentioned document was executed, it was stated by Mr. Young that if Mr. Visser would sign the agreement, the insurer would reopen the case with Mr. Son, appellant's attorney. Mr. Kerr also testified that he had five or six conversations with Mr. Young, it being Mr. Young's contention that his company should have been notified of the accident sooner than it was.

Mr. Son, attorney for appellant, testified that he had a conversation with Mr. Young on February 23, 1941, at which time the latter stated that the insurance company was going to deny liability because it had not been notified of the accident until over a month after its occurrence; that on March 11th, he telephoned Mr. Young that he intended to file a suit; that on March 17th, he again telephoned Mr. Young that he had filed the suit and Mr. Young said the company would resist coverage; that on April 3, 1941, he telephoned Mr. Young and told him the defendant was in default but that if Mr. Young wanted to defend the case "I would give him time to plead and would not enter the default and he again reiterated that they would resist coverage and liability, so we entered the default." Mr. Son further testified that on April 11, 1941, he called at the Markel Agency and endeavored to settle the case but "he was informed that the case would not be defended and that they disclaimed liability; that they had not been notified for over two months after the accident and that the policy had been cancelled; that on the same day, April 11th, 1941, he told Mr. Kerr on the telephone that he was going to enter a default and requested that the case be placed on calendar for hearing."

Mr. Visser testified that he turned over to Mr. Kerr the complaint and summons served on him; also that he received two registered letters from the insurer, one on April 28, 1941, which was some three weeks after he had been served, in which he was asked "to bring the suit papers in and sign an agreement so that the insurance company could proceed to defend the case in my behalf, without prejudicing their rights." Said witness stated he discussed this communication with Mr. Kerr who advised him not to sign such an agreement, but that he did sign the reservation of rights agreement sometime late in May or early in June, 1941.

At the conclusion of the trial on July 10, 1942, the court sitting without a jury took the cause under submission, and on October 28, 1942, after briefs had been filed by both parties, the trial judge made findings of fact accompanied by a memorandum of decision in which he found for respondent insurer on the ground that the delayed notice, which said insurer received of Mr. Visser's accident, was prejudicial to its rights, both as a matter of law and as a matter of fact.

Thereafter, appellant moved for a new trial, and in due course the trial judge in amended findings of fact and a second memorandum of decision decided that the motion should be denied, but that the judgment theretofore rendered in favor of respondent should be vacated and a new judgment entered in favor of appellant.

By said amended findings of fact, the court found that the delay in giving notice "was, under all the facts and circumstances shown by the evidence, excused"; that defendant insurer "by omitting to make objection to said assured promptly and specifically upon the ground that notice of said accident was presented to it too late, has waived said delay in the presentation of said notice under section 554 of the Insurance Code [St.1935, p. 510]."

Thereupon, respondent made a motion for a new trial, and on May 27, 1943, an order granting said motion was entered, accompanied by a third memorandum of decision reading as follows:

"I am forced to the conclusion that a notion for a new trial should be granted.

"In my opinion the case was tried in too much of a hurry and the witnesses were put on the stand without refreshing their minds as to dormant facts. They testified honestly, in my opinion, and refreshment of such witnesses would not have caused them to stray from the truth but might have a beneficial effect in developing the truth. The evidence is in such a shape that in fairness to both parties, they should start with a clean slate and try the case without being hurried.

"The defendant's motion for a new trial is granted on the ground, among others, that the evidence does not support the judgment."

The instant appeal is prosecuted from said order.

[1-4] "The granting of or refusal to grant a new trial rests very largely within the discretion of the trial court—a discretion which is extremely wide; and its ruling will not be disturbed, especially where, as here, a new trial has been granted on the insufficiency of the evidence, unless there is a clear and affirmative showing of a gross, manifest, or unmistakable abuse of the discretion it is called upon to exercise. 20 Cal.Jur. pp. 27–31. In other words, it is only in rare instances and on very strong grounds that the reviewing court will set aside an order granting a new trial. Morgan v. Los Angeles Pac. Co., 13 Cal. App. 12, 108 P. 735. * * * If, therefore, on appeal the case shows a reasonable or fairly debatable justification for the trial court's order, or the evidence presents a situation where reasonable minds might differ in their deductions, said order will not be set aside, even though the court of appellate jurisdiction might take a view different from that of the trial court, Kramm v. Stockton Elec. R. R. Co., 10 Cal.App. 271, 101 P. 914; Springer v. Pacific Fruit Exchange, 92 Cal.App. 732, 268 P. 951, or believe the evidence would be sufficient to support a judgment in the event a new trial had been denied. Glascock v. Watters, 136 Cal.App. 713, 29 P.2d 434." Ogando v. Carquinez Grammer School Dist., 24 Cal.App.2d 567, 569, 75 P.2d 641, 642. See, also, Fisher v. Zimmerman, 23 Cal.App.2d 696, 700, 73 P.2d 1243, and authorities there cited; Shortt v. Los Angeles Gas and Electric Corporation, 30 Cal.App.2d 511, 86 P.2d 854.

[5] The principal questions presented to the trial court for decision were: (1) Did the failure of assured to give notice of the accident to the insurer until 41 days after the accident absolve the insurer of liability under the policy? (2) Did the insurer by its actions subsequent to such period of time waive compliance with the provisions of the policy that timely notice must be given? These were questions of fact, and an examination of the bill of exceptions herein discloses that the evidence adduced at the trial was sketchy and inconclusive. Also, as stated by the trial judge in his memorandum of decision, "the case was tried in too much of a hurry * * * The evidence is in such a shape that in fairness to both parties, they should start with a clean slate and try the case without being hurried."

In view of the expressed feeling of the trial court and the wide discretion vested in him, there was no abuse of such discretion in the granting of the new trial.

For the reasons stated, the order appealed from is affirmed.

DORAN and WHITE, JJ., concur.

69 Cal.App.2d 449

STAMPER v. SCHEMMEL.

No. 12762.

District Court of Appeal, First District, Division 1, California.

June 1, 1945.

1. Statutes 🔑147

Where section of Vehicle Code, relating to overtaking vehicles on right, when enacted, embodied words "proceeding in the same direction," and in revision quoted words were eliminated, court could not construe section as if it contained the quoted words and hold it did not apply to the passing of a parked automobile. Vehicle Code, § 529(b), St.1939, p. 2198.

2. Statutes 🔑231

Where section 528 of the Vehicle Code related to overtaking vehicles on left and section 529 related to overtaking vehicles on right without either section referring to the other, they operated independently and they could not be construed together. Vehicle Code, § 528, St.1935, p. 182, and § 529, St.1939, p. 2198.

3. Automobiles 🔑147

Where sections 528 and 529 of the Vehicle Code operated independently, clause in section 528 stating "subject to the limitations and exceptions hereinafter stated," had reference only to the following paragraphs in section 528 and had no reference to the limitations and exceptions embodied in section 529. Vehicle Code, § 528, St.1935, p. 182, and § 529, St.1939, p. 2198.

See Words and Phrases, Permanent Edition, for all other definitions of "Subject to Limitations and Exceptions Hereinafter Stated".

4. Appeal and error 🔑977(1)
New trial 🔑6

A trial court has broad discretionary powers in passing on a motion for a new trial, its action is entitled to great weight, and on appeal to reverse order unmistakable abuse of discretion must be shown.

5. Trial 🔑241

In pedestrian's action for injuries sustained when struck by motorist who swerved to right in fog to avoid striking other pedestrians and an automobile partially parked on highway, wherein motorist relied on defenses of imminent peril and unavoidable accident, an instruction giving provisions of the Vehicle Code that a driver may overtake another vehicle on right only under safe conditions and in no event by driving on highway's shoulder, without qualifications, was improper. Vehicle Code § 529(b), St.1939, p. 2198.

6. Appeal and error 🔑933(1)

On appeal every intendment is in favor of supporting a trial court's order relating to a new trial.

7. Appeal and error 🔑978(1)

In pedestrian's action against motorist, under evidence and other unchallenged instructions, motorist was not entitled to have a denial of motorist's motion for a new trial reversed, on ground an instruction without qualification giving provision of the Vehicle Code relating to the overtaking of another vehicle on right, misled jury into believing defenses of imminent peril and unavoidable accident were no longer available and that a verdict for motorist was precluded. Vehicle Code § 529 (b), St.1939, p. 2198; Const. art. 6, § 4½.

Appeal from Superior Court, Santa Clara County; M. G. Del Mutolo, Judge.

Action by Arthur Stamper against Frank P. Schemmel for personal injuries. From a judgment for plaintiff after defendant's motion for a new trial was denied, defendant appeals.

Judgment affirmed.

Bronson, Bronson & McKinnon, of San Francisco, for appellant.

H. A. Gabriel and Campbell, Hayes & Custer, all of San Jose, for respondent.

KNIGHT, Justice.

The plaintiff, Arthur Stamper, was struck and injured by an automobile owned and driven by the defendant, Frank P. Schemmel. Among the injuries plaintiff received was a compound, comminuted fracture of both bones of the left leg below the knee; and in the present action a jury awarded him damages in the sum of $2,500. Motion for new trial was denied, and defendant appeals. There is no contention made that the jury's verdict is wanting in evidentiary support, nor is any complaint made of the rulings on the admissibility of evidence. The sole ground urged for reversal is that the trial court misdirected the jury to defendant's prejudice by reading to the jury as part of the court's charge, paragraph (b) of section 529 of the Vehicle Code, St.1939, p. 2198.

Briefly, the circumstances leading up to the happening of the accident were these: Plaintiff and his father, Albert Stamper, were driving their car toward Santa Clara over the Saratoga-Santa Clara highway in Santa Clara County. It is a two lane highway with a 20-foot paved center, and shoulders 2½ feet wide. They were driving through a dense fog about 7:30 o'clock in the morning, and at the point of the accident they sideswiped the left rear end of a car occupied by Charles Rush and his son Robert, traveling also toward Santa Clara, but which had just then pulled over to the right to the edge of the highway and stopped because of windshield wiper trouble. The Stampers continued on about 40 or 50 feet and then pulled off the highway to the right into an adjoining orchard and stopped. The testimony is conflicting as to their subsequent movements. They testified that they started to walk back through the orchard toward the Rush car which was parked at an angle partly off the paved portion of the highway, and that when they reached a point about 10 or 15 feet from the front end of the Rush car and about 12 feet to the right of the paved portion of the highway they were struck and knocked down by defendant's car, which also was traveling toward Santa Clara; that they did not hear the approach of defendant's car, and on account of the dense fog did not see it until it was within 8 feet of them; that it was then impossible for them to get out of its way. Charles Rush and his son were called as witnesses for the defendant and in contradiction of the testimony given by the Stampers they testified that after the Stampers brought their car to a stop in the orchard they walked back to the Rush car and that an argument started as to whether the taillight of the Rush car was lighted at the time it was sideswiped; that during the discussion all parties walked to the rear of the Rush car to examine the taillight; that while the discussion was going on they heard the approach of another car from the rear; that Robert Rush called to his father to "get out of the way" and that thereupon the assembly scattered; that Robert Rush ran to the left across the highway and that the other three ran around the right side of the Rush car. Continuing, Charles Rush testified that he succeeded in getting around in front of his car and that the Stampers reached a point about opposite the front end when they were struck and knocked down by the car driven by the defendant; that at the time of the impact plaintiff was about two or three feet to the right of the front end of the Rush car and about 8 feet from the shoulder of the highway. All testified that on account of the dense fog they did not see the approach of defendant's car and were unable to give any estimate as to the speed the defendant's car was traveling when it overtook the Rush car. The defendant testified that because of the dense fog he was traveling at a speed of about 15 or 20 miles an hour; that he did not see the Rush car; that the first he saw was two men standing "toward" the center of the highway about 15 or 20 feet ahead of him; that in order to avoid striking them he swerved to the right, and at that moment the men ran to the right; that he applied his brakes instantly and maneuvered his car in an effort to avoid striking them, but was unable to avoid the impact; that he brought his car to a stop within a couple of feet beyond the point of impact.

Plaintiff's cause of action was based on allegations to the effect that at the time of the accident there was an automobile stalled on the highway; that the dense fog greatly impaired "the vision of any person travelling" on the highway; that defendant was driving his car at such a careless and negligent rate of speed through the dense fog that he could not avoid colliding with the stalled car "without the excessive use of his brakes" and that he carelessly and negligently applied his brakes with such pressure as to cause it to skid across the highway and along the side thereof where plaintiff was walking, thereby knocking plaintiff down and causing the injuries above mentioned.

The answer denied the allegations of negligence and as a special defense pleaded that plaintiff was guilty of contributory negligence; and the record shows that at the trial defendant relied almost entirely on the doctrines of imminent peril and unavoidable accident, and that his case was submitted to the jury on those theories. The court's charge to the jury consisted of 45 separate instructions. Many of them related to the subjects of the negligent operation of motor vehicles, contributory negligence, imminent peril, and unavoidable accident; and among those given was the following, proposed by plaintiff: "You are instructed that Section 529(b) of the Motor Vehicle Code of the State of California St.1939, p. 2198, provides as follows: 'The driver of a motor vehicle may overtake and pass another vehicle upon the right only under conditions permitting such movement in safety. In no event shall such movement be made by driving upon the shoulder of the highway.'"

[1-3] Defendant's first contention is that section 529(b) has no application to parked vehicles, and in support of such contention he cites and relies upon the case of Ketchum v. Pattee, 37 Cal.App.2d 122, 98 P.2d 1051. An analysis of the decision shows that the case is not in point. It involved a different section of the Vehicle Code, section 528, St.1935, p. 182, which bears the title "Overtaking a Vehicle on the Left." The pertinent portions of that section read: "The following rules shall govern the overtaking and passing of vehicles *proceeding in the same direction*, subject to the limitations and exceptions hereinafter stated: (a) [overtaking vehicle to pass to the left] The driver of a vehicle overtaking another vehicle *proceeding in the same direction* shall pass to the left thereof at a safe distance * * *." (Italics added.) And in the Ketchum case it was held that the words above italicized as used in section 528 meant moving vehicles and did not include a situation where the car being overtaken and passed was parked. Section 529, however, with which we are here concerned, does not contain the italicized words embodied in section 528, on which that portion of the decision in the Ketchum case turned, and the legislative history of those sections (and of section 530 which bears the title "Limitations on Overtaking to the Left") clearly shows that in 1939 when the Legislature recast section 529 it intentionally eliminated therefrom the words which afterwards formed the basis of the decision in the Ketchum case. In this regard it appears that all three sections, 528, 529 and 530, were enacted in 1935 and that sections 529 and 530 were recast in 1939. No change was made in section 528, St. 1935, p. 182. Prior to 1939 sections 529 and 530, like section 528, embodied the words "proceeding in the same direction," and when sections 529 and 530 were revised in 1939 the words above italicized were again inserted in section 530 but they were eliminated entirely in the revision of section 529. It will be seen, therefore, that in order to apply the construction placed on section 528 by the decision in the Ketchum case to the provisions of section 529 it would be necessary for this court to reinsert therein the words which were intentionally eliminated therefrom by the Legislature in 1939; and obviously it is beyond the power of this court so to do. Defendant further contends that section 528 and section 529 should be read and construed together, and that therefore it should be held that the clause "subject to the limitations and exceptions hereinafter stated" as used in the opening paragraph of section 528 has reference to the limitations and exceptions embodied in section 529. There is no merit in the contention. As shown by the titles to the two sections, as well as by the contents thereof, they were designed to operate independently of each other. The subject matters of the two sections are entirely different. Section 528 prescribes rules governing vehicles overtaking and passing other vehicles to the left; whereas section 529 governs in cases of passing to the right. Section 529 is nowhere mentioned in section 528, nor is section 528 anywhere referred to in section 529; and an examination of section 528 makes it plain that the clause "subject to the limitations and exceptions hereinafter stated" has reference only to the two paragraphs immediately following that clause in section 528.

Defendant makes the alternative contention that assuming that section 529(b) does apply to parked vehicles, the reading of that section to the jury without qualification constituted prejudicial error in that the effect thereof was to invade the province of the jury by depriving it of the right to consider and pass upon defendant's defenses of imminent peril and unavoidable accident.

[4] Section 4½ of Article VI of the state Constitution provides that "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Moreover, it is well settled that broad discretionary powers are vested in a trial court in passing upon a motion for a new trial; that its action in deciding the motion is entitled to great weight, Morrison v. Jose, 57 Cal.App.2d 795, 135 P.2d 586; Lewis v. Western Truck Line, 44 Cal.App.2d 455, 112 P.2d 747, and that on appeal a showing of "manifest and unmistakable" abuse of discretion is essential to justify a reversal of the trial court's order. See Fennessey v. Pacific Gas & Electric Co., 10 Cal.2d 538, 76 P.2d 104, and cases cited therein.

[5] In the present case we have examined the record, including the evidence and the entire charge to the jury, and while we agree with defendant that section 529(b) should not have been read to the jury without qualification, we are not prepared to hold as a matter of law, contrary to the conclusion reached by the trial court, that the failure so to qualify the section operated to defendant's prejudice and resulted in a miscarriage of justice. As will be noted, the instruction complained of was not a formula instruction. It was the sixth instruction given, following which the court gave a great many others on the law of negligence, contributory negligence, imminent peril and unavoidable accident. The defendant does not challenge the correctness of any of those instructions, nor does he claim that for any reason any of them were erroneously given. In nearly all of them the jury was instructed that if the defendant proved by a preponderance of the evidence the defenses therein dealt with, he was entitled to a verdict. Furthermore, among the instructions so given was the following: "* * * even though you find and believe from the evidence that the defendant Schemmel was guilty of negligence in any one or more of the particulars complained of by plaintiff, still your verdict cannot be for plaintiff unless you further find and believe from the preponderance of the credible testimony that such negligent act or acts of defendant, if any you find, proximately caused the injury."

In the foregoing state of the record it cannot reasonably be held that there was a manifest and unmistakable abuse of discretion on the part of the trial court in concluding that the giving of the instruction complained of did not mislead the jury into the belief that the defenses interposed by the defendant were no longer available to him and that the jury was precluded from returning a verdict in his favor on the evidence introduced by him in support of those defenses.

The case of Mathers v. County of Riverside, 22 Cal.2d 781, 141 P.2d 419, cited by defendant, is not in point for the reason that the instruction there involved was strictly a formula instruction; and in the case of Finney v. Wierman, 52 Cal.App.2d 282, 126 P.2d 143, upon which defendant mainly relies in support of his position, the situation was different in the following respects from the one here presented: Two instructions were there involved, each of which embodied the language of a section of the Vehicle Code; and to the first of those instructions the trial court added this express admonition: "If you believe from a preponderance of the evidence that Ora Finney violated the provisions of this section, she was *guilty of negligence as a matter of law*" (italics added); and a like express admonition was added to the second instruction. Both instructions were therefore borderline formula instructions; and the trial court, in the exercise of the broad discretionary power conferred upon it in passing upon a motion for new trial, evidently concluded that under the circumstances of that particular case the jury was misled thereby, and it granted the motion. On the appeal it was held that there was no abuse of discretion on the part of the trial court; that the reading of the code sections without qualification, *with the added express admonitions that a violation of those sections constituted negligence as a matter of law,* was error, and that the error was not cured by the general instruction thereafter given on the doctrine of imminent peril. And in so holding the court went on to say: "It is to be remembered that in all of the preceding discussion we have advanced upon the theory that every intendment is in favor of supporting the order of the trial court."

[6, 7] In the present case there is involved but a single instruction, embodying

one paragraph of a code section; and unlike the Finney case no admonition was attached thereto that a violation of that portion of the code section constituted negligence as a matter of law; nor was any other instruction given by the court to the effect that the violation of a statute constituted negligence as a matter of law. Moreover, as stated, the jury was fully and fairly instructed on the law pertaining to the several defenses relied upon by defendant. Under those circumstances, and having heard all of the evidence in the case, the trial court was called upon to exercise the discretionary powers conferred upon it in determining whether the giving of the instruction complained of misled the jury or otherwise operated to the defendant's prejudice; and by denying the motion it held that it did neither. Therefore, having in mind the constitutional amendment above set forth and applying the principle of law referred to in the Finney case, that every intendment is in favor of supporting the order of the trial court, it is our conclusion, based upon the record herein, that no such manifest and unmistakable abuse of discretion has been shown as would justify a reversal.

The judgment is therefore affirmed.

PETERS, P. J., and WARD, J., concur.

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69 Cal.App.2d 399

LOVELAND v. CITY OF OAKLAND et al.

Civ. 12792.

District Court of Appeal, First District, Division 2, California.

May 29, 1945.

1. Judgment ⇨180

Summary judgment is not available in special proceedings in general, or in mandate proceedings in particular. Code Civ. Proc. §§ 437c, 1084–1097.

2. Judgment ⇨180

A mandate proceeding to compel payment of pension to fireman's widow, when pension trustees had refused to recognize widow's right, was not a "demand for a sum of money only" within statute governing summary judgment. Code Civ.Proc. §§ 437c, 1084–1097.

See Words and Phrases, Permanent Edition, for all other definitions of "Demand for Sum of Money Only".

3. Municipal corporations ⇨200

Until basis right of fireman's widow to pension is established, widow cannot sue for any debt, liquidated or unliquidated, arising out of contract or otherwise. Code Civ.Proc. §§ 437c, 1084–1097.

4. Judgment ⇨183

Under statute, motion for summary judgment cannot be made until answer is filed, and filing of demurrer is not substantial compliance with statute. Code Civ. Proc. § 437c.

5. Judgment ⇨185

Affidavits on motion for summary judgment are not a second set of pleadings in the action, but their purpose is only to show whether issues apparently made by formal pleadings are genuine, and whether each party has competent evidence tending to support his side of the issue. Code Civ. Proc. § 437c.

6. Judgment ⇨178

Issue finding rather than issue determination is the pivot on which summary judgment law turns. Code Civ.Proc. § 437c.

7. Mandamus ⇨154(1), 164(1), 170

Pleadings in mandate proceedings are unique and entirely different from those prescribed for ordinary civil actions, and practice is likewise different. Code Civ. Proc. §§ 1084–1097, 1109.

8. Courts ⇨472(2)

The Supreme Court, District Court of Appeal and Superior Court have co-ordinate and concurrent jurisdiction in original proceedings.

9. Mandamus ⇨168(2)

A fireman's widow had burden of proof in mandate proceeding to compel payment of pension. Code Civ.Proc. § 1089.

10. Judgment ⇨181

In mandate proceeding to compel payment of pension to fireman's widow, whether fireman's death was result of bodily injury for which he was pensioned raised a fact question precluding summary judgment for respondents.

11. Mandamus ⟹164(1)

In mandate proceeding to compel payment of pension to fireman's widow, question of legal effect of break in marital status resulting from fireman's divorce from and remarriage to petitioner could be raised by answer. Code Civ.Proc. § 1094.

12. Mandamus ⟹187(4)

Where effect of break in marital status of fireman and wife, resulting from divorce and remarriage, on wife's right to pension after fireman's death, was not properly brought before trial court and was only one of several potential issues, reviewing court would not pass on such legal question on appeal from judgment dismissing widow's mandate proceeding.

13. Mandamus ⟹1

Mandate is in the nature of a summary proceeding. Code Civ.Proc. §§ 1084–1097.

◆

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Petition by Zora A. Loveland against the City of Oakland and others for writ of mandate to compel grant of pension to fireman's widow. From a summary judgment dismissing the petition, petitioner appeals.

Reversed.

Frank E. McGuire and Louis B. DeAvila, both of Oakland, for appellant.

F. B. Fernhoff, City Atty., and John W. Collier, Asst. City Atty., both of Oakland, for respondents.

GOODELL, Justice.

This is an appeal from a summary judgment dismissing a petition for a writ of mandate.

Section 103a of the Oakland charter provides that if a retired fireman shall die by reason of an injury for which he was pensioned, his pension shall not cease but shall continue and shall be paid to his widow to whom he was married at the time of such injury.

Victor F. Loveland had been retired on a pension on June 1, 1938 because of an injury received on September 19, 1937 in line of duty as a lieutenant in the Oakland fire department. He died on December 23, 1943, and the petitioner, his widow, invoked section 103a in an application to the Board of Trustees of the Firemen's Relief and Pension Fund. Her application was denied and she filed a petition for a writ of mandate to compel the board to grant it. An alternative writ was issued, commanding the defendants to grant the pension or show cause on April 17, 1944 why they had not done so. Thereupon defendants served and filed a notice that on April 12, 1944, they would move to dismiss the petition on the ground that the action was without merit. A general and special demurrer to the petition, filed by the respondents, was never argued but was dropped from the calendar. On April 12, which was 5 days before the return day on the writ, the motion was presented and submitted, and on June 23, 1944, granted.

The motion was made "upon the ground that the action herein has no merit in that petitioner's deceased husband, the continuance of whose pension she seeks, secured a final decree of divorce from said petitioner on January 7, 1938, approximately five years prior to his death." An affidavit setting forth the entry of the final decree on that date accompanied the motion papers. The petitioner filed a counter-affidavit showing that on March 4, 1938 the parties had remarried. Accordingly there was an interval of 56 days between the time of Victor's injury on September 19, 1937 (which was over 8 months after the entry of the interlocutory decree on December 31, 1936; see In re Estate of Dargie, 162 Cal. 51, 121 P. 320; In re Estate of Lee, 200 Cal. 310, 253 P. 145) and his death (when petitioner was his wife) during which interval she was *not* his wife. The motion papers showed also that these facts had been laid before the board.

The motion to dismiss was made under section 437c, Code of Civil Procedure, and not under any procedure prescribed for mandate cases by sections 1084–1097 of that Code. It is apparent that the purpose of the motion was to get before the court at the threshold a legal point which could not be raised by demurrer, and to obtain, if possible, a ruling thereon before the time arrived to answer the petition, for it was noticed for hearing and heard five days before the return day on the writ. The result of the ruling was to bring petitioner's case to a sudden halt without a hearing on the demurrer, without the filing of a return or answer (section 1089, Code of Civ.Proc.) and without a hearing such as is required in mandate proceedings (sections 1087, 1088, 1090, 1091, 1094, Code of Civ.Proc.)

Petitioner's counsel state her grievance rather broadly thus: "All we ask here and now is that we be given an opportunity to present the facts which we believe will prove all our allegations."

[1-3] Section 437c provides that a motion for summary judgment may be made "In superior courts and justices' courts of Class A and municipal courts *when an answer is filed* in an *action* to recover upon a *debt* or upon a *liquidated demand* * * * or to recover an *unliquidated debt or demand for a sum of money only* arising on a *contract* express or implied in fact or in law * * * if it is claimed that there is no defense to the action or that the action has no merit * * *." (Emphasis ours). As far as the language of the section goes, special proceedings in general, and mandate in particular, are not included. The section seems to apply, in the first place, only to *actions,* and only to such actions as are of the restricted types which the legislature was careful to specify. The respondents contend, nevertheless, that section 437c applies in mandate. They say: "The instant proceeding is essentially a demand for a sum of money only, claimed due upon a contract within the provision of section 437c", and further "a pension such as here involved constitutes a part of the compensation of the officer and as such is a part of his contract of employment." In support thereof they cite Casserly v. City of Oakland, 6 Cal.2d 64, 56 P.2d 237, and Sweesy v. Los Angeles, etc., Board, 17 Cal. 2d 356, 110 P.2d 37. Those cases and several others so hold, but they deal with the status of the officer himself and *his* contract with the municipality. His widow has no contract. Whatever pension rights *she* gets come into being only when her husband's contract with the municipality is terminated by his death. Further, it is difficult to see how this proceeding can be "a demand for a sum of money only" when it appears that the board has refused to recognize the petitioner's right to a pension and the very purpose of this proceeding is to compel such recognition. Until her basic right is first established the petitioner cannot sue for any debt, liquidated or unliquidated, arising out of contract or otherwise. See 20 Cal.Jur. p. 1001, sec. 7. The respondent's contention is answered by the case of Sheehan v. Board of Police Commissioners, 188 Cal. 525, 532, 206 P. 70, 73, as follows: "* * * the sole purpose for which the petitioner could institute, and, in fact, did institute, his mandamus proceedings was that of procuring an adjudication of his right to a writ of mandate, directing said board to perform its official duty by the issuance of a warrant for his unpaid pension. It was not, and could not be, the procurement of a money judgment, either against said board of police commissioners or against said municipality, since the procurement of such a judgment was not within the scope and purposes of such a proceeding." And at page 535 of 188 Cal., at page 75 of 206 P., the court says: "The writ of mandate in this state is an independent proceeding, having for its purpose the compulsion of an act which the law specially enjoins as a duty resulting from an office, trust or station. *It has none of the characteristics or functions of a civil action for the collection of a debt.*" (Emphasis ours.)

[4-6] While the respondents contend that section 437c is applicable, they did not, in this case, follow the plain provisions of that section. Their motion was heard 5 days before their answer was due. There was no answer on file then, or when the court ruled, and there is none on file now. The section says the motion may be made "when an answer is filed", meaning, of course, that it cannot be made *until* an answer is filed. Compare Johnston v. Baker, 167 Cal. 260, 264, 139 P. 86. The reason for this provision is obvious, for no court can tell what the issues are in any case until the answer comes in. "The affidavits on a motion for summary judgment do not constitute a second set of pleadings in the action. Their purpose is only to show whether the issues apparently made by the formal pleadings are genuine, whether each party has competent evidence to offer which tends to support his side of the issue. On the hearing of such a motion no issues are tried, but the inquiry is limited to the question whether there is an issue to be tried." Gardenswartz v. Equitable, etc., Society, 23 Cal.App.2d Supp. 745, 752, 68 P.2d 322, 326 (citing cases.) "Issue finding rather than issue determination is the pivot upon which the summary judgment law turns." Walsh v. Walsh, 18 Cal. 2d 439, 441, 116 P.2d 62, 64. The Walsh case also holds in so many words that if the court finds an issue of fact "it is then powerless to proceed further, but must allow such issue to be tried * * *". For these reasons it is evident that the respondents' claim that the filing of the demurrer

is a substantial compliance with the statute cannot be sustained. As said in Romero v. Snyder, 167 Cal. 216, 221, 138 P. 1002, 1004, with respect to a somewhat similar claim: "There is no force in the argument of plaintiff that for the purposes of this section a demurrer is deemed to have the same effect as an answer. We must suppose that the Legislature meant exactly what the words express."

[7] Next it is argued by the respondents that the provisions of section 437c are made applicable by section 1109, Code of Civil Procedure, which reads: "Except as otherwise provided in this title, the provisions of part two of this code are applicable to and constitute the rules of practice in the proceedings mentioned in this title." Section 1109 is found in the title dealing with the writs of review, mandate and prohibition, which are "special proceedings of a civil nature", and section 437c is in part two of the Code. Respondents cite numerous cases where the procedure of ordinary civil actions has been held adaptable to mandate, and that may be readily conceded. The effect and scope of section 1109 is discussed at some length in Scott v. Superior Court, Los Angeles County, 83 Cal.App. 25, 30, 256 P. 603, 605, where it is said: "While it is true that generally the rules of practice are the same in proceedings in mandate as in civil cases, this being expressly provided in section 1109 * * * still that very section provides that such rules may not be identical, and anticipates exceptions where they are not the same. * * * *Apparently the pleadings of the parties in mandate constitute an outstanding exception to the rule above mentioned. Special provisions are made for such pleadings.* These are contained in chapter 2, title 1, part 3, of the Code of Civil Procedure, and the whole scheme is set up in sections 1089, 1091, and 1094 thereof * * *." (Emphasis ours.) An examination of these provisions will readily show that the pleadings in mandate proceedings are unique, and entirely different from those prescribed for ordinary civil actions; the practice is likewise quite different. Section 1088 provides: "* * * The writ cannot be granted by default. The case must be heard by the court, whether the adverse party appears or not." Section 1089 provides that on the return day the respondent "may answer the petition under oath, in the same manner as an answer to a complaint in a civil action." Section 1090 provides that if the answer raises an issue of fact the court may in its discretion order the question tried by a jury. Section 1091: "On the trial, the applicant is not precluded by the answer from any valid objection to its sufficiency, and may countervail it by proof either in direct denial or by way of avoidance." It has been held that in mandate, issues of law as well as of fact may be raised by the answer. Scott v. Superior Court, Los Angeles County, 83 Cal.App. 25, 31, 256 P. 603. In mandate the petitioner may file a reply to the answer, in other words a replication, a pleading unknown in civil actions in California. Scott v. Superior Court, Alameda County, 205 Cal. 525, 271 P. 906. "In a proceeding for the writ of mandate affirmative allegations of the answer, if not demurrable, are to be taken as true unless they are countervailed by proof presented by the petitioner." Vanderbush v. Board of Public Works, 62 Cal.App. 771, 775, 217 P. 785, 786, citing McClatchy v. Matthews, 135 Cal. 274, 67 P. 134. In Fox v. Workman, 6 Cal.App. 633, 635, 92 P. 742, 743, it is said: "The application of this section (1091) leads to the conclusion that if the affirmative allegations of the sworn answer present matters material to the issue before the court and are not controverted, either by pleading or proof, they are sufficient to support the judgment of the court, although no evidence be taken to support them. * * * *To this extent, then, the answer may be considered as if it were evidence.*" (Emphasis ours.) Section 1094: "If no answer be made, the case must be heard on the papers of the applicant. If the answer raises only questions of law, or puts in issue immaterial statements, not affecting the substantial rights of the parties, the court must proceed to hear or fix a day for hearing the argument of the case." From this examination of the mandate sections it is clear that a system of pleading peculiar to that subject has been set up by the legislature.

[8] There is still another reason why, in our opinion, it could not have been the legislative intent (by cross-reference or otherwise) that section 437c should apply to mandate proceedings. That section is made available only "In superior courts and justices' courts of Class A and municipal courts." Consequently, in an original proceeding in mandate in the Supreme Court or District Court of Appeal such proceeding could not be summarily halted,

while (if respondents are right) it could be in the Superior Court. Yet all three courts in original proceedings have co-ordinate and concurrent jurisdiction. Santa Cruz, etc., Co. v. Board of Supervisors, 62 Cal. 40, 41; Cohn v. Isensee, 45 Cal.App. 509, 510, 188 P. 278.

[9-11] Section 103a of the charter provides that a fireman's widow is not entitled to a continuation of his pension unless his death occurs "by reason of the bodily injury for which he was pensioned". The petition alleges inter alia that the death was the result of such injury. The burden of proof is of course on the petitioner. 16 Cal.Jur. p. 869, sec. 67. In their brief the respondents say "whether his death was the result of such injury is, of course, a question of fact which can only become material in the event the judgment herein is reversed. We deny that such death was the result of the said injury." This means, of course, that the answer would raise this issue of fact. As soon as such issue of fact develops it is the court's duty, *under the summary judgment cases* to deny the motion for summary judgment. As said in the Walsh case, supra, "Thus, in passing upon a motion for summary judgment, the primary duty of the trial court is to decide whether there is an issue of fact to be tried. *If it finds one, it is then powerless to proceed further, but must allow such issue to be tried by a jury unless a jury trial is waived.*" (Emphasis ours.) We are, of course, mindful of the fact that in a mandate case a jury trial is discretionary. The petitioner was and is entitled to have issue joined by an answer under oath on the return of the alternative writ. Sec. 1089, Code Civ.Proc. The question of the legal effect of the 56-day break in the marital status likewise could have been and can be raised by the answer, Scott v. Superior Court, Los Angeles Court, 83 Cal.App. 25, 31, 256 P. 603, supra; Dare v. Board of Medical Examiners, 21 Cal.2d 790, 797, 136 P.2d 304, and the whole case heard and tried in the manner amply and sufficiently provided by the mandate sections. In the Dare case, supra, there is to be found in the prevailing opinion a full review of the sections dealing with mandate cases where, at 21 Cal.2d 796, 136 P.2d 307, it is said: "First, the petitioner comes before the court governed by the provisions of the Code of Civil Procedure applicable to mandamus proceedings, Code Civ.Proc., secs. 1084 to 1097 inclusive. *In the disposition of such proceedings the court is likewise governed by those code sections. The powers and duties of the court in the premises are provided for therein.*" (Emphasis ours.)

In the case at bar there was a departure from those sections, the result of which was to prevent a hearing of the petitioner's case. The affidavits filed on the motion under 437c effectively constituted "a second set of pleadings in the action", Gardenswartz v. Equitable, supra, and led to the premature trial of an isolated issue. The case of Walsh v. Walsh, 18 Cal.2d 439, 116 P.2d 62, 65, quoted earlier, was cited in the trial court. It contains a review of several cases decided since the last amendment of section 437c. In reversing a judgment of dismissal predicated upon the granting of a motion for summary judgment the court said: "The summary judgment statute is drastic and its purpose is not to provide a substitute for existing methods in the trial of issues of fact". In Eagle Oil, etc., Co. v. Prentice, 19 Cal.2d 553, 555, 122 P.2d 264, 265, the court says: "The issue to be determined by the trial court in consideration of a motion thereunder (437c) is whether or not defendant has presented any facts which give rise to a triable issue or defense, and not to pass upon or determine the issue itself, that is, the true facts in the case" (citing a number of cases including Walsh v. Walsh, supra; Gardenswartz v. Equitable, supra; and McComsey v. Leaf, 36 Cal.App.2d 132, 97 P.2d 242, which was cited by the petitioner in the trial court).

[12] Whether the 56-day break in the marital status would defeat the petitioner's claim for pension is a legal question. We are asked to decide it as long as it is up here regardless, so to speak, of how it got here. But as we have pointed out, the question was not brought before the trial court in the proper way, it was only one of several potential issues in the case, and the petitioner was clearly entitled to have all issues, both of law and fact, tried and determined at one time and according to the procedure long settled for the handling of mandate proceedings.

[13] We are satisfied that the summary judgment procedure was never intended by the legislature to be imported into mandate which, is itself "in the nature of a

summary proceeding". Private Investors v. Homestake Mining Co., 16 Cal.App.2d 1, 3, 60 P.2d 146, 147.

The judgment of dismissal is reversed.

NOURSE, P. J., and DOOLING, Justice pro tem., concur.

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69 Cal.App.2d 337

BLUMENTHAL v. W. I. HOLLINGSWORTH & CO.

Civ. 14646.

District Court of Appeal, Second District, Division 3, California.

May 28, 1945.

Rehearing Denied June 26, 1945.

Hearing Denied July 26, 1945.

1. Appeal and error 🔑977(3)

The granting of a new trial rests so completely within discretion of trial judge that an appellate court will not interfere with his action unless a manifest abuse of discretion clearly appears.

2. New trial 🔑72

In passing upon a motion for new trial, trial court was entitled to consider and weigh evidence, even though evidence was not conflicting, and determine whether evidence was sufficient to support court's former conclusion; the question of probative force or evidentiary value of evidence being within determination of trial court.

3. New trial 🔑9

Where there were various issues of fact for consideration of trial court in trial of action by one real estate broker against another for a share in commission, and trial court concluded that evidence was insufficient to justify its decision in favor of plaintiff, the granting of defendant's motion for a new trial was within discretion of trial court with respect to any of such issues.

4. Appeal and error 🔑933(1)

All presumptions in favor of order granting a new trial will be indulged in upon appeal.

5. Appeal and error 🔑854(6)

Reviewing court's consideration, in determining legal sufficiency of order granting a new trial, is not limited to reasons assigned by trial judge in granting motion for new trial.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action by Frank Eugene Blumenthal, doing business under the fictitious firm name and style of Commercial Realty Company, against W. I. Hollingsworth & Co. to recover a portion of a real estate commission it paid defendant for lease and sale of certain realty, wherein plaintiff recovered a judgment. From an order granting defendant's motion for a new trial, plaintiff appeals.

Affirmed.

Girard F. Baker and U. T. Clotfelter, both of Los Angeles, for appellant.

W. C. Shelton and George W. Burch, Jr., both of Los Angeles, for respondent.

PARKER WOOD, Justice.

Plaintiff appeals from an order granting defendant's motion for a new trial. In a trial without a jury plaintiff had judgment for $2,250, which amount represented one-half of a commission paid to defendant for the lease and sale of certain real property. Defendant's motion for a new trial was granted on the ground of insufficiency of the evidence to sustain or justify the decision.

Plaintiff and defendant were licensed real estate brokers. Defendant had the exclusive agency to sell certain real property owned by Arden Farms Company, which company will be referred to as Arden. Arden agreed to pay defendant a commission for its services as such agent. Defendant posted a notice on said property which stated that defendant was the sole agent, and that anyone interested in the property should see Mr. Hughes. Hughes was a salesman for defendant, licensed to sell real estate under defendant's license, and "handled all the Arden property" listed with defendant for sale. A company by the name of Marketville, Inc., which will be referred to as Marketville, desired to acquire a parcel of property on which to erect a farmer-type market. Plaintiff was the exclusive agent of Marketville to lease or purchase a suitable site for such a market. Plaintiff saw the Arden property, read the notice posted thereon, telephoned defendant company, talked with Hughes, and arranged for an interview. He then went to defendant's office where he and Hughes discussed the property. Thereafter, plaintiff communicated with his principal and a meeting was held which was attended by Hughes, plaintiff, and two representatives of Marketville. Thereafter, on February 21, 1941, Marketville made an offer to purchase which was rejected by Arden. Subsequently several meetings were held at which plaintiff, Hughes, and representatives of both Marketville and Arden were present. Hughes was the only representative of defendant company who participated in said meetings. One meeting was held between a representative of Arden and a representative of Marketville. As a result of negotiations at these meetings, a lease with an option to purchase, drawn by attorneys for Arden and Marketville, was executed on May 14, 1941. Said lease provided in part: "It is understood and agreed by the lessor and the lessee that W. I. Hollingsworth & Co., duly licensed real estate brokers are representing the Lessor in connection with this lease, and the option herein contained and shall be paid a commission by the Lessor herein." No provision was made therein in regard to plaintiff, and there was no written agreement between plaintiff and defendant to share said commission. The option was subsequently exercised and a commission of $4,500 was paid to defendant by Arden. After the execution of said contract, plaintiff telephoned Hughes and asserted an interest in the commission. Hughes related plaintiff's assertion to Mr. Swan, secretary and general manager of defendant company, who arranged a meeting at which he, plaintiff and Hughes were present. This was the first time that Swan had seen plaintiff or had had any communication with him. Plaintiff's claim for a commission was discussed but no decision was made, and it was decided to resume the discussion at a later date. Hughes died before another meeting was held. There were subsequent discussions between plaintiff and Swan concerning plaintiff's claim.

Plaintiff testified that he and Swan "differed with each other" on the question "as to the amount due" him; that Swan was figuring an equal division of the total amount, but they did not agree on the sum to be divided.

Swan testified that he "made no agreement whatever" to pay plaintiff part of the commission, but he did discuss the question of making a settlement out of court with plaintiff; and that before the case went to trial he made plaintiff an offer of compromise.

A letter written by Marketville, addressed to plaintiff and dated February 22, 1941, was offered in evidence and was received. The letter stated that plaintiff was "*H*ereby" appointed the exclusive agent of Marketville, and that plaintiff had advised Marketville that he was to receive one-half of the commission paid by Arden. On cross-examination it was pointed out that the letter was written on the letterhead of Marketville showing its address to be that of the property which it had not purchased from Arden at that time, February 22, 1941, and which it did not purchase until May 14, 1941.

Plaintiff commenced this action for a share of the commission, and alleged as a first cause of action that he had an agreement with defendant that in the event a lease or sale of said property was made "to a prospect produced by plaintiff, that the defendant would pay to plaintiff one-half (½) of all real estate commissions received by defendant as a result of such lease" or sale. A second cause of action was for the reasonable value of services rendered in connection with the lease. A third cause of action was for the reasonable value of services rendered in connection with the sale of said property. The fourth and last cause of action was for the reasonable value of services rendered in connection with both the lease and sale of said property. It appears from a memorandum written by the trial judge, at the time he decided the case, that judgment was based upon the fourth cause of action.

Plaintiff contends there was no substantial conflict in the evidence, that the evidence fully supported the findings and original decision, and therefore the order granting the motion for a new trial cannot be sustained.

[1-4] "[T]he granting of a motion for a new trial rests so completely within the discretion of the trial judge that an appellate court will not interfere with his action unless a manifest and unmistakable abuse

of discretion clearly appears." Mazzotta v. Los Angeles Ry. Corporation, 1944, 25 Cal. 2d 165, 153 P.2d 338, 340. In passing upon such motion the trial court is entitled to consider and weigh the evidence, even though the evidence is not conflicting, and determine whether it was sufficient to support its former conclusion. The question of the probative force or the evidentiary value of the evidence is within the determination of the trial court in a proceeding on motion for a new trial. Abercrombie v. Thomsen, 59 Cal.App.2d 331, 334, 138 P.2d 701; Owings v. Gatchell, 32 Cal.App.2d 482, 488, 90 P.2d 368. The evidence herein shows that there were various questions of fact for the consideration of the trial court, such as, whether there was an agreement to share commissions with plaintiff; whether such agreement, if existent, was binding upon defendant; whether, in the absence of such agreement, defendant was indebted to plaintiff for the reasonable value of his services; whether there is a custom in Los Angeles to share such commissions and, if so, what division is customary; in what capacity plaintiff acted during the negotiations for the lease and sale, and whether his services were performed with the knowledge and acquiescence of the seller and buyer, especially in view of the evidence that the buyer ante-dated a letter to indicate such knowledge on its part before the negotiations were completed. It was within the discretion of the trial court as to whether there should be a retrial of any of those issues, and the court concluded that the evidence was insufficient to justify its former decision. All presumptions in favor of the order will be indulged in upon appeal. Mazzotta v. Los Angeles Ry. Corporation, supra, 25 Cal.2d 165, 153 P.2d 338. In the absence of an abuse of discretion, the action of the trial court is conclusive upon appeal. There was no abuse of discretion and the plaintiff's contention is not sustained.

[5] By reason of the above conclusion, it is unnecessary to discuss the statements in a memorandum made by the trial court at the time it granted the motion for a new trial. The reviewing court's consideration, in determining the legal sufficiency of the ruling, is not limited to the reasons assigned by the trial court in granting a motion for a new trial. Scott v. Renz, 67 Cal.App.2d 428, 154 P.2d 738.

The order granting the motion for a new trial is affirmed.

DESMOND, P. J., and FOX, Justice pro tem., concur.

REMMERS v. CICILIOT et al. *

Civ. 14641.

District Court of Appeal, Second District, Division 1, California.

May 28, 1945.

Rehearing Granted June 18, 1945.

1. Evidence 🔑546, 547

Proper procedure in establishing market value of property is for the witness, when found to be qualified as an expert, to state what, in his judgment, the market value of the property is.

2. Specific performance 🔑120

Evidence respecting market value of properties was competent in action for specific performance of an agreement for exchange of real property.

3. Specific performance 🔑121(8)

Evidence establishing that agreement for exchange of real property was just and reasonable as to both parties, that the consideration therefor was adequate and consent to exchange was given freely and without fraudulent representations, sufficiently supported judgment decreeing specific performance.

4. Appeal and error 🔑1176(1)

Where judgment decreeing specific performance of an agreement for exchange of real property did not require conveyance of personal property and bakery equipment described in exchange agreement, the trial court will be directed to require that a bill of sale for personal property described in the exchange agreement be executed and delivered.

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Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

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*For subsequent opinion see 161 P.2d 257.

Action by Rosa T. Remmers against Joe Ciciliot and another for specific performance of an agreement for exchange of real property. Judgment for plaintiff, and defendant appeals.

Modified, and, as modified, affirmed.

Julius V. Patrosso, of Los Angeles, for appellants.

Clark & Morgan, of Alhambra, for respondent.

YORK, Presiding Justice.

This is an appeal by defendants from a judgment rendered in favor of plaintiff in an action for specific performance of an agreement for the exchange for real property. The following grounds are urged in support of a reversal of the judgment:

"1. The evidence does not support the trial court's finding that the properties of the respondent and of the appellants were of equal value or its conclusion that the consideration was adequate to the appellants and the contract just and reasonable as to them;

"2. The findings do not support the judgment in that the trial court failed to make findings upon the issues raised by the pleadings (a) as to the respective values of the properties of the respondent and the appellants, and (b) as to the representations made by respondent to appellants as to the cost or value of her property;

"3. The judgment, while compelling a full performance by the appellants, does not require like performance by the respondent."

This is the second trial of the instant cause, a judgment in favor of appellants as a result of the first trial having been reversed on the ground of insufficiency of the findings to support the judgment. Remmers v. Ciciliot, 59 Cal.App.2d 113, 138 P.2d 306.

On July 29, 1941, the parties to the instant action met at respondent's property located at Monrovia, and entered into a contract whereby it was agreed that appellants would exchange their parcel of improved real property situate at Pomona, free of incumbrance, and $100 in cash, for respondent's parcel of real property at Monrovia, improved with a building then used as a bakery and the fixtures and equipment therein contained, said property being subject to a trust deed for $2,500. A memorandum in the form of a receipt was executed and an escrow opened at a bank to effect the proposed exchange, the parties signing the escrow instructions substantially in accordance with the terms of the memorandum, except that in addition to the $100 cash payment therein provided to be paid by appellants, they also agreed to pay an additional $150 which was deposited with the escrow agent at the time the instructions were executed.

Thereafter, to-wit, on September 25, 1941 and before the escrow was closed, appellants served notice of cancellation and rescission of the exchange agreement upon respondent and demanded the return of the sum of $250 theretofore paid by them, upon the ground that respondent had made material misrepresentations to them concerning her property.

On September 30, 1941, respondent filed her complaint for specific performance of the agreement of exchange. Appellants answered, admitting the execution of the agreement and alleging that they had been induced to enter therein by fraudulent representations to the effect that the respondent's property had cost her $6,000 and had a cash market value of that amount; that it was under lease to one Voltura for a five-year term at a rental of $40 per month for the first year; $45 per month for the second year and $50 per month for the remainder of the term, and that said Voltura was financially responsible; whereas, in fact, Voltura had no financial responsibility; was merely acting as agent and dummy for respondent, and was posing as her lessee to enable her to dispose of the property. It was also alleged that the exchange was unjust, unfair, unreasonable and inadequate; that said properties were not of equal value and that the consideration for such exchange was inadequate as to appellants.

When the cause came on for trial, respondent was permitted to file an amended complaint adding: (1) an allegation to the effect that she was still ready and willing to exchange her Monrovia property in accordance with the exchange agreement and (2) a new paragraph, to-wit: "That the property owned by defendants at Pomona was and is the fair and reasonable value of the equity of the property owned by plaintiff at Monrovia. That the Pomona property was and is of the value of approximately $2,800.00, and the value of the Monrovia property owned by plaintiff was and is of the value of approximately $5,500.00 and that the consideration for the said exchange was thereby just, reasonable and adequate to the defendants."

The trial court found in favor of respondent in that the agreement for the exchange of the properties of the respective parties was executed as alleged; that appellants on September 25, 1941 served upon respondent a notice of rescission; that respondent had performed all of the conditions of the agreement upon her part to be performed and that appellants had refused to complete the transaction; that the agreement for the exchange and the escrow instructions were signed by the parties after each had inspected the property of the other; that appellants up to the time that they discovered that Voltura (lessee of respondent's property) had assigned his lease "were satisfied with the exchange and agreeable thereto and had no complaint as to the exchange"; that "it is not true that the agreement of exchange between plaintiff and defendants was fraudulently had or induced or obtained by deceitful or false or fraudulent representations made by plaintiff to the defendants; that it is not true that the plaintiff represented to the defendants that her property had cost $6,000.00 or was of the cash market value of $6,000.00 or that plaintiff represented to defendants that the tenant S. J. Voltura was financially responsible; it is not true that S. J. Voltura was a dummy or agent of Rosa T. Remmers or that she executed the lease to him merely posing as her lessee for a sufficient length of time to exchange her property with the defendants, and it is not true that said property was bringing in no income or that it had not brought in any income during the term of said lease.

"It is not true that defendants were mislead or deceived by plaintiff through any representations by plaintiff to enter into said agreement, and it is not true that plaintiff signed the escrow instructions under any misrepresentations at all. * * *

"The court finds that it is not true that said exchange of properties was unjust or unfair or unreasonable or inadequate, and it is not true that said properties were not of equal value as far as the equities of the exchange, but it is true that they were of equal value and it is true that on or about September 25, 1941, the defendants served a notice of cancellation and rescission on the plaintiff that they had cancelled said agreement and demanded the return of their property that they had placed in said escrow and demanded the return of their deed, but the court finds that said notice was without justification and has no legal effect."

Appellants urge that "before a decree of specific performance may be entered it must affirmatively be made to appear that the consideration for the contract is adequate. Moreover, not only must this fact be established by competent evidence, but in order to sustain a judgment decreeing specific performance, there must be a finding of *facts* from which it appears that the consideration was adequate *as to the defendant*. In the absence of such evidence or finding, a decree of specific performance cannot be sustained." (Emphasis included.)

Over the objection of appellants, respondent in an effort to establish the market value of the properties covered by the exchange agreement introduced in evidence, certified copies of the assessment roll of the County of Los Angeles for the year 1941 showing the assessed value of the properties in question. In overruling appellant's objection to the admission of this evidence, the trial court stated: "The court will take judicial notice of the fact that the valuation fixed by the assessor are a certain percentage of the actual value."

[1] For the purpose of establishing the market value of a piece of property, "the procedure which is recognized as proper is, for the witness when found to be qualified as an expert, to state, first, what is, in his judgment, the market value of the property. De Freitas v. Town of Suisun City, 1915, 170 Cal. 263, 149 P. 553, 555. On this, the examination in chief, *it may not be shown:* For what sum the property was assessed (San Jose, etc., R. Co. v. Mayne, 1890, 83 Cal. 566, 23 P. 522; Yolo Water, etc., Co., v. Edmands, 1920, 50 Cal.App. 444, 195 P. 463; McNulty v. Lawley, 1919, 42 Cal.App. 747, 184 P. 50); nor the value placed upon it by the appraisers in a probate proceeding. (See Central Pacific R. Co. v. Feldman, 1907, 152 Cal. 303, 92 P. 849); nor the price being offered for the property being condemned * * *; nor yet that offered or paid for lands in the neighborhood. * * * On cross-examination, however, questions may be asked about these various matters. * * * When evidence of sales, etc., is received on cross-examination, however, it is solely for the purpose of testing the value of the witnesses' testimony; it is not in itself evi-

dence of value of the property." City of Los Angeles v. Deacon, 119 Cal.App. 491, 493, 7 P.2d 378.

In De Freitas v. Town of Suisun City, supra, 170 Cal. at page 266, 149 P. 555, is stated the procedure by which the value of property may be proved: "By preliminary questions the examiner should elicit facts relating to the qualifications of the witnesses; for example, that he has seen and examined the land, or that he knows something of its character and condition, or the market values of land in that vicinity, if such values have been established, or the values of land similarly situated, and the like. He may, thereupon, be asked to give his opinion of its respective values * * *."

"While the opinions of witnesses qualified by their knowledge of values are competent, such witnesses cannot, upon the direct examination, be allowed to testify as to particular transactions, such as sales of adjoining lands, amounts offered and refused for adjoining lands or for the land in question or any part thereof, or amounts paid in other and like cases—notwithstanding those transactions may constitute the source of their knowledge." 10 Cal.Jur. 1027, sec. 282. See, also, Thompson v. Stoakes, 46 Cal.App.2d 285, 293, 115 P.2d 830.

Eliminating the assessor's record above referred to, the evidence respecting the value of appellants' property consists of the testimony of M. C. Trautwein and H. N. Wood.

Mr. Trautwein testified that he had lived in Pomona for 22 years and had been engaged in the real estate business for a period of eight years; that he was familiar with appellants' property and had appraised it in 1941; that he dealt in Pomona property and had sold property in that vicinity; that he was familiar with values in that locality and that $2,500 was the fair and reasonable market value of appellants' property as of July, 1941.

Mr. Wood, real estate broker and auctioneer, testified over the objection of appellants' that "there is nothing shown that this man made any inquiry as to sales in that vicinity"—that in his opinion the value of the Pomona property was between $2,000 and $2,500.

With respect to the value of respondent's property, Mr. Wood testified upon cross-examination that he sold the Monrovia property to respondent at an auction sale some four to six weeks before the exchange went into escrow for $300 subject to the mortgage of $2,500.

Mr. Roy A. Watts, a resident of El Monte, a real estate broker and builder, testified that he had been employed as an appraiser by the real estate department of Southern California Builders, a loan association, from May, 1933 to October, 1937; that for ten months prior to October, 1943, he had been leasing conversion units in California, Arizona and Wyoming for the Home Owners' Loan Corporation, and was familiar with the respondent's property in Monrovia, which he had inspected in June of 1941. This witness was permitted to give his opinion as to the value of this property over the objection of appellants that he had "not shown himself familiar with the value of property in that particular vicinity at the time of the transaction in 1941", because he testified that his estimate of value was "based purely on the fact of the physical conditions of that particular piece of property, the size of the lot, and the character of construction"; the "locality and surrounding territory" and "not on any personal knowledge of sales in that immediate vicinity in Monrovia." His estimate of the value of said property was given as $5,504.80.

Mr. C. H. Clark, who had been engaged in the real estate business, loans and insurance, for a period of 35 years at Monrovia, maintaining offices a block from respondent's property, testified that the value thereof was $2,800 as of July, 1941.

Mr. Bell, the owner of property adjoining that of respondent, testified he had been familiar with respondent's property over a period of ten years, and that "$1500 would be a big price for it."

The foregoing testimony was supplemented by photographs of the respective properties introduced in evidence, and by descriptions thereof given by the witnesses.

[2] Under the principles of law hereinbefore enunciated, the evidence respecting market value of the two properties was competent, hence the trial court was justified in finding that the two pieces of property were of equal value. Moreover, on the question of inadequacy of consideration, it appears from the record that appellants in exchange for their property having a maximum value of $3,000, plus $250 in cash, were to receive, subject to a mortgage for $2,500 a piece of property improved with a building containing bakery

equipment which had a value of at least $750.

[3] An examination of the entire record discloses evidence establishing that the exchange agreement here in question is just and reasonable as to both parties thereto; that the consideration therefor is adequate as to appellants and that their consent thereto was given freely and was not induced by fraudulent representations of the respondent. In this state of the record, the judgment decreeing specific performance is amply supported.

Appellants urge that the judgment is erroneous because while it requires full performance by appellants, it does not require respondent to convey to appellants the personal property and bakery equipment described in the exchange agreement. Respondent argues that the judgment is sufficient in form, but if insufficient, may be modified.

[4] Accordingly, the trial court is directed to require respondent to execute and deliver to appellants a bill of sale for the personal property described in the exchange agreement, and, as so modified, the judgment is affirmed.

DORAN, J., and DRAPEAU, Justice pro tem., concur.

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69 Cal.App.2d 432

SIMON NEWMAN CO. v. SANCHES et al.

Civ. 7129.

District Court of Appeal, Third District,
California.
May 31, 1945.

Rehearing Denied June 30, 1945.

1. Waters and water courses 🔑247(1)

Where deed to plaintiff showed a conveyance of a total acreage of 1,304.13, less excepted roadways, but failed to indicate the number of acres excepted for roadways, and there was no evidence as to the number of acres excepted for such purposes, a finding that the total acreage of plaintiff's land subject to apportionment of water was 1,177.614, was unsupported. Civ.Code, § 1104.

2. Waters and water courses 🔑247(1)

An apportionment of irrigation water based solely on relative number of acres which each owner possesses, without determining the quantity of water necessary for use on any portion thereof must depend upon an accurate estimate of actual number of acres in each parcel subject to similar irrigation, and that all of the land in each tract is susceptible of producing the same variety of crops, or that it may reasonably be used for similar purposes. Civ. Code, § 1104.

3. Waters and water courses 🔑247(1)

In apportioning water of irrigation ditch among several landowners, swampland which required no irrigation and would not be benefited thereby should not be considered. Civ.Code, § 1104.

4. Waters and water courses 🔑247(1)

Where there was no evidence as to acreage retained by plaintiff after conveying several tracts to defendants, and no evidence as to number of acres belonging to plaintiff which derived water from another ditch, or as to character of crops, an apportionment which allots plaintiff water for use on tract not irrigated from ditch involved, and which apportionment did not exclude swamp land therefrom, was inequitable. Civ.Code, § 1104.

5. Easements 🔑16

To convey an easement by implication, it must appear that the use which is appurtenant to the land was open, obvious, apparent, continuous and necessary at a time prior to severance of the property.

6. Waters and water courses 🔑247(1)

In apportioning water from an irrigation ditch on the acreage basis pursuant to an implied easement, it should appear that each acre participating in the award is susceptible of similar use for the production of crops or otherwise, and that each acre has acquired a right to the water pursuant to the implied easement for necessary beneficial use. Civ.Code, § 1104.

◆

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action by Simon Newman Company against Joe S. Sanches and others for apportionment of the water of a drainage and irrigation ditch, and for injunction. From the judgment, the defendant Eileen Sanches, a minor, by her guardian, Joe S. Sanches, and Joe S. Sanches and A. E. Sequeira appeal.

Reversed.

C. Ray Robinson and W. B. Treadwell, both of Merced, and Edward F. Treadwell, of San Francisco, for appellants.

John H. Machado, of San Jose, and H. K. Landram, of Merced, for respondent.

THOMPSON, Justice.

This is an appeal from a judgment apportioning the water of a drainage and irrigation ditch which was maintained for the benefit of a large tract of land from which the parcels involved in this suit were acquired. The deeds contained no specific reference to the ditch or water rights. It was assumed the water rights were conveyed pursuant to Section 1104 of the Civil Code as easements or appurtenances attached to the freehold and that the respective parties were entitled to correlative shares of the water for necessary use on the farms. On the theory that the water was necessarily used on all the separate parcels for similar purposes, it was apportioned on the basis of the relative number of acres which each parcel contained, except that about seventy acres of land "south of the slough described in paragraph X of the findings of fact" were excluded from participation therein. The appellants were enjoined from interfering with plaintiff's adjudicated share of the water.

The defendants Manuel W. Sanches and Edward Sanches were not served with process, and the court reserved jurisdiction to subsequently determine their correlative shares of the water. Eileen Sanches, a minor, appeared by Joe S. Sanches, her duly appointed guardian ad litem. Eileen Sanches, Joe S. Sanches and E. A. Sequeira only have appealed from the judgment.

The amended complaint alleges essential facts constituting a valid cause of action for apportionment of the water of a drainage and irrigation ditch maintained for the use and benefit of each portion of a large tract of land designated as the McPike Ranch which was subdivided and from which each defendant acquired his separate parcel. The evidence shows that Miller & Lux, Inc., owned a large tract of land in Merced and Stanislaus Counties, which included the McPike Ranch consisting of several hundred acres of land; that Miller & Lux, Inc., sold and conveyed the McPike Ranch to plaintiff, Simon Newman Company, in 1927. That ranch was conveyed to plaintiff by two deeds which failed to specifically mention an existing irrigation ditch or water rights therein. The deeds contained the usual provision for conveyance of all "tenements, hereditaments and appurtenances" belonging to the land. Miller & Lux, Inc., constructed and maintained a ditch through the McPike Ranch, called the "Miller Drain Ditch." It had been used for forty years for drainage and irrigation purposes for the benefit of that ranch and other contiguous properties. Into that ditch the excess surface and storm waters flowed. Pursuant to written contracts, excess water was piped into that ditch from the City of Newman and from the Golden Gate Creamery Company. The plaintiff, Simon Newman Company, subdivided the McPike Ranch and sold and conveyed several separate parcels thereof as follows: To Joe S. Sanches, April 15, 1929, 78.220 acres; to Joe and Rose Sanches, April 15, 1929, 80.819 acres; to A. M. Souza, April 15, 1929, 95.778 acres; to Joe S. Sanches, January 13, 1930, 26.961 acres; to J. T. Braza, January 16, 1934, 80.187 acres; to Joe M. Borba, August 23, 1937, 101.559 acres; and to Newman Swamp Rats, Inc., January 5, 1940, 8.00 acres, making a total of 471.524 acres of land. The deeds to these parcels of land merely contained the usual clauses conveying therewith all "tenements, hereditaments and appurtenances thereunto belonging." For their respective claims of correlative water rights both the plaintiff and the defendants relied upon the last-mentioned clauses with regard to appurtenances. Title to the water by adverse possession is not involved in this suit.

It appears, without substantial conflict, that subsequent to their purchases of said tracts of land the appellants constructed and maintained lateral ditches connected with the Miller Drain Ditch, together with a bulkhead, weir and three-foot standpipe, by means of which they diverted water therefrom and augmented their supply for irrigation purposes. The diversion devices, with the exception of the lateral ditches, were not installed until shortly before the commencement of this action. This suit was instituted and tried on the theory, as plaintiff's attorney conceded, that each party "should have correlative, equal rights in this (Miller Drain) ditch, or in this water."

The court adopted findings substantially as previously stated. The court further found that the conveyances were made "to include * * * tenements, hereditaments and appurtenances belonging to the lands conveyed, but subject to an easement for the said (Miller Drain) ditch and the flowage of water through the same;" that the ditch was intended to be used "for the irrigation of all of said land, except that portion of the 80.958 acre tract" conveyed to Joe S. and Rose Sanches, "which lies south of the slough that runs through said property" consisting of about seventy acres which were "irrigated from another ditch"; that the plaintiff retained and now owns 816.206 acres of said McPike Ranch, together with an easement in said Miller Ditch and the water flowing therein, as appurtenant thereto. Thereupon the court apportioned the water of said ditch for irrigation purposes and to water live-stock in the following determined proportions, to-wit: To Simon Newman Company the $\frac{816.206}{1177.614}$ share thereof; to Joe S. Sanches, Manual W. Sanches, Edward Sanches and Eileen Sanches the $\frac{10.000}{1177.614}$ share thereof; to Joe M. Borba the $\frac{101.559}{1177.614}$ share thereof; to E. A. Sequeira the $\frac{98.778}{1177.614}$ share thereof; to Joe S. Sanches the $\frac{146.071}{1177.614}$ share thereof; to Newman Swamp Rats, Inc., the $\frac{8.000}{1177.614}$ share thereof.

The court further found that in 1939 the plaintiff acquired by contract with the Gustine Drainage District the right to an undetermined quantity of water pumped from its land and discharged by said district into the Miller Ditch; that the defendants claimed the right to "all of the water of said ditch", and in pursuance thereof they have "constructed works" in said ditch and have diverted the water therefrom; that in 1943 defendants constructed a concrete box at the entrance of the Gustine Drainage District pipe which connects with the Miller Drain Ditch, thereby diverting all of said Drainage District water; that the defendants threaten to continue to divert all of said water from said ditch unless they are restrained from so doing.

Judgment was accordingly rendered, determining that plaintiff and the defendants are the owners of and entitled to their correlative shares of the water of said Miller Drain Ditch previously stated, for irrigation of their respective tracts of land and for the watering of livestock determined on the basis of the relative number of acres of land which such owner possesses. The appellants were enjoined from interfering with plaintiff's free use of its ascertained share of the water.

From that judgment Joe S. Sanches, Eileen Sanches and E. A. Sequeira have appealed.

The appellants contend that the findings and judgment are not supported by the evidence for the reasons that the deeds, by means of which plaintiff acquired title to the land involved in this litigation, conveyed no title or easement to water rights or ditch; that the court erred in apportioning the water on a basis of mere relative acreage of subdivided portions of the original McPike Ranch; that there is a total absence of proof of the number of acres which that ranch originally contained or of the number of acres retained by plaintiff; that the evidence is uncontradicted that a substantial part of the ranch was used and susceptible of use for producing clover and other products, while the balance was merely grazing land, except that an undetermined part thereof is swamp land which was wrongfully included in the relative acreage apportionment; that there is no finding of the relative quantity of water necessary for use on any portion of the properties involved; and that the court failed to determine an essential issue with respect to claimed damages for diverting water from the ditch.

We are of the opinion the findings and judgment are not supported by the evidence.

[1] The appellants contend that the court erred in finding that the total acreage of the McPike Ranch subject to apportionment of water was 1177.614, and that plaintiff is still the owner of 816.206 acres thereof. It is true that the deeds from Miller & Lux, Inc., to plaintiff show a conveyance of a total acreage of 1304.13, less excepted roadways. The deeds fail to indicate the number of acres excepted for existing roadways. We are unable to find any evidence of the number of acres which were excepted for road purposes. We must therefore

conclude there is no proof to support the finding that the McPike Ranch, as conveyed, consisted of 1177.614 acres.

There is evidence that the plaintiff subsequently subdivided and conveyed the following seven parcels of land:

To Joe S. Sanches	April 15, 1929	78.220 acres
To Joe S. and Rose Sanches	April 15, 1929	80.819 acres
To A. M. Souza	April 15, 1929	95.778 acres
To Joe S. Sanches	Jan. 13, 1930	26.961 acres
To J. T. Braza	Jan. 16, 1934	80.187 acres
To Joe M. Borba	Aug. 23, 1937	101.559 acres
To Newman Swamp Rats, Inc.	Jan. 5, 1940	8.000 acres
Total number of acres sold		471.524

[2] It is apparent that an apportionment of water based solely on the relative number of acres of land which each owner possesses, without determining the quantity of water necessary for use on any parcel or portion thereof, should depend upon an accurate estimate of the actual number of acres in each parcel subject to similar irrigation and that all of the land in each tract is susceptible of producing the same variety of crops, or that it may reasonably be used for similar purposes. Otherwise, the apportionment may not be deemed to be equitable. Rancho Santa Margarita v. Vail, 11 Cal.2d 501, 525, 81 P.2d 533. In the present case the only evidence that the several parcels of land may be used for the production of similar crops was the evidence of Thomas C. Mott, a Civil Engineer, who was called as a witness by plaintiff. He testified in that regard as follows:

"Q. You are familiar with the general type of soil through this McPike Place, are you? A. Yes.

"Q. And you are familiar with the irrigating of that type of land, the watering of it? A. Yes.

"Q. And taking the average of these various ownerships that are marked on the lands of Joe and Rose Sanches, Joe Sanches, the Souza place, the Borba place, and the Swamp Rats, how would you say this would be as to the amount of water that would be required, how would they compare? A. I don't know that there are any material differences in the irrigation requirements of one parcel as against another."

It is true that the evidence shows that the chief use of the several parcels of land was for grazing cattle. The evidence does show that clover, alfalfa and some other crops had been raised on some of the land. It fails to show what particular lands produced such crops, or how many acres were used for that purpose. The evidence also shows that some of the defendants also watered their livestock from the ditch in question. But it does not appear how many cattle were so watered.

Assuming, without so deciding, that the foregoing quoted evidence may be sufficient to support the necessary finding that all of said parcels of land were susceptible of producing similar crops and that they therefore require an equal amount of water per acre for irrigation purposes, the evidence appears to be fatally defective in failing to show the relative number of acres owned by plaintiff, or the number of acres of each parcel requiring irrigation. The court assumed that the McPike Ranch, for which it is claimed the water of the Miller Ditch was reserved as an appurtenance thereto, consisted of 1177.614 acres. There is no evidence to support that assumption. The only proof of the acreage of that ranch is found in the two deeds from Miller & Lux, Inc., to plaintiff. Those deeds purport to convey to plaintiff 1304.13 acres of land, saving and excepting therefrom "all that portion of aforesaid sixty foot road reservation lying within above described tract of land for use as public roads." Another roadway is also excepted from those conveyances. We are unable to determine how many acres of land were reserved to the grantor as roadways. The evidence does show that plaintiff sold seven parcels of land from the McPike Ranch aggregating 471.524 acres of land. From the foregoing it appears that the findings and judgment are not supported by the evidence, since it is impossible to determine how many acres of the McPike Ranch remain in possession of the plaintiff.

[3] Moreover, the evidence is uncontradicted that an extensive swamp, consisting of undetermined acreage, extends over and across a considerable portion of the

lands of both the plaintiff and the appellants. We must assume that swamp land is not entitled to be considered in apportioning the water, for it requires no irrigation and would not be benefited thereby. We are of the opinion the court erred in including that swamp land in its apportionment of water. We are unable to determine how many acres are included therein.

[4] Prior to the conveyance of the McPike Ranch from Miller & Lux, Inc., to the plaintiff, it was irrigated in part by water which flowed from the San Joaquin and Kings River Canal. The water from that source was specifically reserved by Miller & Lux, Inc., in their deed to plaintiff dated September 17, 1927. That deed provided that: "Party of the second part [Newman Company] shall acquire no right, title or interest in or to said water or the use thereof." Mr. Mott testified that Miller & Lux, Inc., abandoned that source of supply in 1929. He stated that the McPike Ranch was not thereafter irrigated from that source. Independently of the water which was formerly derived from that source, it satisfactorily appears that the Miller Drain Ditch was continuously maintained and supplied with water from other sources, as previously stated, from which portions of the McPike Ranch were irrigated. But it appears without conflict that the Miller Drain Ditch did not furnish water to irrigate "all of the McPike Ranch." The court found, and it is conceded, that ditch did not supply water for appellants' land "south of the slough." That land was irrigated by means of water from another ditch. The court excluded seventy-one acres of that portion of appellants' land from participating in the apportionment of water. But it is also undisputed that a portion of the land south of that same swamp, which was retained by plaintiff, was not irrigated by water from the Miller Ditch. Mr. Mott testified in that regard: "Q. * * * Now, it [water from the Miller Ditch] did not irrigate all of the McPike Ranch, did it? A. No." Mr. C. E. Hubbs, another of plaintiff's witnesses also testified in that regard: "A. It was impossible to get the water out of that ditch across that slough. Q. It was never used over there? A. No." In spite of the fact that a considerable number of acres of plaintiff's land south of the swamp was never irrigated from that Miller Ditch, they were included in plaintiff's total acreage which participated in the apportionment of water. There is no evidence of the number of acres belonging to plaintiff which lie south of the slough. But the maps indicate there are many acres south of that slough. We are persuaded the apportionment was inequitable in allowing plaintiff water for use on the undetermined number of acres south of the slough, which were not irrigated from that ditch, and because the acreage contained in the slough was not excluded from the apportionment. For those reasons and because there is an absence of evidence showing either the total number of acres in the original grant of the McPike Ranch, or the acreage retained by plaintiff which is subject to irrigation, the findings and judgment are not supported by the evidence.

It is not necessary to consider the numerous other assignments of error which the appellants urge on this appeal.

[5, 6] It is true, as the respondent asserts, that an open and obvious ditch which has been maintained for many years to uniformly irrigate an entire tract of land from which parcels have been sold and conveyed, may be benefited or burdened, by an implied easement, as appurtenant to each parcel for necessary, correlative irrigation purposes in favor of the grantor or the grantees. Civil Code, Sec. 1104; Palvutzian v. Terkanian, 47 Cal.App. 47, 190 P. 503; Kallenburg v. Long, 39 Cal.App. 731, 179 P. 730; Nay v. Bernard, 40 Cal. App. 364, 180 P. 827; Southern Pacific Co. v. Los Angeles Milling Co., 177 Cal. 395, 170 P. 829; 2 Kinney on Irr. and Water Rights, 2nd Ed., p. 1786, secs. 1005–1008; 1 Wiel on Water Rights, 3rd Ed., p. 592, sec. 553; 9 Cal.Jur. 957, sec. 11; 25 Cal. Jur. 1088, sec. 95; 28 C.J.S. Easements, §§ 30–33, p. 686; 58 A.L.R. 824, note. To convey an easement by implication, as the authorities uniformly hold, and in accordance with the rule announced in the text of 28 C.J.S., supra, it must appear that the use which is appurtenant to the land was open, obvious, apparent, continuous and necessary at a time prior to severance of the property. In apportioning water from an irrigation ditch on the acreage basis pursuant to an implied easement it should appear that each acre participating in the award is susceptible of similar use for the production of crops or otherwise, and that each acre has acquired a right to the water pursuant to the implied easement for

necessary beneficial use. We are of the opinion the record in this case does not adequately show those facts.

For the foregoing reasons, the judgment is reversed.

ADAMS, P. J., and PEEK, J., concur.

69 Cal.App.2d 348

HOLLANDER v. DENTON.

Civ. 3357.

District Court of Appeal, Fourth District, California.

May 28, 1945.

Rehearing Denied June 26, 1945.

Hearing Denied July 26, 1945.

1. Municipal corporations 🔑110, 302(4)

Under city charter providing that an ordinance should take effect at time indicated in ordinances, and that general ordinances should be published once in each two years in a book, provision as to publication was merely directory, and effective date of an ordinance establishing a street grade did not depend on publication.

2. Municipal corporations 🔑404(6)

In abutting property owner's action against subdivision owner for lowering of a city street grade, by introducing into evidence a duly certified copy of ordinance establishing street grade, which set forth fact of its adoption, and its effective date, together with a certified copy of the resolutions granting subdivision owner permission to grade the street, showing that resolutions were, on date specified, adopted by city council, subdivision owner met, at least by prima facie evidence, burden of justifying lowering of street grade under city's authority. Code Civ.Proc. § 1918, subd. 5; § 1963, subd. 15.

3. Municipal corporations 🔑404(6)

In abutting property owner's action against subdivision owner for lowering a city street grade, where ordinance establishing grade and resolutions permitting subdivision owner to grade street were, on their face, valid without publication, after subdivision owner introduced into evidence duly certified copies of ordinance and resolutions, burden of proof of want of publication rested on abutting owner denying validity of ordinance. Code Civ.Proc. § 1918, subd. 5; § 1963, subd. 15.

4. Municipal corporations 🔑302(4)

The publication of an ordinance establishing a city street grade or of resolutions permitting a subdivision owner to grade the street is not a prerequisite to their taking effect unless city charter or some other applicable law definitely makes such publication a prerequisite to their effectiveness.

5. Trial 🔑54(1)

In abutting property owner's action against subdivision owner for lowering a city street grade, where court, when ordinance establishing grade was offered in evidence, stated "I will admit the ordinance. As I see it, the ordinance has some evidentiary value as to the propriety of the work that was done, in view of the testimony," statement was not a limitation on purpose for which ordinance might be received, so as to preclude its being considered to establish subdivision owner's authority to lower the street grade in accordance with the ordinance.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action by Martha Hollander against Daniel M. Denton for the lowering of a street grade. From a judgment for defendant, plaintiff appeals.

Judgment affirmed.

Wm. J. M. Heinz, of San Diego, for appellant.

Lindley & Higgins, of San Diego, for respondent.

GRIFFIN, Justice.

Action for damages for the lowering of the grade of a street.

Plaintiff was the owner of the beneficial interest in four lots in "Overlook Heights" in San Diego. These lots border on a public street known as Dorcas Street (formerly Elenor Street) which furnishes access to plaintiff's property. The complaint alleges that defendant, on June 20, 1941, without legal authority, and without plaintiff's consent, negligently lowered, approximately two feet, the curb and street grade and destroyed the pavement and concrete curb of Dorcas Street in front of said lots, to plaintiff's damage in the sum of $3,000.

On February 5, 1940, defendant acquired 10.92 acres of land for subdivision purposes opposite Overlook Heights. Plaintiff had done certain improvements to the streets in Overlook Heights addition and was selling lots in that tract. On April 9, 1940, the City Council of San Diego adopted a resolution approving defendant's proposed subdivision "Dorcas Knoll". Defendant applied to the City Planning Commission for permission to lower the grade of Dorcas Street. Plaintiff was notified of a hearing on the matter and not only mailed a protest thereto but was present and objected to such proceedings.

Defendant answered plaintiff's complaint, denied generally the allegations thereof and by way of defense alleged that on June 18, 1940, the City Council passed Ordinance No. 1873, New Series, establishing the grade of Dorcas Street; that on August 20, 1940, the City Council, by Resolution No. 72059, granted permission to defendant to grade a portion of that street by private contract at his own expense to the official grade in accordance with a plat prepared by the City Engineer; that on April 16, 1941, defendant was notified to complete the improvement by May 15, 1941; that pursuant thereto, defendant employed a contractor to do the work and bring the grade of Dorcas Street to the grade required by the ordinance; that said work was done in a workmanlike manner and in accordance with the grade and plans specified and adopted by the City Council, and with the consent and approval of plaintiff.

The trial court found generally in accordance with the defense interposed by defendant; that no official grade had been established for Dorcas Street prior to June 18, 1940; that on that date the official grade was established by the City Council by Ordinance No. 1873, New Series; that defendant did the work in accordance with the plans and specifications prepared by the City Engineer under the supervision of the Department of Public Works; that on completion it was accepted by the city; that the amount involved in grading said street was less than $1,000; that in grading the street a section of the concrete curb, which was not on the grade, was removed and certain gas and water pipes which were not in service were removed; that the natural elevation of said street where it abuts plaintiff's lots was lowered approximately two feet. Judgment went for defendant and plaintiff appealed.

Plaintiff now argues that defendant failed to prove his affirmative defense, i. e., the passage, publication and existence of the legal requisites authorizing the lowering of the grade of Dorcas Street.

Defendant offered and there was received in evidence over objections a copy of the several resolutions above referred to as well as a copy of ordinance No. 1873, New Series, all of which were certified to by the City Clerk as true and correct copies of the resolutions and ordinance "as adopted by the Council of said City."

It is urged by plaintiff that defendant failed to prove the passage and publication of Ordinance No. 1873, New Series, as provided by law and by the City Charter. This is the principal point involved on this appeal.

Section 17 of the Charter provides "When Ordinances and Resolutions Take Effect * * * Emergency Measures. Ordinances making the annual tax levy and the annual appropriations ordinances and emergency measures, shall take effect at the time indicated therein. All other ordinances passed by the council shall take effect at the time indicated therein, but not less than 30 days from the date of their passage * * *

"Resolutions shall become effective immediately upon their passage, unless otherwise stated therein."

Section 18 provides that "within ten days after final passage each ordinance or resolution of a general nature shall be published at least once in such manner as may be provided by this charter or by ordinance." Section 20 provides that the City Council shall cause to be printed in book form all ordinances "of a general nature in force at the time of such publication" and when so published shall be received in all courts as prima facie evidence of due passage and publication.

It is argued that the ordinance involved was one "of a general nature" and was therefore required to be published; that since said ordinance was not published in book form or otherwise, and since the certificate of the City Clerk did not show that the ordinance was published, it therefore should be assumed "that the council abandoned the passage" of it, and that the resolutions or ordinances adopted without publication were void, citing San Francisco v. Buckman, 111 Cal. 25, 43 P. 396; and City of Napa v. Easterby, 61 Cal. 500.

[1, 2] The provisions of section 20 of the City Charter in reference to the publication of ordinances of a general nature at least once in each two years in a book of ordinances is merely directory. The ordinance here involved, according to the certified copy, was passed and adopted on June 18, 1940, and was ordered to take effect 31 days thereafter. It sets forth the ordinance in full and shows the necessary signatures thereto, together with the names of the councilmen voting for and against its adoption. The resolutions, under the charter, were effective immediately on passage. Unlike the cases relied upon by plaintiff, the effective date did not depend upon the fact of publication. We are satisfied that the defendant met, at least by prima facie evidence, the burden placed upon him of justifying the act done, under the authority of the city, by introducing into evidence a duly certified copy of the ordinance establishing the grade, which set forth the fact of its adoption, and its effective date, together with a certified copy of the resolutions showing that they were, on the date specified, "adopted by the City Council". Merced County v. Fleming, 111 Cal. 46, 43 P. 392; People v. Baldwin, 117 Cal. 244, 49 P. 186; Sec. 1918, subd. 5, Code Civ.Proc.; People v. Zimmerman, 11 Cal. App. 115, 119, 104 P. 590; Sec. 1963, subd. 15, Code Civ.Proc.

[3, 4] The ordinance and resolutions were therefore, on their face, valid without publication. The burden of proof of want of publication under the circumstances here related, rested upon the one who denied the validity of the ordinance. Brougher v. Board of Public Works, 107 Cal.App. 15, 290 P. 140. It has been repeatedly held by the courts of this state, that the publication of an ordinance or resolutions of the character here involved, is not a prerequisite to their taking effect unless the provisions of the charter or some other applicable law definitely makes such publication a prerequisite to their effectiveness. Pacific P. Ass'n v. Huntington Beach, 196 Cal. 211, 221, 237 P. 538, 40 A.L.R. 782; Gay v. Engebretsen, 158 Cal. 21, 26, 109 P. 876, 139 Am.St.Rep. 67; City of Sacramento v. Dillman, 102 Cal. 107, 111, 36 P. 385; McQuillin Municipal Corporations, Second Series, Vol. 2, sec. 734, pp. 809–813.

The evidence supports the finding that the improvement was done with legal authority in accordance with the plans and specifications of the city, under its direction, and to the grade specified in the ordinance.

[5] It is next contended that in receiving the ordinance into evidence the trial court limited the purpose for which said ordinance might be considered. When the ordinance was offered in evidence the court stated: "I will admit the ordinance. As I see it, the ordinance has some evidentiary value as to the propriety of the work that was done, in view of the testimony." We do not construe the statement of the court as being a limitation upon the purpose for which the ordinance might be received so as to preclude its being considered to establish the authority of the defendant to proceed with the work in accordance with the grade therein established. The finding that the plaintiff is not entitled to recover damages is fully supported by the evidence.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

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69 Cal.App.2d 441

Ex parte CASPERSON et al.

Cr. 1904.

District Court of Appeal, Third District, California.

May 31, 1945.

1. Food 🔑12, 15

The statute prohibiting sale, etc., of inedible or mislabeled eggs absolutely prohibits the acts mentioned, irrespective of knowledge or intent of person charged, and mere commission of the prohibited act, regardless of intent or knowledge, is sufficient to constitute the crime denounced. St.1939, p. 2416, § 1103; St.1937, p. 1988, § 1107.

2. Partnership 🔑175

In prosecution for shipping inedible and mislabeled eggs into county, that partner who was general manager had no personal knowledge of the particular transactions, and that negotiations relative to sale were carried on solely by another partner, was no defense. St.1939, p. 2416, § 1103; St.1937, p. 1988, § 1107.

3. Food ⚿12, 15

Statute prohibiting the sale, etc., of inedible or mislabeled eggs was intended to cover whole field from producer to consumer and it applied to sale or transfer of eggs between wholesalers. St.1939, p. 2416, § 1103.

4. Food ⚿12, 15

That eggs were bought by another wholesaler "as is" was no defense to prosecution of wholesaler for shipping inedible and mislabeled eggs into county, where there was no contention that the eggs were not to be resold but they were manifestly bought for resale and ultimate consumption. St.1939, p. 2416, § 1103; St.1937, p. 1988, § 1107.

5. Statutes ⚿158, 159

Repeal of statutes by implication is not favored, and, to overcome presumption against repeal by implication, the two acts must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operations; but, where such conditions obtain, an intention to repeal the prior act is necessarily implied.

6. Statutes ⚿167(1)

Amendment approved July 18, 1939, and which amended numerous sections of code and changed entire subject matter of section prohibiting the sale, etc., of inedible and mislabeled eggs superseded amendment approved May 25, 1939, which amended the section merely to include an exemption of eggs in the possession of a wholesaler, since the later amendment was an all inclusive expression of legislative intent upon the subject. St.1939, p. 1493, § 1104; St.1939, pp. 2416, 2417, §§ 1103, 1104; Const. art. 4, § 24.

Application by L. O. Casperson and another for writ of habeas corpus.

Writ discharged and petitioners remanded.

J. Thaddeus Cline and Clifton E. Brooks, both of San Francisco, and Robert A. Zarick, of Sacramento, for petitioners.

Robt. W. Kenny, Atty. Gen., Ralph H. Cowing and Ariel C. Hilton, Deputy Attys. Gen., and John Quincy Brown, Dist. Atty., and John B. Heinrich, Asst. Dist. Atty., both of Sacramento, for respondent.

PEEK, Justice.

Two misdemeanor proceedings are involved in this controversy. In the first, petitioner L. O. Casperson was charged with the violation of section 1103 of the Agricultural Code St.1939, p. 2416, in that he shipped into Sacramento county inedible eggs, while in the second action both L. O. and E. G. Casperson were charged jointly in two counts under said section. First, with shipping inedible eggs into Sacramento county, and second, with shipping mislabeled eggs into said county. The actions were consolidated for the purpose of trial, and at the conclusion thereof the petitioners were found guilty as alleged in both complaints. From such convictions they appealed to the appellate division of the Superior Court of said county, which sustained the judgments of conviction. By habeas corpus they now seek their discharge.

Both petitioners are members of the firm of O. Casperson & Sons of San Francisco, wholesale dealers in butter and eggs. They and three brothers actively operate and conduct the business of said partnership, of which L. O. Casperson is the managing director. The eggs were purchased by telephone from E. G. Casperson by Kay Wilson, a wholesale egg dealer of Sacramento, California. On or about November 4, 1943, Mr. F. E. Trimble, Agricultural Inspector of the County of Sacramento, inspected the eggs involved in the first complaint and found 8.8% of the entire lot to be inedible. On December 11, 1943, he inspected the eggs involved in the second complaint and found them to be mislabeled.

The first issue raised by petitioners is that there is no evidence in either proceeding establishing the guilt of L. O. Casperson, the general manager of the partnership, that the evidence admittedly discloses he had no personal knowledge of the particular transactions and that all negotiations relative to the sale of the eggs were carried on solely by E. G. Casperson. To this contention respondent replies that violation of pure food laws is an offense wherein no affirmative proof of criminal intent or guilty knowledge is required; that it is the act itself and not the intent that determines the guilt; that the distribution of food unfit for human consumption is an act potentially detrimental to human life and health, hence a dangerous act, and cannot be made innocent or harmless by the want of knowledge or good faith.

Petitioners, however, argue that the question of intent is of no consideration to the point so raised; that petitioner L. O. Casperson cannot be held merely because he was a partner of another who committed a violation of the statute, and in support of such contention rely upon the cases of People v. Maljan, 34 Cal.App. 384, 167 P. 547, and People v. Schomig, 74 Cal.App. 109, 239 P. 413.

The two cases so cited by petitioners are of no assistance to a determination of the questions herein raised. The first case held that a member of a partnership who feloniously converts to his own use funds which have come into his hands as a member of the partnership may be guilty of embezzlement—a crime wherein the word itself has a significant meaning and implies a fraudulent intent (10 Cal.Jur. 260), and obviously, therefore, the party charged must be the individual partner who converts the funds. In the second case the constitutionality of an act relating to real estate brokers was attacked, among other things, on the ground that it was discriminatory in that no penalty was provided for the violation thereof by a partnership. The court therein properly held that generally as regards criminal responsibility a partnership is not recognized as a person separate from its component members in the sense that a corporation is a separate entity, and therefore cannot commit a crime, but that guilt attaches to the delinquent members subject to certain qualifications.

[1] With such statements of the law in relation to partnerships there can be no complaint. However, in the present case we are dealing with a so-called pure food law, where neither intent nor knowledge are made essential elements of the crime, and therefore no showing in that regard need be made. Here the legislature, under its broad police powers, has determined that "It is unlawful to prepare, pack, place, deliver for shipment, place in storage, deliver for sale, store, load, ship, transport, or sell in bulk or in containers or subcontainers" inedible or mislabeled eggs. Sec. 1103. From a reading of that portion of the act it is immediately apparent that the purpose of the legislature in enacting the same was to absolutely prohibit the enumerated acts relating to inedible or mislabeled eggs, irrespective of the knowledge or intent of the person charged. Having so prohibited such acts and denounced them as criminal (Sec. 1107, St.1937, p. 1988), the mere commission of the prohibited act, regardless of the intent or knowledge with which it was committed is sufficient to constitute the crime so denounced. People v. Pera, 36 Cal.App. 292, 171 P. 1091; 36 C.J.S., Food, § 22, p. 1078.

Such laws do not "make a dealer liable for a crime committed by another, nor do they make him criminally responsible for accidents or deeds beyond his control, but they do hold him, criminally as well as civilly, accountable for the quality of the goods which he sells. If he undertakes to sell food for human (and in many cases other) uses, he must sell pure and not adulterated food; that is his responsibility, fixed by law. * * * His act in selling food, if he voluntarily engages in that business, is deliberate, willful, intentional, and knowing." People v. Schwartz, 28 Cal.App. 2d Supp. 775, 778, 70 P.2d 1017, 1018; Weigand v. District of Columbia, 22 App.D.C. 559; People v. Kibler, 106 N.Y. 321, 12 N.E. 795.

If the rule were otherwise, pure food laws would be of small consequence and no deterrent whatever to the commission of the acts similar to those with which petitioners herein are charged. As the court stated in People v. Kibler, supra, experience has taught the lesson that in regard to pure food laws repressive measures which depend for their efficiency upon proof of the dealer's intent and knowledge are of little use and rarely accomplish their purpose; that, therefore, under such circumstances, legislation which casts upon the dealer the entire responsibility for the purity of the article he offers for sale, is entirely justified.

[2] We do not believe it was the legislative intent that a dealer should escape the prohibitions of the act by showing that a clerk made the sale, as in the Schwartz case, or that it was unauthorized or without his knowledge. Nor can we believe the legislature intended that partners could evade the act by a similar showing. Although our attention has been directed to no case wherein the precise point as regards a partnership has been directly passed upon in this state, it has been approved in some of the earlier decisions in other jurisdictions. See Whitton and Ford v. State, 37 Miss. 379; Robinson & Warren v. State, 38 Ark. 641; Waller v. State, 38 Ark. 656; Edgar et al. v. State, 45 Ark. 356; Ellison et al. v. Commonwealth, Ky.,

69 S.W. 765; Bayles v. Newton, 50 N.J. L. 549, 18 A. 77.

To hold that a partner should be held liable only when the sale was made by him or in his presence, or with his knowledge or consent, would be to judicially establish a way of easy escape. Particularly would this be true when we consider the community of interest between the partners, and also, as in the present case, where the original order was placed by telephone thereby rendering the identification of the seller practically impossible if such evasion was desired. It, therefore, is obvious that to sustain petitioners' contention in this regard would be to completely nullify the act insofar as partners are concerned. Groff v. State, 171 Ind. 547, 85 N.E. 769, 17 Ann.Cas. 133.

[3] Petitioners further contend that the sale or transfer of eggs between wholesalers, particularly where, as in the present case, the eggs were purchased "as is", is not a public offense, even though the eggs may be incdible or mislabeled, in that the "egg law is strictly a consumers' law", and that the argument of respondent which would have required the candling of the eggs in question by petitioners prior to the shipment to the wholesaler Wilson would have accomplished nothing, as he in turn likewise would have had to candle the eggs before selling them to a retailer. Petitioners then conclude that to so argue is to assume that the legislature intended to place upon wholesalers frivolous and ridiculous burdens, and if this be true the provision is thereby unreasonable and invalid. We find no merit in this contention.

From the last quoted portion of section 1103 it is evident that the legislature desired to cover the whole field from producer to consumer. It is likewise apparent that the legislature wisely anticipated that the best and most effective method to insure good eggs, properly labeled, was to prohibit all of the enumerated acts in relation to inedible or mislabeled eggs as set forth in said section at every stage from producer to consumer. People v. Wilson & Co., 138 Misc. 440, 246 N.Y.S. 111. The act, therefore, is no more a consumers law than it is a producers, a wholesalers, or a retailers law. In other words it is an act designed to keep every phase of the egg business free of inedible and mislabeled eggs.

[4] No contention is made that the "as is" purchase of the eggs, was because the eggs were not to be re-sold. Manifestly they were purchased for re-sale and ultimate consumption. Even if this were not true such argument would be of no avail to petitioners, for the act contains no exemptions or qualifications in this regard.

Petitioners' final contention involves the construction of two chapters of the Statutes of 1939 relating to the Agricultural Code. Prior to the 1939 session of the California Legislature, section 1103 of said code read as follows:

"It is unlawful to sell chicken eggs in containers or subcontainers unless each container and subcontainer is marked with the following:

"(a) The full, correct and unabbreviated designation of size, followed by designation of quality, of the eggs therein according to the standards as prescribed in this article;

"(b) The name and address of the producer, wholesaler, retailer or agent by or for whom the eggs were graded or packed." Ch. 709, p. 1984, Stats.1937.

Section 1104 of said code, prior to said session of the legislature, contained the following provisions:

"It is unlawful to prepare, pack, place, deliver for shipment, place in storage, deliver for sale, store, load, ship, transport or sell, in bulk or in any container or subcontainer:

"(a) Eggs for human consumption: (1) which contain black spot, black rot, white rot, adherent yolk, bloody or green white, blood or embryo chicks; (2) or which are addled, moldy, filthy, decomposed, putrid, or otherwise unfit for human food.

"(b) Eggs which are mislabeled.

"(c) Eggs which are deceptively packed, placed, arranged or displayed.

"Eggs being delivered to a wholesaler in the State for candling, grading or storing are exempt from the provisions of this section.

"The owner or person in possession of eggs which are to be used or disposed of as herein provided, or as provided in section 1103.2, must, upon the demand of any enforcing officer, give to such officer a sworn statement in writing made before a notary public specifying that the eggs were packed for such disposal." Stats.1937, Ch. 709, p. 1985.

At said session two bills were proposed. The first was introduced on January 13, 1939, and upon its introduction was designated as A.B. No. 599. It passed both houses of the legislature, was approved by the Governor on May 25, 1939, was filed with the Secretary of State on May 26th, and became Chapter 235, page 1493, of the Statutes of 1939. By its provisions the next to the last paragraph of said section 1104 was amended merely to include the additional exemption of eggs "in the possession of" a wholesaler.

The second bill was introduced on January 24, 1939, and was numbered A.B. 1664. After several amendments it likewise passed both the Assembly and Senate, was approved by the Governor on July 18th, was filed with the Secretary of State on July 22nd, and became Chapter 834, page 2413, of the Statutes of 1939. This bill was amendatory of numerous sections of said code, including sections 1103 and 1104 and changed the entire subject matter of the last mentioned section.

Although both bills were approved and chaptered as previously stated, Chapter 834 is the only one which appears in the Agricultural Code; Chapter 235 appears solely in the Statutes of 1939.

In support of their final contention petitioners argue that in any event the terms and provisions of sections 1103 and 1104 as amended by the two bills are in no way repugnant to each other and that an earlier statute is not repealed by a later enactment unless such an intention clearly appears in the language of the latter or if the two cannot be reconciled.

[5] It is true that the repeal of statutes by implication is not favored (Boyd v. Huntington, 215 Cal. 473, 11 P.2d 383; Hammond v. McDonald, 32 Cal.App.2d 187, 89 P.2d 407), and that to overcome the presumption against repeal by implication the two acts "must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operations." Penziner v. West American Finance Co., 10 Cal.2d 160, 74 P.2d 252, 260. However, where such conditions obtain, obviously an intention to repeal the prior act is necessarily implied. Mansfield v. Chambers, 26 Cal.App. 499, 505, 147 P. 595.

By the second bill, A.B. No. 1664, all reference to wholesalers as originally provided in Section 1104 and as amended by the first bill, A.B. No. 599, was completely eliminated, so that the section as amended finally recites in its entirety that "It is unlawful to sell to retailers or consumers, eggs ungraded as to quality or size." The remaining portions of Section 1104 as they stood prior to amendments and revisions by A.B. No. 1664 (excluding the exemption of wholesalers) are substantially incorporated in the amendments by said bill, A.B. No. 1664, to Section 1103.

In addition thereto Section 10 of the last mentioned bill declarees that "Section 1104 of said code is hereby amended to read as follows" and the section amended is then set forth as previously quoted. Apropos of this, Section 24, Article IV of the Constitution provides in part: "No law shall be revised or amended by reference to its title; but in such case the Act revised or section amended shall be reenacted and published at length as revised or amended." Under this provision it has been held that such an amendment operates as a repeal of those parts of the statute or section which were not specifically enacted. This court, in construing a similar question, stated:

> "There is no shade of difference in meaning, under the rules governing the construction of statutes, between the 'revision' of a particular act, or a section thereof, 'to read as follows,' and the 'amendment' of the same act or section 'to read as follows.' In either case it is clear that the revising or amending act is intended as a substitute for the original statute or section, continuing in force that which is reenacted and repealing what is omitted." Pierce v. County of Solano, 62 Cal.App. 465, 469, 217 P. 545, 546.

This court further held in the later case of Shearer v. Flannery, 68 Cal.App. 91, 94, 228 P. 549, 550, that:

> "Under the provisions of this section it is clear that the amendment of a statute or section operates as a repeal of those parts of the statute or section which are not re-enacted."

[6] We are convinced that a reading of the two bills at once discloses that the legislature originally desired to exempt wholesalers from the provisions of the Agricultural Code; whether on the theory as contended by petitioner, that such provisions were for the benefit of the consuming public, is immaterial, for by the provisions

of A.B. No. 1664, the legislature formulated a new procedure complete in itself, for the protection of the consumer by eliminating all possibility of inedible or mislabeled eggs reaching the ultimate consumer. Therefore, by Chapter 834, the earlier declaration of the legislature expressed in Chapter 235 was completely superseded by an entirely new and all inclusive expression of legislative intent upon such subject. As such it must prevail, and whatever was excluded from the previous enactment by said Chapter 834 must be ignored. Penziner v. West American Finance Co., supra; Mack v. Jastro, 126 Cal. 130, 58 P. 372.

The writ is discharged and the petitioners are remanded.

ADAMS, P. J., and THOMPSON, J., concur.

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69 Cal.App.2d 496

BOOTH v. BOOTH.

Civ. 12772.

District Court of Appeal, First District, Division 2, California.

June 8, 1945.

Rehearing Denied July 7, 1945.

Hearing Denied Aug. 6, 1945.

1. Divorce 🔑303(3)

In proceeding to modify a provision in divorce decree for custody of a minor child, moving party has the burden of proving that conditions have so changed as to justify the modification.

2. Divorce 🔑312

All presumptions are in favor of the reasonableness of provision in divorce decree for custody of a minor child, and in absence of a showing that compels conclusion that decree should be modified, an appellate court cannot interfere with trial court's refusal to modify decree.

3. Divorce 🔑303(3)

Mother's contention that welfare of 12 year old daughter would be promoted by modification of provision in divorce decree awarding to father custody of daughter, then two years of age, so as to award custody to mother was not supported by the record.

4. Divorce 🔑303(2)

Where father having been awarded custody of two year old daughter gave her exceptional advantages of education and care in his home with his parents for almost eight years until he was called to military service, his induction into military service did not constitute such a change in conditions as would justify modification of divorce decree by awarding custody of daughter, then 12 years of age, to mother. Soldiers' and Sailors' Civil Relief Act of 1940, § 1 et seq., 50 U.S.C.A.Appendix, § 501 et seq.

5. Divorce 🔑303(2)

Mother was not entitled as a matter of law to custody of 12 year old daughter merely because father had been inducted into military service, though court in granting mother a divorce and awarding to father custody of child, then two years of age, made no written findings as to mother's fitness to have custody of child. Soldiers' and Sailors' Civil Relief Act of 1940, § 1 et seq., 50 U.S.C.A.Appendix, § 501 et seq.

6. Divorce 🔑303(3)

In proceeding for modification of divorce decree, evidence established without conflict that best interests of 12 year old daughter who was placed in father's custody when two years of age required that she should not be removed from the exemplary care and surroundings which she enjoyed in his custody.

◆

Appeal from Superior Court, Santa Clara County; Wm. F. James, Judge.

Action by Lillian Catherine Booth against Walter Sherman Booth, wherein an interlocutory decree of divorce was granted plaintiff without contest, and custody of a daughter was awarded to defendant. From an order denying her motion to change the award of custody of the minor child of the parties, plaintiff appeals.

Order affirmed.

Campbell, Hayes & Custer and Robert E. Hayes, all of San Jose, for appellant.

Byrl R. Salsman, of Palo Alto, for respondent.

NOURSE, Presiding Justice.

The plaintiff appeals from an order of the superior court denying her motion to change the award of custody of a minor child of the parties.

In September, 1934, an interlocutory decree of divorce was granted plaintiff without contest in which the custody of their two year old girl was awarded to the defendant father. In June, 1938, the plaintiff moved for an amendment of the decree relating to the custody of the child and her motion was denied. In January, 1944, another motion was made for the same purpose and denied. This is the subject of the appeal.

The grounds of the motion are that the circumstances had changed since entry of the former award; that plaintiff now has a comfortable home where she lives with her second husband and a six year old son born of the second marriage; that defendant is in the United States Army and has placed the child in the home of his parents; that the child had reached the age when she needs the guidance and counsel of her natural mother and that this was for the best interest "mentally, physically and morally" of the child. The counsel who had represented the defendant in all the former proceedings appeared in response to the motion and requested a continuance under the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A.Appendix § 501 et seq., because of the defendant's absence in the military service. In denying this request the trial court notified all parties that if the plaintiff should establish any ground for a consideration of her motion the application of defendant for a continuance would be granted. The plaintiff was then given every opportunity to present her case "that conditions have so changed as to justify the modification", Prouty v. Prouty, 16 Cal. 2d 190, 193, 105 P.2d 295, 297. The trial court in its judgment found that a modification was not justified, and the controlling question on this appeal is whether such finding was such an abuse of discretion that the appellate court should assume the function of a court at nisi prius and try the issues of fact.

There is little dispute in these facts. The parties were married when both were young and were soon separated. The plaintiff's parents are unknown. The defendant lives with his parents and this has been the home of the minor almost from her birth when the plaintiff tossed the baby into the care of its paternal grandmother and refused to give her any further care or attention. The offer of defendant in this hearing to prove that during the marriage the plaintiff had committed numerous acts of adultery was rejected. The same trial judge had heard the divorce proceeding, and a former motion, and was cognizant of the entire background upon which the controversy between the parties was based.

At the close of the hearing the trial judge filed an opinion and order which affirmatively finds that the conditions do not justify a modification of the decree, and gives the reasons for so holding. We quote with approval the following:

"On September 7th, 1934, this Court gave its interlocutory decree of divorce in the above case; and therein awarded the custody of the minor daughter of the parties to the Defendant father. The child, Barbara May Booth, was then only two years of age.

"At that time, and continuously ever since, the Defendant has had and maintained his residence at the home of his mother, Mrs. Sydney Portner; and he kept and maintained the child, Barbara, there.

"In 1938, the Plaintiff—having in the meantime remarried—applied to this Court for an order changing the custody of Barbara from the Defendant father to the Plaintiff mother.

"This motion was, after a full hearing denied by the Court.

"There were no written findings made at any of the three Court actions.

"On July 1st 1942, the Defendant was drafted into the military service of the United States of America; and on or about February 1st 1943, was detailed to service abroad. He is still in service abroad.

"On February 4th, 1944, the Plaintiff filed herein another application to have the custody of Barbara given to her.

"This motion came on for hearing before this Court, without the presence of the Defendant, and without any notice to him thereof."

"The Plaintiff contends that there has never been any finding by the Court of her unfitness to have the custody of her child, and that therefore her rights in the matter are equal to rights of the Defendant. Assuming, without conceding those contentions, it would logically follow that the Defendant's rights in these regards would be at least equal to hers. And this would call for such a hearing as would give each of the contending parties an equal opportunity for presenting his or her case. This opportunity is not being had by the Defendant under the existing conditions."

"The child now twelve years of age is well, strong, and healthy. She is receiving most excellent care and education and training—is attending Miss Harker's School, which is an exceptionally high class girls school; and is apparently quite happy and contented. The home in which she lives is her father's home to which she was taken by him, when he was awarded her custody, and where he has ever since maintained her. She is receiving now the same care, the same maintenance, training and education she has been receiving continuously for the past ten years, and all under the father's custody. During that ten years, her contacts with the Plaintiff have been few—not more than three or four times in the ten years. Her mother is really a stranger to her. The Plaintiff, after her divorce from Defendant, left this part of the state, remarried, has a six year old son by her present husband; and has been living in Southern California with her new family most of these intervening years.

"I can find in these conditions no reason for urgency of action on the pending motion for change of custody of Barbara. I am of opinion the hearing on the motion should be stayed until the Defendant can be present in Court in person.

"Plaintiff contends that she is entitled, as a mother of right to the custody of Barbara, on the basis the father is unable to care for the child and has left her with his mother—that there has never been any finding that Plaintiff is not a fit person for such custody—and finally that the grandmother has no rights in the premises as against the mother.

"The authorities cited to support these contentions are neither compelling or persuasive.

"This is not a contest between the mother of a child, and the grandmother of that child. The grandmother has no custody nor claims any. The custody is in the father; and the child is in his home, being maintained, trained and educated in accordance with his directions, and still under his control—notwithstanding his enforced temporary absence in an honored cause.

"Nor is there any force in the Plaintiff's contention that, because no written findings have been made herein, her fitness has never been in question. It has been held repeatedly that such findings are not necessary, in a contest between the parents over the custody of a minor child.

"Our statute provides that—other things being equal—the custody of a child of tender years should be given to the mother. This is expressly so in the case of a female child.

"Yet in the instant case, the child Barbara—then only two years of age was taken from the mother, and given to the father. That order of this Court was acquiesced in, without appeal or further action, for some four years; and, after one move for change of custody, continued for six years longer.

"The presumption attaching to the Court action would be that it was properly taken, and that it was justified by the facts made known to the Court. It was not necessary that those facts should be stated.

"To take this young girl from the only home she has ever known, and from an environment which is as favorable to her development and education as could very well be devised, and send her away to live with a strange new family in a strange new community, would be against the best interest of the child * * *."

[1, 2] The soundness of these views rests in the principle heretofore stated that the burden is on the moving party to prove the justification for the modification of the decree. In Prouty v. Prouty, 16 Cal.2d 190, 193, 105 P.2d 295, the supreme court thus stated the rule: "It must be borne in mind that in every proceeding to modify a provision for the custody of a minor child the burden is on the moving party to satisfy the court that conditions have so changed as to justify the modification. All presumptions are in favor of the reasonableness of the decree, and in the absence of a showing that compels the conclusion that the decree should be modified, an appellate court cannot interfere with the trial court's refusal to modify it. Gavel v. Gavel, 123 Cal.App. 589, 11 P.2d 654." To the same effect are Foster v. Foster, 8 Cal.2d 719, 726, 68 P.2d 719; Olson v. Olson, 95 Cal.App. 594, 597, 272 P. 1113; 19 Cor.Jur. p. 350.

[3] Appellant's argument that the court "erred as a matter of fact" because the child's welfare would be promoted by a modification of the order is not supported by the record. All the competent evidence

is to the contrary. The testimony upon which appellant relies consists of conjectures and intimations not based upon any fact. The evidence discloses an unusual case where the father and his parents have given the child exceptional advantages of education and care, special lessons in music, religious and social training, and the enjoyment of good companions none of which were shown to be available under appellant's care.

[4] This leaves no ground for a claim of "changed conditions" except the fact of respondent's induction into the military services. If it be the law that a father who has had legal custody of his daughter for more than thirteen years and has provided her the best of care, education and training may be deprived of that custody just because he has been inducted into military service then the reason for the Soldiers' and Sailors' Civil Relief Act becomes apparent and the father should be allowed his day in court. Otherwise that Act becomes a mere psuedo-patriotic gesture to be used at the whim of the trial judge under the appellation of "judicial discretion."

[5] But the appellant argues that as a matter of law the court erred because she is "entitled" to the custody in the absence of a finding of unfitness. This is not the law of the cases cited. Stever v. Stever, 6 Cal.2d 166, 170, 56 P.2d 1229, 1231, was a contest between the mother of a minor child and its paternal grandparents. When the parties were divorced no disposition was made as to the custody of the minor. Four years later, upon application of the child's father, the court awarded its custody to his parents. In reversing the order the Supreme Court said: "But before the court can deprive the mother of her right to the minor's custody and give her into the charge of strangers, there must be a finding that the mother is an unfit person to have the custody of her child." Eddlemon v. Eddlemon, 27 Cal.App.2d 343, 80 P.2d 1009; In re White, 54 Cal.App.2d 637, 129 P.2d 706; In re Guardianship of De Ruff, 38 Cal.App.2d 529, 101 P.2d 521; and Roche v. Roche, 25 Cal.2d 141, 152 P. 2d 999 were contests between a parent of the child and its grandparents. The philosophy of all these cases is based upon the early rule of In re Campbell's Estate, 130 Cal. 380, 62 P. 613, that the right of a parent to the use of a minor child is a right of property of which a parent cannot be deprived unless the court finds that he or she is "unfit." These authorities are not applicable here because, as pointed out in the opinion of the trial court, no findings were required and none were made when the final decree was entered. But it may be presumed from the fact that the plaintiff, though awarded the decree of divorce, was denied the custody of the child that the court then deemed her unfit. That she was saved the stigma of a finding of "unfitness" does not avail her now. In her present application the burden was on her to show that there was such a substantial change in the circumstances that the trial court was left with no discretion to determine what was for the best interest of the child, but that it was the duty of the court to modify the award because, and only because, the father was called to participate in the military services. It cannot be possible that the authorities cited by the appellant were intended to support her argument that a father of a minor child should be penalized with an order depriving him of custody just because he has undertaken to take his part in the national defense.

[6] If the rule of the earlier cases that "the good of the child is regarded as the controlling force," Crater v. Crater, 135 Cal. 633, 634, 67 P. 1049, 1050, is still applicable in a controversy of this type, then the order must be affirmed for the further reason that all the evidence, without the least conflict, demonstrates that the best interests of the child require that she should not be removed from her present exemplary care and surroundings.

The order is affirmed.

STURTEVANT, J., and DOOLING, J., pro tem, concur.

69 Cal.App.2d 416

PEOPLE v. AUGE.

Cr. 3863.

District Court of Appeal, Second District, Division 3, California.

May 29, 1945.

Hearing Denied June 28, 1945.

1. Criminal law ⚿829(1)

Refusal of requested cautionary instructions with respect to testimony of prosecutrix in rape prosecution covered by other instructions given was not error.

2. Criminal law ⚿822(1)

In rape prosecution, where part of instruction criticized by defendant instructed that jury should consider the matter as calmly, dispassionately, and deliberately as they would any other accusation, such part should be considered with direction immediately following that jury should carefully and guardedly weigh, analyze and consider the testimony against defendant so that the instruction as a whole was not erroneous.

3. Criminal law ⚿804(1)

In rape prosecution, it was not error to instruct jury orally without stipulation therefor. Pen.Code, § 1127.

4. Criminal law ⚿768(1), 1172(2)
Rape ⚿59(3)

In rape prosecution, where court gave instructions that although law does not require that prosecuting witness be supported by another witness, or other corroborating circumstances, it does require that jury examine the testimony with caution, "not with great caution but with caution," the addition of quoted words was equivalent to saying "without great caution," and was prejudicial error.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Charles Auge was convicted of statutory rape, and he appeals.

Reversed.

Joslyn & Hollopeter, of Pasadena, for appellant.

Robert W. Kenny, Atty. Gen., and Walter L. Bowers, Asst. Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was convicted in a jury trial of the crime of statutory rape, a felony, in two counts. He appeals from the judgment and from the order denying his motion for a new trial.

It is not asserted that the evidence was insufficient legally to support the judgment, but it is contended that the court committed prejudicial error in refusing to give a cautionary instruction in the form requested by the defendant and in giving an incorrect and misleading cautionary instruction.

Defendant is the step-father of the prosecutrix, Martha, who was 16 years of age when the alleged offenses occurred about February 1, 1944, and about January 25, 1944. He married her mother in 1934 when Martha was 5 years of age and when Martha's brother Charles was 2 years of age. Defendant and his wife and the 2 children lived together in Michigan until September, 1942, when the wife left him and took the children with her. After a reconciliation they all lived together again about one month and then she left him and took the children with her. After another reconciliation they all lived together until September, 1943, when they came to Alhambra, California, where they lived in a house trailer until they separated on February 15, 1944. From January 15, 1944, until February 15, 1944, defendant was employed from 7:30 a.m. to 5:30 p.m., and he usually returned home about 6 p.m. During that same period his wife was employed from 7:30 a.m. to 6:00 p.m., and she usually returned home about 6:30 p.m. The house trailer, 24 feet in length, had two rooms—a living room and a kitchen, and there was a couch in the kitchen.

The prosecutrix testified in part that on a Tuesday or Wednesday "around" February 1, 1944, she had returned from school and was preparing dinner at the kitchen sink when the defendant arrived home from work about 10 minutes before six o'clock; that he set his lunch pail down, took off his coat, walked directly over behind her as she stood at the sink, put his arms around her and asked her to have intercourse with him; that she remonstrated, and he begged her until she gave in and had an act of sexual intercourse with him on the couch in the kitchen; that defendant had been home about 5 minutes before the act was commenced; that her brother Charles was at home when defendant arrived there on that day but he was not in the trailer; that on that occasion she did not see defendant's penis; that defendant had another act of sexual intercourse with her on the same couch about 2 weeks before the act just mentioned, but she did not know what time of day it was when that act occurred or whether it occurred before or after dark; that he had had intercourse with her many times since she was 11 or 12 years of age—"sometimes every two or three days; sometimes it would be a month, or every week; any time he felt like it"; that she did not complain to anyone, except defendant, about the acts of intercourse; that there was constant quarreling and fighting between her and defendant; that in California it was practically one continuous quarrel and she had become more and more disgusted and angry with him; that in the evening of February 14, 1944, she, her mother, and defendant had been to a picture show, and a quarrel, relating in part to the purchase of a war bond, started among them while they were in the theater; and that after they returned to the trailer the quarrel continued and her mother and defendant had a fight, and her mother called the police and had him arrested upon a charge of disturbing the peace.

At a former trial of defendant the prosecutrix testified that she was quite certain that defendant arrived home "after six" o'clock on the day of the alleged offense which occurred "around" February 1st, and that when he arrived home on that day it was "five after six." At the preliminary hearing she testified, as to the act of intercourse of February 1st, that defendant had been home about 10 or 15 minutes before the act took place; that her brother was in when defendant came home, but he was outdoors afterward; that defendant came in and talked to her brother and then told him to go out and play; and that she did see defendant's penis.

Defendant's wife testified in part that many times over a period of 2 or 3 years before they separated in 1942, defendant had put his hands under Martha's dress and on her breasts; that she (wife) and defendant had had many quarrels about such conduct by defendant; that their married life was almost "constantly a matter of bickering and battling"; that on one occasion in Michigan, when defendant was drunk, he proposed an act of intercourse with Martha, and she (wife) told the defendant that if she ever found out that he had done that to her she would have him thrown in jail; that Martha had never told her that she had had intercourse with defendant; and that Martha had told her that she (Martha) had a deep dislike and hatred toward defendant.

Charles, the brother of the prosecutrix, testified that he had seen defendant place his hands on Martha's breasts many times.

A physician testified that she examined the prosecutrix about February 16, 1944, and found the hymen ruptured and the vagina dilated to admit two fingers, but it was not a recent rupture.

A police officer testified that defendant said he had not had sexual intercourse with the prosecutrix; and that defendant, in response to a question as to whether he had placed his hands on her, said he had "held her on his lap several times and would take hold of her breasts just to tease her."

Defendant testified that he had never had sexual intercourse with the prosecutrix; that he had touched her breasts when he put his arms around her, but he had never fondled her breasts; that he and his wife had had many quarrels; that on various occasions he had disciplined Martha and had slapped her, and she had resented it; that he had disciplined Charles on various occasions, and during the period from January 15 to the early part of February, 1944, he had required that Charles stay in the trailer from the time he returned from school until the defendant came home; that his wife had told him on numerous occasions that she would put him in the penitentiary; that after he had been arrested she said to him, "I want to see you in the penitentiary"; that he was arrested on February 14, 1944, on a charge of disturbing the peace, and on the next day he was arrested on a morals charge, and on the next day thereafter that charge was changed to a charge of rape.

[1] The cautionary instruction requested by defendant and refused by the court was a proper instruction, but it was covered by other instructions which were given. The requested instruction was: "By reason of the fact that charges of the nature involved in this case can easily be made and are often difficult to disprove, I instruct you that it is your duty to examine with caution the testimony of the prosecuting witness. The fact that the charge here made, however, is one difficult to disprove

should not deter you from rendering a verdict of guilty in the event that you are convinced by the evidence beyond a reasonable doubt that the defendant is guilty as charged."

While the jury was being impaneled, counsel for defendant asked the court "to instruct the jury on the precautionary instruction given in these cases." Thereupon the court gave the following instruction:

"In a case of this kind it is particularly difficult for a defendant to clear himself of a charge of this character. No charge can be more easily made, and none more difficult to disprove.

"From the nature of the case, the complaining witness and the defendant are the only witnesses. The law does not require in this character of case that the prosecuting witness be supported by another witness or other corroborating circumstances, but does require that you examine her testimony with caution.

"You are therefore to consider the matter as calmly, dispassionately, and deliberately as you would any other accusation, and you are to carefully and guardedly weigh, analyze, and consider the testimony against the defendant." (It appears that jurors who were so instructed were sworn to try the cause.)

[2] At the close of the testimony and before the arguments were made the court instructed the jury and gave the same instruction, above quoted, except that it omitted therefrom the first six words, namely, "In a case of this kind." Appellant does not assert that the first two paragraphs of said instruction were erroneous, but contends that a part of the language of the third paragraph thereof, namely, "You are therefore to consider the matter as calmly, dispassionately, and deliberately as you would any other accusation," was erroneous, misleading, and in conflict with the language of the first two paragraphs. His argument is "that cautionary instructions such as are required to be given in statutory rape cases have no place in trials concerning other alleged offenses," and that the jury was told, in one part of the instruction, that from the nature of the case it should examine the testimony of the prosecutrix with caution, and, in another part thereof, it was told to consider the matter as it would any other case. In other words, his argument is that the jury was first told to consider her testimony with caution, and then was told not to so consider it. In the case of People v Webster, 36 Cal.App. 540, 172 P. 768, wherein the charge was statutory rape, the court held that a cautionary instruction requested by defendant might well have been given, but said further (36 Cal.App. at page 541, 172 P. at page 768): "[W]e are satisfied that the trial court fully covered the points involved therein when it instructed the jury to consider the matter 'calmly, dispassionately, and deliberately,' as they would any other accusation, and that they were 'to be very careful in any such case,' and should 'carefully and guardedly weigh, analyze, and consider the testimony against the defendant.'" It is to be noted that the language in said instruction in that case was practically the same as the language of the third paragraph of the instruction herein. The language of the third paragraph herein was to the effect that the jurors should be as calm, dispassionate and deliberate in considering this accusation as they would be in any other accusation, and that in addition thereto they should carefully and guardedly weigh, analyze and consider all the testimony presented against the defendant. The direction or part of the third paragraph criticised by appellant (that the jurors should consider the matter as calmly, dispassionately, and deliberately as it would consider any other accusation) was given in conjunction with the direction immediately following it, viz., that it should carefully and guardedly weigh, analyze and consider the testimony against the defendant. Those two directions must be considered together. As stated in People v. Webster, supra, in referring to language similar to that of said third paragraph, the language of the third paragraph herein covered the points required in a cautionary instruction. The third paragraph was in itself a cautionary instruction and was not in conflict with the first two paragraphs, which admittedly constituted a proper cautionary instruction as to the testimony of the prosecutrix. Apparently the first two paragraphs were based upon the instruction in People v. Adams, 14 Cal.2d 154, 164, 93 P.2d 146. There was evidence herein to the effect that the prosecutrix, her mother, and her brother were actuated in their testimony by animosity toward the defendant. It was to the advantage of the defendant that the jury was instructed in the third para-

graph that, in addition to the usual deliberateness required in cases generally, all the testimony presented against the defendant (not only the testimony of the prosecutrix) should be carefully and guardedly weighed. The whole instruction met the requirements set forth in People v. Putnam, 20 Cal.2d 885, at page 889, 129 P.2d 367, at page 369, wherein the court said: "The defendant is entitled to have the jurors informed that the charges made against him are 'easily made and difficult to disprove' and that 'the testimony of the prosecuting witness should be examined with caution.'"

[3] At the conclusion of the arguments, the court gave certain oral instructions to the jury. Appellant asserts that prejudicial error was committed in giving oral instructions without a stipulation therefor, and cites Section 1127 of the Penal Code in support of his contention. That section provides that "All instructions given * * * shall be in writing, unless both parties request the giving of an oral instruction, or consent thereto." It also provides that "if the instructions are given orally, they must be taken down by the phonographic reporter." The oral instructions were taken down by the reporter. In People v. Mack, 115 Cal.App. 588, at page 590, 2 P.2d 209, at page 210, wherein a similar contention was made, the court said: "The statute authorizes such instructions to be given to the jury in a criminal case, if taken down by the phonographic reporter." See also People v. Perez, 19 Cal.App.2d 472, 478, 65 P.2d 1319. It was not error to instruct the jury orally without a stipulation therefor.

Appellant contends that the court erred prejudicially in giving the following oral instruction after the arguments:

"Considerable has been said in the argument about the fact that it is the girl's testimony alone that tells the story of the acts claimed in this case. I again call your attention to the instructions that I have twice given you:

"From the nature of the case, the complaining witness and the defendant are usually the only witnesses. The law does not require in this character of case that the prosecuting witness be supported by another witness or other corroborating circumstances, but does require that you examine her testimony with caution.

"Not with great caution, but with caution.

"You are therefore to consider the matter as calmly, dispassionately, and deliberately as you would any other accusation, and you are to carefully and guardedly weigh, analyze, and consider the testimony against the defendant."

[4] Appellant asserts the court in instructing the jury to examine the testimony of the prosecutrix with caution, "Not with great caution, but with caution," in effect told the jury to use only slight caution in scrutinizing the testimony of the prosecutrix. The defendant was entitled to a cautionary instruction. Even though the prosecutrix was not of extremely tender years and even though there was some corroboration of her testimony, the background of years of quarreling and fighting between her and defendant, her deep hatred of him, the background of years of quarreling and fighting betwen her mother and defendant, and her mother's long-continued avengeful attitude toward him were such that a cautionary instruction was required in order to carefully protect the rights of defendant. The court gave a proper cautionary instruction at the beginning of the trial and repeated it just before the arguments. After the arguments, however, the court gave the instruction again except that it inserted therein, after the admonition that the law requires "that you examine her testimony with caution," the additional phrase, "Not with great caution, but with caution." Where a cautionary instruction is required, it has been held that an admonition that the jury should examine the testimony of the prosecutrix with caution was proper. See People v. Putnam, 20 Cal. 2d 885, 889, 129 P.2d 367; People v. Lucas, 16 Cal.2d 178, 181, 182, 105 P.2d 102, 130 A.L.R. 1485; People v. Adams, 14 Cal.2d 154, 164, 93 P.2d 146. It has also been held that a proper cautionary instruction is that such testimony should be examined with utmost care. See People v. Scott, 24 Cal.App. 440, 443, 141 P. 945; People v. Vaughan, 131 Cal.App. 265, 274, 21 P.2d 438. In People v. Scott, just cited, it was said at page 443, of 24 Cal.App., at page 947 of 141 P.: "For reasons readily suggested, though, it is entirely proper for the court to caution the jury to weigh the testimony of the prosecutrix with the utmost care, that no wrong be done to the defendant." Although, under the authority of some reported cases, the defendant might have proposed an in-

struction that utmost or great caution be exercised in examining the testimony of the prosecutrix, his proposed cautionary instruction did not include an admonition that the jury should use utmost or great caution, but it did state that it should examine such testimony with caution. Defendant asserts in effect that although, under some authorities, he would have been entitled to an instruction that utmost or great caution be used, he was willing to have the jury admonished that it should examine her testimony with caution. He insists that irrespective of whether he was entitled to an instruction that the jury should use the highest standard of care, he was entitled to a cautionary instruction which stated that the jury should exercise caution, and which placed no limitation upon the quantum of caution to be exercised by the jury. His argument is that the instruction that the jury should examine the testimony of the prosecutrix with caution "Not with great caution, but with caution," impliedly told the jury to use only slight caution and that the matter of examining the testimony of the prosecutrix was only of casual concern. The outcome of the trial depended upon whether the jury believed the prosecutrix or believed the defendant. Her testimony concerning the alleged act of January 25, 1944, was uncertain as to the day of the month, the day of the week, and the time of day—even as to whether it was daytime or nighttime—when it occurred. She made contradictory statements as to the time of day when the other alleged act occurred, testifying on the former trial that she was quite certain that it was after six o'clock, and in the present trial that she was not sure but "I know it was about 10 minutes to six o'clock." She made other contradictory statements concerning whether her brother was in the trailer when the defendant came home, and whether she saw a certain part of defendant's body. Her testimony that defendant had had many acts of intercourse with her since she was about 12 years of age—sometimes every 2 or 3 days, but that she had not complained to her mother of the bestial treatment inflicted upon her by defendant is almost beyond belief—especially in view of the animosity of Martha and her mother toward the defendant, and in view of the further fact that she had had ample opportunity to make complaint to her mother, without any fear of the defendant, when he was living separate and apart from the rest of the family. It is unnatural, to say the least, that a young girl should fail to report to her mother repeated violations of her body over a period of years. The corroborative evidence in this case was circumstantial. Her mother's testimony, by way of corroboration, was to be considered in connection with her expressed desire for revenge against defendant. The testimony of her thirteen-year-old brother was to be viewed in connection with the punishment and discipline defendant had given him. The record shows that there had been a former trial of this case but it does not show the outcome of it; however, a fair assumption is that the jury disagreed. It was a close question as to whether the testimony of the prosecutrix should have been accepted or rejected. In People v. Putnam, supra, 20 Cal.2d 885, at page 891, 129 P.2d 367, at page 370, it was said: "It has been long recognized that there is no class of prosecutions 'attended with so much danger, or which afford so ample an opportunity for the free play of malice and private vengeance.'" In a case of this kind, owing to the disadvantage in which a defendant is placed, it was stated in People v. Baldwin, 117 Cal. 244, at page 249, 49 P. 186, at page 187, that "he should be given the full measure of every legal right in an endeavor to maintain his innocence." The use of the words, "Not with great caution," in the questioned instruction detracted materially from the right of defendant to have an instruction given that the testimony of the prosecutrix should be examined with caution. The instructions which were in proper form were definitely qualified by the later instruction. The words interpolated by the court signified that there were degrees of caution within the meaning of the word "caution" as it was used in the two preceding cautionary instructions and in the questioned instruction, and those words also signified that there was a limitation as to the degree of caution the jury should use in considering the testimony of the prosecutrix. By reason of those words the jury might reasonably have concluded that in the opinion of the judge even a slight degree of caution on its part would be sufficient. The defendant was entitled to an instruction that did not place a limitation upon the quantum of caution the jury should exercise. The use of the phrase, "Not with great caution," is equivalent to saying "without great caution," and it was prejudicial error to instruct the jurors in effect that they should examine the testimony of the prosecutrix without great caution.

The judgment and the order denying the motion for a new trial are reversed.

DESMOND, P. J., and SHINN, J., concur.

DE YOUNG v. DE YOUNG.*

Civ. 14413.

District Court of Appeal, Second District, Division 3, California.

May 31, 1945.

As Modified on Denial of Rehearing June 29, 1945.

Hearing Granted July 26, 1945.

1. Judgment 🔑489, 509

Any judicial record may be impeached on the ground of either want of jurisdiction in the court or fraud of the party offering it. Code Civ.Proc. § 1916.

2. Appeal and error 🔑1011(1)

Where evidence in separate maintenance action showed that defendant husband did not furnish wife's address in Connecticut to counsel and to court in divorce proceedings in Mexico, husband's testimony to contrary did not create a conflict in the evidence which was binding on appeal, since there must be more than a mere conflict of mere words to constitute a conflict of evidence.

3. Appeal and error 🔑1011(1)

Rule that appellate court will not interfere with judgment arrived at by trier of facts when there exists a substantial conflict in evidence does not relieve appellate court of duty of analyzing evidence in light of reason and human experience, and giving consideration to motives and propensities which tend to influence or prompt human action.

4. Divorce 🔑327

Where husband in divorce suit in Mexico did not give his attorney or the court address of his wife residing in Connecticut, and no notice was given to her of divorce suit except by publication, the Mexican court never acquired jurisdiction to render a binding divorce decree, and such decree would not be recognized in wife's separate maintenance action in California. Code Civ.Proc. §§ 1915, 1916.

5. Judgment 🔑831

The full faith and credit clause does not apply to a judgment rendered by a court of a foreign country. U.S.C.A.Const. art. 4, § 1.

6. Divorce 🔑327

Where husband's divorce obtained in Mexico from wife residing in Connecticut was not binding in Mexico where wife was served only by publication, although husband knew her address, the Mexican decree was not binding in state under statute relating to judgments of foreign countries. Code Civ.Proc. § 1915.

7. Divorce 🔑329

No rule of comity requires courts of state to recognize a decree of divorce fraudulently obtained in another country. Code Civ.Proc. § 1915.

8. Divorce 🔑327

Marriage 🔑40(10)

Where it was determined that husband's Mexican divorce decree was obtained through fraud which went to jurisdiction of court, evidentiary value of presumption that foreign decree regular on face was valid, and that husband's second marriage implied a legal dissolution of first marriage, vanished in wife's separate maintenance suit.

9. Divorce 🔑326

In wife's action for separate maintenance, burden was on plaintiff to show invalidity of husband's Mexican divorce.

10. Divorce 🔑326

In wife's separate maintenance action, invalid divorce decree obtained by husband in Mexico would not be recognized, even though neither of parties was domiciled in California when husband secured Mexican divorce.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action for separate maintenance by Helen M. DeYoung against Clarence DeYoung. From a judgment denying any relief, plaintiff appeals.

Reversed.

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* Subsequent opinion 165 P.2d 457.

Victor A. Gillespie and Lester E. Hardy, both of Los Angeles, for appellant.

Otto A. Gerth, of Los Angeles, for respondent.

FOX, Justice pro tem.

Plaintiff appeals from a judgment denying her any relief in an action for separate maintenance.

Plaintiff and defendant were married in 1925 and lived principally in Grand Rapids, Michigan, until June, 1931. At that time plaintiff, with her daughter by a former marriage, returned to her former home in Stamford, Connecticut, where she resided continuously to July, 1942, when she came to Los Angeles, California. Defendant was in the garage business in Grand Rapids for some years. On March 1, 1936, he sold said business and on or about the fifteenth of the month left Grand Rapids for Juarez, Mexico. He arrived in Juarez about April 1, 1936. On April 25, 1936, he filed an action in the Civil Court of Bravos District, State of Chihuahua, to obtain a divorce from the plaintiff herein, Helen M. DeYoung. He registered as a resident of Juarez three days later. On June 5, 1936, he was granted a divorce. He married Mrs. Lelia Marshall on February 26, 1937. They have since lived together as husband and wife in Los Angeles In the fall of 1937, plaintiff herein first learned that Mr. DeYoung had obtained said divorce and had remarried. She filed her complaint herein for separate maintenance on November 30, 1942. He set up, among other defenses, the said Mexican decree. The trial court sustained this defense and denied plaintiff any relief.

[1] The Mexican decree, however, should not have been sustained because it clearly appears, on the record before us, that said decree was fraudulently procured, no proper notice being given Mrs. De Young of the divorce proceedings there. This condition went to the jurisdiction of the court. Delanoy v. Delanoy, 1932, 216 Cal. 27, 37, 13 P.2d 719, 86 A.L.R. 1321. As the plaintiff herein she is in a position to attack the validity of the Mexican decree which Mr. DeYoung offered as a defense because any judicial record may be impeached on the ground of either want of jurisdiction in the court or of fraud in the party offering it. Code Civ.Proc. sec. 1916; Stewart v. Stewart, 1939, 32 Cal.App.2d 148, 150, 89 P.2d 404; Ryder v. Ryder, 1934, 2 Cal.App.2d 426, 37 P.2d 1069; People v. Harlow, 1935, 9 Cal.App.2d 643, 50 P.2d 1052; Kegley v. Kegley, 1936, 16 Cal.App.2d 216, 60 P.2d 482; DuQuesnay v. Henderson, 1937, 24 Cal.App.2d 11, 74 P.2d 294; Cardinale v. Cardinale, 1937, 8 Cal.2d 762, 68 P.2d 351; Raps v. Raps, 1942, 20 Cal.2d 382, 125 P.2d 826; Rhea v. Millsap, 1945, 68 Cal.App.2d 449, 156 P.2d 941.

Mr. DeYoung in the instant case testified that he gave his attorney in the Juarez divorce proceeding and the court there the correct address of his wife. He knew her address for he was writing her letters, which she received, after he went to Juarez and even after he filed his divorce action. *They were all mailed, however, from Grand Rapids.* These letters, dating from a period about ten days prior to the sale of his garage in Grand Rapids until five days after he filed his divorce action in Juarez, demonstrate conclusively that his testimony in the instant case that he gave the Juarez court and his counsel there his wife's address is unworthy of any credence whatever. See, Hicks v. Ocean Shore R. R., Inc., 1941, 18 Cal.2d 773, 780, 117 P.2d 850.

These letters show that he was attempting to mislead and deceive his wife as to his interest in and affection for her, the likelihood of their going back together, the sale of his garage business, the prospect of his locating in the East, and more particularly, in the later letters, he sought to conceal from her and to deceive her as to where he was and that he was planning to and later had actually filed an action for divorce. No other conclusion can be drawn from them. For example, in a letter to her under date of February 18, 1936, which was eleven days before the sale of his business, he said in part: "Dear I hope you & Anita [her daughter by a former marriage] are OK and do please be careful & not get sick. Am glad you got Anitas coat. Do you know anymore about Furniture prices. Surely hope Vern can do something for us because it will save us so much money. Have been looking for a small house but not very plentiful but we will find something. Dear this is just a short note to you, and am sorry I have kept you waiting for a letter but being sick I could not help myself so please excuse me for not riting before. * * * Dear please rite me as I want to hear from you always and real often. I received your last letter just before I was taken sick. So will say bye bye for now and will be looking for your letter soon. Always Love & Kisses for you and Anita. As Ever Clarence." Another letter, dated March 20, 1936, which was nearly three weeks after he had sold his business and apparently after he had left Grand Rapids, for the findings show he left there on or about March 15, reads, in part, as follows: "Received yours Tue and was glad to hear from you and will get money to you for Rent before the last of the month. * * * Expect to make a sale before long, and I am waiting for the time to come and then I can get going in the East and see & be with you again. Well my dear can't think of much to rite to-day but will do better the next time. I will send you another ck before the last of the week so you can pay for your rent and then a ck each week. Will that help a little my dear. Say Hello to Anita & the rest and here is love for you both. With Love Clarence. Am a little busy so could not rite much. Had to get up & down so much to wait on people. C." In an undated letter which, however, was written prior to April 15, defendant said this: "Received your letter Friday A. M. Glad to hear from you and that you are both well. * * * I may go to Rochester the 15th or 20th of April to look this Outfit over. Rochester is pretty good town. I believe I will like it so much better than G. R. I have been thru there one time and it did not look so bad. This place is downtown and is a going business and I understand I can get it at a good price because the party that owns it is getting along in years, and will turn it over to a younger man and the sale will be free & clear. * * * they [his folks] was wondering if I was going to New York or South America, as they know I have a chance to go there with a company from Philadelphia Penn. for five years, but I said no, in as much as I would like to go, but thought that would not be the proper thing to do, so thought I would land somewhere in New York. Well my dear this is Sat. A. M. and a little busy so Guess I will have to cut this short, so I can get this off to my dear lady Helen. Will rite latter, hope this ck will hlep. * * * here is kisses for you and Anita. With Love Always Clarence."

In a letter dated "4/18/36 Mon. A. M." which was some two and a half weeks after he arrived in Juarez, according to his testimony, Mr. DeYoung wrote Mrs. DeYoung in part as follows: "Your letter came a couple of days ago and glad to get same. Also pictures of Anita. * * * Yes I still have the same buyer for the business, as I have a Deposit from him, he is waiting for the rest of his money, but from what he said I will not be long now. And when I am sure of it, I will take a trip East and look over the other proposition, and then I can let you know something about it. * * * Surely hope you are well, also stay that way. * * * Well my dear I will have to get busy now, as I have some of the boys go to lunch at this time 11:30 A. M. So I have to get down stairs and let the people out with their cars. They are all business people that store there cars with me and some of them go home to lunch. Well Dear stay well and here is my love to you & Anita. Will rite later. As Ever Clarence."

In another letter dated "4/18/36 Sat. Noon" which was seven days before Mr. DeYoung filed his action for Divorce in Juarez, this is what he wrote Mrs. DeYoung: "Your letter came a few days ago and glad to get it, I have been out of town for a couple of days, makeing a few collections & also getting some business. It is a bit slow rite now. * * * Well Helen I will be out of town for a few days. In fact for a week as I have a couple of propositions to look over and I am going to decide on one or the other so if you don't hear from me don't think anything of it. Wait until you hear from me before you rite and then send it to 1244 So. Lafayette Ave. E. Don't call me by phone because I don't work nites any more. * * * Well Helen will say bye bye for now. Will rite you later and let you know what I am going to do. Love to you & Anita. As Ever Clarence."

Mr. DeYoung's next letter to his wife was dated April 30, 1936. This was five days *after* he had filed his action against her for divorce in Juarez, and two days after he had registered as a resident of that city. This letter, like the others, was mailed in Grand Rapids. Consisting of four pages, it reads, in part, as follows: "I want you to have your freedom and then you can do as you care to do, you have had it for five years now, and believe you are better off than I am, but that is my hard luck, and I must take what ever is handed out to me.

"I will at least tell you were I am going, which is many miles away from anybody I know. In one of my letters to you I mentioned about So. America, well I have signed up with a Company to go there for ten years or more, which will be better for both of us. Of course I do not know if it will agree with me, but that is what I must find out for myself. So you see Helen that is why I want you to have your freedom, because I may never come back to U.S. alive if things don't work out for me as far as the climate is concerned. Some of the boys have had the fever and never came back, but time will tell for me, and that is one chance I have to take, so you see Helen that is why it is best for me not to see you again and why you must have your freedom. My time is getting short here now so will have to be on my way, so please Helen don't take this to hard, as it is the best way for both." All these letters were introduced as exhibits in the trial, but apparently their full significance escaped the trial judge. Particularly the last three or four of them show a deliberate plan and scheme to conceal from Mrs. DeYoung where he was and to mislead her into believing he was still in Grand Rapids. The letter of April 30th conceals from her the fact that five days previously he had filed suit for divorce in Juarez, and seeks to mislead her further by suggesting, in effect, that she get a divorce from him. He also attempts to mislead her by saying he is leaving soon for South America. With his plan and scheme of concealment and deception as to his whereabouts so carefully and completely worked out it is beyond belief that Mr. DeYoung gave his attorney in Juarez and the court his wife's address for that would have served to undo his fraudulent plan. If he had disclosed his wife's address to his attorney prior to or at the time of filing the action, there would have been no object in his writing the letter of April 30, 1936, suggesting that she get a divorce and telling her he was going to South America under a ten-year contract. If Mr. DeYoung did not furnish his attorney and the court with his wife's address it would remain unknown for there was no other source for such information. As a consequence, no notice could be given, and undoubtedly no notice was given, to Mrs. DeYoung, except as disclosed by the finding of the Juarez court that "summons issued to the defendant through publications in the official Bulletin of the State of Chihuahua." It is clear from the record on this appeal that Mrs. DeYoung received no notice whatever of Mr. DeYoung's pending action in Juarez, and this because of his dishonest scheming. She testified she did not hear "from him" after the letter of April 30, 1936, and did not hear "of him" until she located him in Los Angeles in the fall of 1937 through the district attorney of Stamford, Connecticut, and the Chief of Police of Grand Rapids. After locating Mr. DeYoung in Los Angeles she wrote him a lengthy letter under date of October 29, 1937. If she had known of his having secured a Mexican divorce it is reasonable to assume she would have made some mention thereof. Instead, she said: "Well Clarence don't you both think your are a little bit outside the Law going into another State and posing as man and wife without the benefit of a divorce." If any notice of the action in Juarez had been mailed to plaintiff herein the presumption is she would have received it.

[2-4] On the record before us it is clear that the defendant herein perpetrated a gross fraud upon his wife and upon the court in Juarez by not furnishing her address to counsel and the court there. Mr. DeYoung's testimony to the contrary does not create a conflict in the evidence which is binding on appeal for "There must be more than a conflict of mere words to constitute a conflict of evidence." Herbert v. Lankershim, 1937, 9 Cal.2d 409, 471, 71 P.2d 220, 251. We are not unmindful of the oft-repeated rule that an appellate court will not interfere with the judgment arrived at by the trier of facts when there exists a substantial conflict in the evidence. "This rule, however, does not relieve an appellate court of its duty of analyzing the evidence in the light of reason and human experience and giving consideration to the motives and propensities which tend to influence or prompt human action, in an effort to solve the question as to whether the judgment is reasonably and substantially sustained by the evidence." Herbert v. Lankershim, supra, 9 Cal.2d at page 471, 71 P.2d 251. In that case 9 Cal.2d at page 472, 71 P.2d 251, the court quotes with approval the rule that "'While the jurors are the sole judges of the facts, *the question as to whether or not there is substantial evidence in support of the plaintiff's case is always a question of law for the court* (Grant v. Chicago, etc., Ry. Co., 78 Mont. 97, 252 P. 382), and, in determining this question, 'the credulity of courts is not to be deemed commensurate with the facil-

ity or vehemence with which a witness swears. "It is a wild conceit that any court of justice is bound by mere swearing. It is swearing creditably that is to conclude its judgment."'" (Italics added.) Since no proper notice was ever given plaintiff herein of the divorce proceedings in Juarez, the Mexican court never acquired jurisdiction to render a binding decree. Delanoy v. Delanoy, supra; 13 So. Cal.Law Rev. 294, 299. The situation here is not altogether unlike that considered in Aldrich v. Aldrich, 1928, 203 Cal. 433, 264 P. 754, where the Supreme Court reversed an order denying the defendant wife's motion to set aside a decree of divorce which had been granted the husband. At page 437 of 203 Cal., at page 755 of 264 P., the court said: "* * * it is obvious from the entire record that he knew the residence of defendant and planned to have notice mailed to her at an address which was never her address during the married life of the parties. This is extrinsic fraud —fraud on the defendant which prevented her from having her day in court * * * and it was also a fraud upon the court."

[5] No question of the full faith and credit clause of the United States Constitution (Art. IV, Sec. 1) is here involved since the judgment relied on by the defendant was not rendered by a sister state.

[6] Defendant, however, argues that his Mexican divorce decree must be recognized by the court of California in view of the provision of section 1915, Code of Civil Procedure. That section reads as follows: "A final judgment of any other tribunal of a foreign country having jurisdiction, according to the laws of such country, to pronounce the judgment, shall have the same effect as in the country where rendered, and also the same effect as final judgments rendered in this state." The section lays down the rules with reference to the legal "effect" which must be given to final judgments rendered in a foreign country as distinguished from judgments of sister states. The first rule is: a final judgment "shall have the same effect as in the country where rendered." Measured by this rule defendant's Mexican divorce decree is not entitled to recognition by the courts of this state in view of our determination that the evidence establishes that the defendant herein, as the plaintiff in a Mexican action, fraudulently concealed his wife's address so as to effectively prevent any notice of said proceedings being sent to her. This fraud, resulting in the failure to give proper notice to the absent spouse, constituted a violation of a constitutional guarantee under the Mexican Constitution and rendered the judgment subject to being set aside for lack of jurisdiction. The Mexican law on this point is summarized by Manual Ruiz, Jr., Esq., of the Los Angeles Bar, in his article on the subject of "Migratory Divorces," under the title of "The Effect of Section 1915 of the Code of Civil Procedure on Migratory Divorces procured in Foreign Countries" in 13 So.Cal.Law Rev. (1940), 294, at p. 299, as follows: "Divorces may nevertheless be set aside by the absent spouse, if improper notice is given, since, under the Mexican Constitution, proper notification is a constitutional guarantee. Notice must be given at the place of the defendant's residence, even though without the jurisdiction of the notifying State. This may be done personally, through letters rogatory, or by giving notice through the mails. *If the complaining party commits a fraud by claiming a fictitious address as being that of defendant's residence, the defendant can move to set aside the judgment for lack of jurisdiction.*" (Italics added.) Mr. Ruiz cites decisions of the Mexican Supreme Court rendered prior to the date on which Mr. DeYoung obtained his divorce in Juarez in support of his statement of the Mexican law. The Mexican Supreme Court has since continued to follow these decisions. In an article entitled Mexican Marriages and Divorces in the March-April (1945) issue of the California State Bar Journal (Vol. 20, No. 2) by William B. Stern, Esq., Foreign Law Librarian, Los Angeles County Law Library, the author says: "As late as in June, 1944, the Mexican Supreme Court upset two Morelos divorces because the defendants were served only by publication although their whereabouts were known to the plaintiffs." Additional cases to the same effect, particularly dealing with divorces from the State of Chihuahua, are cited in footnotes. Since, therefore, Mr. DeYoung's Mexican divorce is not binding there, it is not within the protection of section 1915, Code of Civil Procedure, and is not enforceable here under the terms of said section, for to hold that it is would be to give it greater effect here than it has there.

[7] No rule of comity requires the courts of this state to recognize a decree of divorce fraudulently obtained in another country.

[8] Mr. DeYoung emphasizes the rule that a foreign decree, regular on its face, is entitled to a presumption of validity and that such presumption constitutes evidence in support of the judgment herein. He also argues that a ceremonial marriage, such as later took place between him and Mrs. Marshall, implies a legal dissolution of the prior marriage between him and plaintiff herein. However, where it is determined, as here, that the Mexican divorce decree was obtained through fraud which went to the jurisdiction of the court the evidentiary value of such presumptions vanishes. See, Delanoy v. Delanoy, supra, 216 Cal. at page 37, 13 P.2d 719, 86 A.L.R. 1321.

[9] We are not unmindful of the rule that the burden is on the plaintiff to show the invalidity of the defendant's Mexican divorce. But the evidence herein recited unmistakably meets that burden.

[10] Defendant points out that California was never the matrimonial domicile of the plaintiff and himself and that neither of the parties were domiciled in California when he secured his Mexican divorce. He then says "California was therefore not then interested nor is she now interested in the divorce proceedings." But California is interested in defendant's Mexican decree when he seeks to have it recognized here, because California is interested in the administration of justice to the end that a litigant in her courts may not be deprived of her rights through a judgment fraudulently procured elsewhere. "Nothing in modern times has brought greater discredit upon the judiciary as a department of government than the granting of so-called mail order divorces and other procedure under which some courts are suspected as being little better than vending machines for the issuance of divorce decrees." Litvinuk v. Litvinuk, 1944, Cal.App., 149 P.2d 882, 885, 886. Defendant's Mexican decree was not a mail order divorce, but if he is to prevail as a result of the concealment, fraud and deception which this record shows he practiced on the plaintiff and the Mexican court in securing it, then such a decree is little more than one step removed from the mail order class. California is indeed interested in seeing that such a result does not obtain.

Plaintiff also urges that the evidence is insufficient to support the finding that defendant established a bona fide domicile or residence in Juarez. This argument is based upon the letters hereinbefore quoted, the uncertain, contradictory and sketchy character of his testimony as to where he lived, what he did and other matters relating to his sojourn in Juarez, and upon the fact, which, however, did not come to light until the motion for a new trial, that during the early part of May, 1936, he was in Los Angeles, and on the 13th of that month purchased jointly with Lelia Marshall (whom he later married, but who used the name L. DeYoung in the transaction) the St. Paul Garage, and also on that occasion opened a joint bank account in Los Angeles with her. It is not, however, necessary for us to pass upon this question, in view of our determination of the other points herein involved.

The judgment is reversed.

DESMOND, P. J., and PARKER WOOD, J., concur.

MUNSON v. MUNSON.*

Civ. 7118. Sac. 5687.

District Court of Appeal, Third District, California.

May 31, 1945.

Rehearing Denied June 21, 1945.

Hearing Granted July 26, 1945.

1. Parent and child 🔑2(4)

The determination as to which parent shall have custody of minor child rests in sound discretion of trial court whose decision will not be reversed except for clear abuse of such discretion. Civ.Code, § 84.

2. Parent and child 🔑2(4)

The discretion exercised by trial court in awarding custody of minor child must be a judicial discretion, and where custody has once been awarded, and change is sought, a change of circumstances must be shown, burden of showing which is upon moving party, and all presumptions are in favor of reasonableness of original decree.

3. Evidence 🔑154

In proceeding for modification of marriage annulment decree which awarded

* Subsequent opinion 166 P.2d 268.

custody of minor child to wife, on ground that wife was an unfit person to have control of the minor, a love letter written by wife to a man which was never mailed, and which was purloined from wife's home by husband, was inadmissible under statute providing that "No one can take advantage of his own wrong." Civ.Code, §§ 82, 84, 3517.

4. Evidence ⚷471(12)

On petition for modification of marriage annulment decree on ground that wife was not a fit person to have custody of minor child, opinion evidence that husband would be a fit person to have custody of the child was entitled to no consideration, since except in instances specified in statute, a witness must testify to facts and not opinions. Civil Code, §§ 82, 84; Code Civ.Proc. § 1870, subd. 9.

5. Evidence ⚷471(12)

Opinion evidence as to fitness of a parent to have custody of a child is inadmissible. Code Civ.Proc. § 1870, subd. 9.

6. Parent and child ⚷2(3)

The custody of infant cannot be entrusted to a stranger unless infant's natural parents are found to be unfit to have such custody.

7. Parent and child ⚷2(1)

While agreements between parents regarding custody of minor children are not binding upon courts, generally courts approve and adopt such agreements because parents have greatest interest in determining which of them can best care and provide for the children.

8. Marriage ⚷64

On husband's petition to modify marriage annulment decree which, pursuant to parties' agreement, awarded custody of 20-month old son to wife, evidence failed to establish that wife was an unfit person to have custody of the child, so as to warrant modification of decree to award complete custody to husband who was boarding with strangers. Civ.Code, §§ 82, 84.

9. Marriage ⚷64

Where wife was constrained to secure annulment of marriage because, unknown to her, husband married her when he had another wife living from whom he was not divorced, such conduct constituted such "fraud" upon wife as required court to award custody of minor child to wife. Civ. Code, §§ 82, 84.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud".

THOMPSON, J., dissenting.

◆

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Suit by Rosemary Munson against Walter C. Munson for annulment of the marriage between the plaintiff and defendant. From an order modifying a decree of annulment and changing the custody of the minor child of the parties from plaintiff to defendant, plaintiff appeals.

Reversed.

Blaine McGowan, of Eureka, for appellant.

Chester Monette, of Eureka, for respondent.

ADAMS, Presiding Justice.

This is an appeal from an order modifying a decree of annulment of the marriage between plaintiff and defendant, and changing the custody of the child of the parties from the mother to the father.

The evidence shows that plaintiff and defendant intermarried November 6, 1941; that at that time defendant had another wife living from whom he was not divorced, though this fact was unknown to plaintiff. The latter subsequently filed an action to annul said marriage. Defendant made no appearance, and on March 31, 1944, a decree of annulment was made and entered, said decree also providing that the minor child of the parties, then aged twenty months, be awarded to plaintiff, defendant being granted the right to visit said child at all reasonable times and places, defendant to pay plaintiff the sum of $30 per month for the support of such child. The provisions regarding the child's custody conformed to an agreement entered into between the parties settling such property rights as they had and providing that plaintiff should have the custody of her child. Less than two months later, on May 18, 1944, defendant filed a petition to modify the annulment decree to provide that the full care, custody and control of the child be awarded to him. The grounds alleged in the petition were that

"1. Plaintiff is not a fit and proper person to have control of said minor, in that since the granting of said decree she has become intoxicated at least twice a week in the presence of said minor; that she permits a certain man to come through the window of the house where she maintains said minor to visit her in her bedroom.

"2. That plaintiff is maintaining said minor child in a residence that is not a fit and proper place of residence for the best interests and welfare of said minor in direct violation of her written separation agreement which defendant incorporates and makes a part of this Petition as if fully set out herein."

Plaintiff answered said petition denying the allegations thereof. The matter came on for hearing on May 24, 1944, and on June 27, 1944, the trial court filed a memorandum of opinion in which it stated:

"There is considerable testimony on the condition of the home in which defendant and the child reside; but, from all the evidence and the report of the Probation Officer, the said home is orderly, neat, clean, and well-kept.

"The issue in a case such as this is not the condition of the home, but it is the fitness of the parents to supervise the care, custody, and control of the child, and what is for the best interest of the child. On this subject it appears that the defendant is better fitted to exercise that duty, and it appears that the best interest of the child will be served if he is awarded to the custody of defendant."

The court made no finding that the mother was unfit, but made an order modifying the prior decree and awarding the "full care, custody and control" of the child to the father, and made no provision for the mother to even see her infant. From this order the present appeal has been taken, it being contended by appellant that the trial court abused its discretion in awarding the child to the father.

Before considering the evidence let us consider certain principles of law applicable to such a case. Section 138 of the Civil Code provides that in actions for divorce the court may, during the minority of the children of a marriage, make such order for their custody, care, education, maintenance and support as may seem necessary or proper, and may at any time modify or vacate the same; that in awarding custody the court is to be guided by what appears to be for the best interests of the child in respect to its temporal and its mental and moral welfare; but that as between parents claiming custody, neither parent is entitled to it as of right, *but other things being equal, if the child is of tender years, it should be given to the mother.*

Section 84 of the Civil Code also provides that in an annulment proceeding the court may make such order for the custody, care, education, maintenance and support of the children of the marriage, except that it *must* award the custody of the children of a marriage annulled on the ground of fraud or force to the innocent parent.

[1, 2] It is well established that the determination as to which parent shall have the custody of a minor child is a matter resting in the sound discretion of the trial court and that its decision will not be reversed on appeal except where there is a clear abuse of such discretion. However, the discretion exercised must be a judicial discretion, and where custody has once been awarded and a change is sought, a change of circumstances must be shown, the burden of showing which is upon the moving party; and all presumptions are in favor of the reasonableness of the original decree. Prouty v. Prouty, 16 Cal.2d 190, 193, 105 P.2d 295; Foster v. Foster, 8 Cal.2d 719, 726, 727, 68 P.2d 719; Olson v. Olson, 95 Cal.App. 594, 597, 272 P. 1113; Gavel v. Gavel, 123 Cal.App. 589, 11 P.2d 654; Moon v. Moon, 62 Cal.App.2d 185, 144 P.2d 596; Washburn v. Washburn, 49 Cal.App.2d 581, 587, 122 P.2d 96; In re Inman, 32 Cal.App.2d 130, 134, 89 P.2d 421.

In Moon v. Moon, supra, the court said, 62 Cal.App.2d at pages 186, 187, 144 P.2d at page 598: "Undoubtedly the trial court had authority to change its order respecting the custody of Charla (Civil Code, sec. 138). Because of her tender years, 'other things being equal' she should be in the custody of the plaintiff, her mother. Civ. Code, sec. 138. The court having originally determined that she should be in her mother's custody, some change in conditions or some unusual circumstance had to be shown to justify an alteration of that provision. Foster v. Foster, 1937, 8 Cal.2d 719, 726, 68 P.2d 719; Washburn v. Washburn, 1942, 49 Cal.App.2d 581, 587, 122 P.2d 96. One who seeks a modification of an existing custody order has the burden of proving that conditions have so changed that a modification is justified (Prouty v. Prouty, 1940, 16 Cal.2d 190, 193, 105 P.2d 295), and the paramount purpose of the whole proceeding is to serve the best interests of the child. Prouty v. Prouty, supra, 16 Cal.2d at page 195, 105 P.2d at page 295. The sum of the matter is that the evidentiary support for the order taking three year old Charla from her mother's custody and placing her in that of her father, must be adequate, if the order is to stand."

And in that case the order changing custody from mother to father was reversed. In Washburn v. Washburn, supra, less than six months after the interlocutory decree of divorce which gave to the mother custody of a boy and girl aged fifteen and nine years, respectively, the father sought a modification, alleging the mother was no longer a fit and proper person to have custody. The trial court awarded custody to the father but the order was reversed on appeal. Defendant introduced the testimony of two detectives who had shadowed plaintiff, one of whom testified that he had seen plaintiff intoxicated on a dozen occasions. These detectives also testified to a visit by plaintiff to a certain doctor's apartment and a meeting between this doctor and plaintiff at Palm Springs. The court said, 49 Cal.App.2d at pages 586, 587, 122 P.2d at page 99: "So far as the evidence goes there is not one iota to indicate that the children did not have the best of care from their mother, *and none to indicate that any of the acts or conduct of the mother of which the father complains was known to the children.* The maternal grandmother of the children lives in the mother's home and assists with the housework and the care of the children. The father is active in his business and employs a housekeeper to maintain his home; and so if the children were to reside in his home they would be largely under the immediate care of a housekeeper or of a governess if he employed one, as he stated he would if awarded the custody. Moreover, so far as the record discloses the home surroundings are the same now as when the interlocutory decree was signed." (Italics ours.)

Also it said, 49 Cal.App. at pages 587, 588, 122 P.2d at page 100:

"In custody cases the underlying principle, paramount to all others, is the welfare and best interests of the child. In no way in conflict with this rule is another, equally well established, that once a court has decreed it there may be no change in the child's custody except where adequate cause therefor arises out of changed conditions. This principle is based on the idea not only that the stability of the home life of the children is an important and vital factor, but also that the turmoil of litigation must somewhere end. Short of a modification based upon adequate grounds, the decree awarding custody is conclusive and settled beyond recall other than by appeal. Moreover, the acts and conduct of one of the parties to the divorce which give offense to the other, or even to the public at large, are not a matter that calls for or permits a change of custody *unless such acts and conduct are shown to affect directly the welfare and best interests of the child.* Where a court has decreed custody to one parent, such parent may not be deprived of the custody for any supposed unfitness unless it be shown that he or she is *so unfit as to endanger the child's welfare. A custody proceeding is not one to discipline one parent for such parent's shortcomings* as an individual, nor to reward the other for any wrong suffered therefrom. * * * Before a decree awarding custody may be vacated and the child's life unsettled the evidence must be clear and convincing that the child's welfare and best interests will be directly promoted by a change. Generally speaking, there may be no change in the custody provisions of a decree unless the material facts and circumstances occurring subsequently are of a kind to render it essential or expedient for the welfare of the child that there be a change. While each case must be solved on its own facts, there are, of course, elemental factors common to all cases that must not be overlooked. (Italics ours.)

"It is not open to question, and indeed it is universally recognized, that the mother is the natural custodian of her young. This view proceeds on the well known fact that there is no satisfactory substitute for a mother's love. So true is this that in this state the code exacts that she shall have custody of her child, everything else being equal, unless the child has reached the age which necessitates a particular education or preparation for its life work. Civ. Code, § 138."

And the order changing custody was reversed.

Turning now to the evidence in the case which is relied upon as justifying the order of the trial court, since that court stated that the home in which Mrs. Munson was maintaining the child was orderly, neat, clean and well kept, and petitioner admitted that the child looked healthy and well, the charges in defendant's petition that plaintiff was maintaining said child in an unfit and improper place may be said to have been disproved. In support of his charge that plaintiff had become intoxicated in the presence of the child defendant produced no testimony except his own, and while he made the general allegation that he had seen Mrs. Munson "under the influence of liquor" several times, that he had "seen her intoxicated once or twice a week, on an average," he did not testify that she had been intoxicated in the presence of the child. Petitioner's charges were denied by respondent herself and by her mother and her sister-in-law with whom respondent lives. Plaintiff stated that she did take a drink now and then, but that she was not a drunkard—that she had only been in a bar once, and that was when Mr. Munson took her on the night of his birthday, on April 8th. A neighbor who lived across the street from Mrs. Munson and saw her frequently, and another neighbor who visited in the Munson home about twice a week, both testified that they had never seen Mrs. Munson drunk. In Stafford v. Stafford, 299 Ill. 438, 132 N.E. 452, 456, 20 A.L.R. 827, the court said: "This court would not feel warranted in holding that a man is utterly disqualified from having the care, control, and education of his children because of the fact that he has occasionally taken a drink of intoxicating liquor. If we were to adhere to that rule it would disqualify a very large per cent. of men in this country in all of the occupations and professions in which men are engaged. Taking a drink of intoxicants in the presence of a child would be setting a bad example for it. So would smoking or chewing tobacco likewise be a bad example. It may be admitted that the occasional taking of a drink of liquor or the smoking or chewing of tobacco is not a special aid to a man or a recommendation, but we apprehend that no court would undertake to hold, as a matter of law, that either or both would absolutely disqualify a man from having the custody of his child or be considered sufficient ground for giving the custody of his child to another who has no such habit or any other bad habit."

In this day and age that language is equally applicable to a woman.

As to the allegation that plaintiff "permits a certain man to come through the window of the house where she maintains said minor and to visit her in her bedroom," no testimony was given in support of this charge except that of petitioner himself. He testified that he once saw a man referred to as "Tippie" go through the window of plaintiff's room at 12:45 at night. This was denied by plaintiff and its probability is discredited by the testimony of plaintiff, her mother, her sister-in-law and one of the women neighbors, all of whom testified that the window was a small one five or six feet from the ground, that it was hinged at the bottom and had a chain at the top which prevented its being opened more than a little over a foot, that it was almost connected with a window opening into the adjoining room where the sister-in-law slept. It is even discredited by Munson's own testimony that the baby's crib was directly under the window, and his statement that in the evening before he saw "Tippie" go through the window, he had been in Mrs. Munson's home and that this man Tippie was there when he left.

[3] Petitioner relies heavily upon a mushy love letter written by Mrs. Munson to Tippie, but never mailed, which letter Munson purloined from the Munson home, and in which she said "If I really thought there was any chance of your coming down, hon, I'd not only have my windows made bigger, but I'd even move out in the yard and pitch a tent, then I'd be sure you'd get in." Whether this letter acquired by Munson in what he stated was a search for notes or information to get the custody of the child inspired his testimony, or whether it tends to corroborate it, were, perhaps, matters for the trial court. However, objection to admission of the letter in evidence was interposed, and, we think, under the circumstances should have been sustained. While there is authority in this state that, at least in criminal cases, evidence otherwise competent is not inadmissible because secured illegally and by an invasion of the constitutional rights secured by Art. I, section 19, of our State Constitution, on the theory stated in People v. Mayen, 188 Cal. 237, 205 P. 435, 24 A.L.R. 1383, that the Constitution and laws of the land are not solicitous to aid persons *charged with crime* in their efforts to conceal or sequester evidence of their iniquity, and that from the necessities of the case the law countenances many devious methods of securing evidence in criminal cases, this rule has not always been applied in civil actions. In Kohn v. Superior Court, 12 Cal.App.2d 459, 55 P.2d 1186,

1188, where stolen documents were attempted to be read in evidence, the court said, in a replevin action, that if, as plaintiff claimed, the documents had been wrongfully taken, "then it was the duty of the court to order them returned to him with as little inspection as the issues would permit and not to aid, or become a party to, the wrongful taking in any respect whatever." Also see Kohn v. Crocker First National Bank, 22 Cal.App.2d 246, 248, 70 P.2d 989. But whatever may be the rule in criminal cases and in other cases where the interests of the public are involved, where, as in the case before us, purely private rights are involved, and a party to the action has himself infringed the constitutional rights of the other party and stolen a letter from her for the purpose of using it against her in a civil action, the principle set forth in section 3517 of our Civil Code, that "No one can take advantage of his own wrong," becomes applicable; and we are of the opinion that the trial court in a proceeding such as this should not have permitted petitioner to take advantage of his wrong in purloining the letter, and should have refused to become a party to its use.

[4, 5] Petitioner also relies upon the testimony of four witnesses called by him, who were asked their opinions as to whether he, Munson, was a fit and proper person to have custody of the child. A typical question and answer were: "Q. In your opinion is he [Munson] a fit and proper person to have the custody of his own son? A. I would say he would be, as far as I know." Such opinion evidence is entitled to no consideration whatever. Under section 1870, Code of Civil Procedure, opinion evidence may be given only on matters covered by subdivision 9 thereof; and except in the instances therein provided a witness must testify to facts and not opinions. Moore v. Norwood, 41 Cal.App.2d 359, 366, 106 P.2d 939. Opinion evidence as to the fitness of a parent to have custody of a child is inadmissible. Milner v. Gatlin, 143 Ga. 816, 85 S.E. 1045, L.R.A.1916B, 977; Moore v. Dozier, 128 Ga. 90, 57 S.E. 110, 112; Churchill v. Jackson, 132 Ga. 666, 64 S.E. 691, 692, 49 L.R.A.,N.S., 875, Ann.Cas.1913E, 1203; State v. Giroux, 19 Mont. 149, 47 P. 798, 803; Long v. Smith, Tex.Civ.App., 162 S.W. 25, 28, 29.

[6] Petitioner testified that he was boarding with a Mr. and Mrs. Granberg, and, if awarded the custody of the child, intended to take it to their home to be cared for by Mrs. Granberg. This would mean, in effect, that the physical care and custody of this infant would be entrusted to a stranger. But it has been held in numerous cases that this cannot be done unless the natural parents of a child are found to be unfit to have such custody. This principle was restated in the very recent case of Roche v. Roche, 25 Cal.2d 141, 152 P.2d 999, 1000, where joint control of a girl eight years of age was awarded to the parents, but the physical care and control were awarded to the child's paternal grandparents. The Supreme Court quoted from Stever v. Stever, 6 Cal.2d 166, 170, 56 P.2d 1229, to the effect that "before the court can deprive the mother of her right to the minor's custody and give her into the charge of strangers, there must be a finding that the mother is an unfit person to have the custody of her child." Other cases so holding were cited, 25 Cal.2d at pages 143, 144, 152 P.2d 1000. In re Mathews Estate, 169 Cal. 26, 145 P. 503, there cited, the court made a finding that the father of the minor was dead, and that the mother was "an unfit, incompetent, and improper person to have the care, custody, or control" of said child. On appeal an order appointing a stranger as guardian was reversed, the court saying that the evidence relied upon as warranting a finding of incompetency "is pitifully weak, and entirely insufficient in our judgment to warrant a conclusion that the mother is incompetent to act as guardian and should be deprived of the custody of her child."

In Estate of Lindner, 13 Cal.App. 208, 109 P. 101, 102, in a guardianship proceeding, the court found that the mother of the minor child, a girl aged less than three years, was not a fit and proper person to have the custody of her child. The court said that the prior rights of parents to the custody of their children under fourteen years of age cannot be disregarded except *on the most compelling reasons* proven and sustained; that "as against everyone except the father the mother is by the law of God and man entitled as of right to the custody of her own child, and of this right she cannot be deprived except upon a clear showing of her unfitness for the exercise of such right." Also that "a mother who is both capable and anxious to rear her own offspring should not be deprived of the opportunity to thus discharge the duty she owes to the child, without a clear showing of unfitness for

the trust." And the judgment and order were reversed. Also see Wand v. Wand, 14 Cal. 512, 517.

As hereinbefore stated, the order in this case awards the full custody of the child to the father, and contains no provision for the mother to even see her offspring. There is certainly nothing in this case that justifies any such deprivation. In Allison v. Bryan, 26 Okl. 520, 109 P. 934, 939, 30 L.R.A.,N.S., 146, 138 Am.St.Rep. 988, plaintiff, the mother of an illegitimate child which had been legitimized by its father and was in his custody, had been deprived by the latter of any right to see her child. She applied for and was granted an order which provided that the child should be permitted to be with her at certain times and places. On appeal the court quoted from Haley v. Haley, 44 Ark. 429, as follows: "The privilege of visiting accorded to the mother is a plain dictate of humanity, in the absence of any reason to suppose that the privilege would be abused to the injury of the boy. There was none in this case. The charges of immorality against the mother were not sustained. She is shown to be an industrious, hard-working woman, and a good woman, by all the witnesses, except the defendant. But had it been otherwise the permission to visit would not be necessarily erroneous. *The courts should regard the maternal instinct in the veriest trull that walks the streets, taking proper care that it do not lead to the corruption of the offspring. It is the strongest and holiest sentiment of humanity; the freest from selfishness or impurity, and often the last hope of redemption for fallen natures.*" (Italics ours.)

After reviewing other cases dealing with the right of visitation, the court said: "From the foregoing it will be seen that under practically every and all conditions the parent, in some instances the father and in others the mother, while losing the right of custody of their children, have in every instance received at the hands of the court recognition of their right of visitation. * * * the underlying reason for the rule was in each instance that the one accorded the right was a parent, and that it was in accord with humanity and right living and the best interests of the child that it should not forget and be estranged."

In Copeland v. Copeland, 58 Okl. 327, 159 P. 1122, 1124, L.R.A.1917B, 287, the court said: "The child was the legitimate offspring of a lawful marriage between the parties and was of tender years, and, though the mother may have erred, her sin did not dry up the wellsprings of mother love and forfeit all right upon her part to visit with and enjoy the association of her own offspring. Neither does the law so declare, but recognizes this right, so long as the welfare of the child will not be endangered thereby."

It also cited and quoted from Allison v. Bryan, supra, and from Haley v. Haley, supra, which was quoted therein.

[7, 8] We think petitioner failed to furnish evidence which justified the change of custody made by the order of the trial court. As hereinbefore stated, he agreed in a writing dated March 15, 1944, that the custody of the child should be awarded to the mother; and while such agreements are not binding upon the courts, nevertheless, as was said in Black v. Black, 149 Cal. 224, 226, 86 P. 505, courts do generally approve and adopt them, because parents, solicitous for the welfare of their offspring, have the greatest interest in determining which of them can best care and provide for them. And in Sargent v. Sargent, 106 Cal. 541, 546, 39 P. 931, 932, it was said that "Parents have a right to contract with each other as to the custody and control of their offspring, and to stipulate away their respective parental rights, and such contracts are binding upon them."

Petitioner had lived with respondent from the date of their marriage, November 6, 1941, until its dissolution on March 31, 1944, part of the time in the home she now shares with her mother. He must have known when he made his agreement whether Mrs. Munson was a fit and proper mother, and his agreement indicates that he so believed. Even giving his testimony the fullest scope, we think it was inadequate to show that in the space of some seven weeks conditions had so changed and Mrs. Munson had become a person of such dissolute character that she should be deprived of the custody and care of her infant child and same be in effect awarded to a stranger. Petitioner has been free to visit with the baby, and has visited him five or six times a week. While Mrs. Munson is employed in the diet kitchen of a hospital her hours are from 8 a.m. to 1 p.m., and from 4 to 7 p.m., and during her absence from her home the child is well cared for by her sister-in-law who has a child of her own about the same age.

[9] Also the record contains evidence tending to show that petitioner himself is

not above reproach and that his character is not of the best; but it is unnecessary to recite same. We are satisfied for the reasons above stated that other things were not unequal in this case and that this child of tender years should be in the custody of its mother; and we cannot agree that upon the showing made it is for the best interests of this infant to be deprived of its mother's care and affection. We might add that though the Civil Code does not define the degree of fraud which under section 82 thereof will justify the annulment of a marriage, it might well be said that where, as here, plaintiff was constrained to secure the annulment of her marriage because, though the fact was unknown to her, Munson married her when he had another wife living from whom he was not divorced, that his conduct constituted such a fraud upon respondent as required the court, under section 84, supra, to award the custody of the child to her.

The order is reversed.

PEEK, J., concurs.

THOMPSON, Justice.

I dissent. The record contains sufficient evidence to support the order awarding the minor child to his father. The majority opinion appears to invade the exclusive province of the trial judge by disregarding proof and the inferences to be drawn therefrom and by discrediting witnesses.

In an application for custody of minor children the trial judge has a "very broad discretion" in determining what is for the best interests of the temporal, mental and moral welfare of the child, and in deciding which parent is best qualified to assume the custody. Prouty v. Prouty, 16 Cal.2d 190, 105 P.2d 295; Civil Code, sec. 138. In Lefebvre v. Lefebvre, 48 Cal.App. 483, 192 P. 76, 77, it is appropriately said: "If we find substantial evidence in the record to support a rational inference that the order is for the best interests of the child, * * * it would be an excess of our authority to disturb the determination of the trial court."

The respondent testified that, after the decree of annulment had been rendered, he saw the appellant "intoxicated once or twice a week"; that as a result of undue punishment of the child with a wooden paddle, "I have seen five black and blue marks across his body," and that he saw a man called "Tippie" climb through a window into the bedroom where the appellant and the child slept, at 12:45 on the night of April 25th. If those statements are accepted as true, and the trial judge evidently believed them, they furnish ample evidence warranting the court in finding that it is for the best interests of the child, who is now over three years of age, to award its custody to the father. The father's testimony requires no corroboration if the court believed it to be true.

The majority opinion appears to pass upon the weight of evidence and the credibility of witnesses. It asserts with respect to the evidence of intoxication that, "Defendant produced no testimony except his own" on that subject. Regarding the charge of immoral conduct inferred by the statement that respondent saw Tippie climb through the bedroom window, the opinion inadvertently asserts that "No testimony was given in support of this charge except that of petitioner himself." The law requires no corroboration of the respondent's positive statements, but I am satisfied there is substantial corroboration of both statements. The appellant testified that she did drink intoxicating liquor. She admitted that she drank four whisky cocktails one evening on her way from work, and that she did not arrive at her home until ten o'clock that night. She left her child in the care of her sister-in-law. She said she did not become drunk, if that meant that she "passed out" from the effect of the liquor. In a letter which she wrote to the man Tippie she admitted stopping at a friend's house "for just one shot and *it didn't end at that. I did feel pretty high for a while, but don't think I'll feel so good tomorrow.*" Regarding the bedroom window episode, she said in that letter, "If I really thought there was any chance of you coming down, hon, I'd not only have my window made bigger, but I'd move out in the yard and pitch a tent, then I'd be sure you'd get in." (Italics added.)

Several witnesses testified that they believed Mr. Munson was a fit and suitable person to take custody of his minor son. It appears that he was employed as foreman for the Arcata Redwood Lumber Company, and for eight years previously he had worked for the Hammond Lumber Company in Humboldt County. The majority opinion discredits the testimony of those witnesses as mere opinions and incompetent. But in each instance, with one exception, their evidence was received without objection. I think that testimony is competent, although it is not of great importance.

The trial judge did not find that the appellant was unfit to have custody of her child; neither did he find that she was fit or suitable. That omission is immaterial. He did find that it is for the best interests of the child to award its custody to the father. The very fact that the same judge who tried the annulment proceeding saw fit to change the custody from the mother to the father is very persuasive of the fact that he was convinced it was for the best interests of the child to do so. The majority opinion suggests that the trial judge declared in his memorandum opinion filed before judgment that appellant's home was a suitable place for the child. That opinion is not a finding that the *mother* was fit. It only stated "Said *home* is orderly, neat, clean, and well-kept." That merely refers to the condition in the house, and not to the character or fitness of the mother. It is not in conflict with the finding adopted or the order awarding custody.

It is true that the opinion of a trial judge may now be included in the record on appeal. Rule 5 (a), Rules on Appeal. But it may not be considered to overcome, modify or change findings which have been adopted. Lord v. Katz, 54 Cal.App.2d 363, 367, 128 P.2d 907; Nestor v. Burr, 124 Cal.App. 369, 12 P.2d 479; Blackwell v. Ferrari, 60 Cal.App.2d 13, 18, 139 P.2d 997; 2 Cal.Jur. 688, sec. 394; 5 C.J.S., Appeal and Error, § 1641. In the case of Phillips v. Hooper, 43 Cal.App.2d 467, 111 P.2d 22, 23, it is appropriately said: "No antecedent expressions of the judge can in any way restrict his absolute power to declare his final conclusion, in the only manner authorized by law, to wit, by filing his 'decision' (findings of fact and conclusions of law), provided in sections 632 and 633 of the Code of Civil Procedure." (Citing authorities.)

The trial court did not abuse its discretion in modifying the original decree by changing the custody of the child from the mother to the father for conditions which arose after the decree was rendered. It is true that a change of custody may not be based alone on evidence of conditions which did appear in the original trial, or which existed when the decree was rendered. In the case of Washburn v. Washburn, 49 Cal.App.2d 581, 122 P.2d 96, which is cited in the majority opinion and relied upon, a similar order awarding custody of a child was reversed. But it was reversed for the reason that there was no evidence adduced at the hearing of conditions which did not exist at the time of the original trial. In the present case evidence was produced of conditions existing after the rendering of the annulment decree which are inimical to the welfare of the child.

The award of custody of the child was originally made pursuant to a written agreement of the parties. But that agreement is not controlling. Courts are not bound by agreements of the parents respecting the custody of their children in either divorce or annulment proceedings. Puckett v. Puckett, 21 Cal.2d 833, 839, 136 P.2d 1; Van Der Vliet v. Van Der Vliet, 200 Cal. 721, 254 P. 945; Black v. Black, 149 Cal. 224, 86 P. 505; Anderson v. Anderson, 56 Cal.App. 87, 204 P. 426; 9 Cal.Jur. 793, sec. 136; 27 C.J.S., Divorce, § 311; 35 Am.Jur. 228, sec. 73; Civil Code, sec. 84.

The majority opinion suggests, in support of the reversal of the order, that respondent's "character is not of the best." That seems to me to be an invasion of the exclusive province of the trial judge. That is an important question upon which the trial judge must have determined that it is for the best interests of the child to award its custody to him. To suggest that the father was not fit to have the custody depends upon the impeachment of his credibility, and of the witnesses who supported him in that regard. Clearly a reviewing court may not discredit witnesses whose evidence has been accepted by the trial court.

The crux of this appeal appears to depend on how far a reviewing court may go in weighing evidence and discrediting witnesses, to reverse the judgment of a trial court for abuse of discretion in awarding the custody of minor children. No class of cases is so dependent on a careful analysis of the evidence and determination of the credibility of witnesses, as divorce cases and proceedings for the award of custody of children. In such cases the rule that trial judges, who hear the evidence and observe the witnesses in the atmosphere of the trial, are best qualified to pass upon the issues, is peculiarly applicable. The judgment of reviewing courts should not be substituted for that of the trial judge, upon the merits of a cause, except for a total lack or disregard of evidence adduced, or for a very clear and apparent abuse of discretion. It is true that "other things being equal," Civil Code, sec. 138, the mother of a child of tender years is entitled to its custody. The child which is involved on this appeal was only twenty months old at the time of the hearing. He is now over three years of age. Common knowledge warrants the court in assuming that a child three years of age is often very impressionable. Evidently the trial judge concluded that "other things" were not equal, and in his discretion he found that it would be for the best interests of the child to award it to the father. There is an abundance of evidence to support that finding.

I am of the opinion the order should be affirmed.

Rehearing denied; THOMPSON, J., dissenting.

69 Cal.App.2d 530

SCHULTZ v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 14913.

District Court of Appeal, Second District, Division 2, California.

June 8, 1945.

1. Divorce 🔑137

Where wife in divorce action, desiring to take deposition, subpoenaed husband, who failed to appear, it was incumbent on wife to prove service of notice of taking of deposition on husband's attorneys of record.

2. Divorce 🔑137

Where wife in divorce action, desiring to take deposition, subpoenaed husband, who failed to appear, court had no adequate basis for adjudging husband guilty of contempt, where notice of taking of deposition was served on husband but not on either of his attorneys of record.

3. Divorce 🔑137

Where husband in divorce action disregarded wife's subpoena to appear before notary, but later, on show cause order, appeared and stated that no notice of taking of deposition had been served on his counsel, the court, having made no order for husband to answer notary's questions, had no jurisdiction to adjudge husband guilty of contempt, there being no proof of contemptuous behavior outside of court's presence.

4. Divorce 🔑137

Where divorce action in which husband, though summoned, did not appear, was dismissed by court on its own motion after lapse of over 4½ years, jurisdiction was terminated, and hence judgment of contempt because of husband's disobedience of subpoena subsequently issued at request of wife, who desired to take deposition, was void. Code Civ.Proc. § 581a.

5. Dismissal and nonsuit 🔑60(2)

Where defendant has not appeared and no judgment has been entered, court has no alternative under statute except to dismiss action after lapse of three years from service of summons. Code Civ.Proc. § 581a.

6. Divorce 🔑182

Divorce action, dismissed for want of prosecution, was transferred to Supreme Court by wife's appeal from dismissal and from refusal to vacate order thereof, and hence superior court was powerless to make orders therein, or to adjudge husband guilty of contempt because of disobedience of subpoena which wife, desiring to take deposition, caused to be issued after appeal. Code Civ.Proc. §§ 581a, 2021, 2031, 2055.

Petition by Henry C. Schultz against the Superior Court in and for the County of Los Angeles and Stanley Mosk, Judge thereof, for a writ of certiorari, seeking to annul a judgment finding petitioner guilty of contempt because of disobedience of a subpoena.

Judgment of contempt annulled.

Henry Cleveland Schultz, of Los Angeles, for petitioner.

H. Sidney Laughlin, of Los Angeles, for respondents.

MOORE, Presiding Justice.

Petitioner seeks to effect the annulment of a judgment of contempt entered by respondents on the grounds that (1) court had no jurisdiction over petitioner or (2) of the action in which the contempt was adjudicated.

The facts appear to be undisputed that petitioner was sued for divorce on December 27, 1939. Summons was served upon him but he filed no appearance in the action. On August 30, 1944, pursuant to Section 581a, Code of Civil Procedure, the court on its own motion dismissed the action. On the following September 11 the court denied the plaintiff's motion to vacate the order of dismissal. On September 13 she filed her notice of appeal from the order denying her motion to vacate as well as from the order of the court dismissing the action. Having assumed that the action was still pending, on December 4, 1944, pursuant to sections 2021, 2031 and 2055, Code of Civil Procedure, plaintiff filed her affidavit averring that she desired to take the depositions of petitioner and caused the county clerk to issue a subpoena requiring him to appear before a notary public on January 12, 1945, to answer interrogatories relating to the divorce action. The subpoena was served on petitioner on the day of its issuance and notice was also served upon him but not upon either of his attorneys of record.

On January 17, 1945, respondent court issued its order directing petitioner to show cause on January 24 why he should not be adjudged guilty of contempt for his wilful disobedience of the subpoena of December 4, 1944, in that he had failed to appear at the time and place named in the process. On January 24 the court made its second order directing petitioner to show cause on February 14 why he should not be adjudged guilty of contempt for disobeying the order of December 4, 1944. On February 14, 1945, petitioner appeared before the court, suggested the death of his "attorney of record" and stated that no notice of the taking of the deposition had been served upon his counsel. The court made no order for petitioner to answer questions propounded to him by the notary but upon the conclusion of the hearing then and there found him guilty of contempt in that he had willfully failed and refused to appear before the notary public at the time and place designated in the subpoena, and fined him $100.

[1-3] From the foregoing recitals the nullity of the judgment of contempt is readily apparent. After petitioner's failure to appear in obedience to the subpoena it was incumbent upon the plaintiff to prove service of notice of the taking of the deposition on petitioner's attorneys of record. The only approach to this showing is the affidavit of her counsel that the notice was addressed to petitioner and his attorneys. Lacking proof of the required service the court had no adequate basis for an adjudication of contempt. Kreling v. Superior Court, 18 Cal.2d 884, 118 P.2d 470. Conceding, arguendo, the pendency of the divorce action, the court never acquired jurisdiction to punish petitioner by reason of the court's failure first to require the performance of the omitted act. Blache v. Superior Court, 35 Cal.App.2d 740, 96 P.2d 970. Having failed to make its order requiring petitioner to answer the questions which had been propounded to him, the court had no jurisdiction to adjudge him guilty of contempt, there being no proof showing contemptuous behavior outside of the presence of the court. Overend v. Superior Court, 131 Cal. 280, 63 P. 372.

[4-6] But the transcendent vice of the judgment of contempt lies in the fact that the case in which the subpoena was issued was not pending before the court at the time of the issuance of the writ or at any subsequent date. Under section 581a, Code of Civil Procedure, the court is required on its own motion or on that of the defendant to dismiss an action after the lapse of three years following the date of the service of the summons. Where no appearance has been filed in an action by the defendant and no judgment has been entered, the court has no alternative other than to dismiss the action following the prescribed period. The dismissal ordered on August 30, 1944, terminated the jurisdiction of the court with reference to the divorce action. Jacks v. Lewis, 61 Cal.App.2d 148, 142 P.2d 358; Lynch v. Bencini, 17 Cal. 2d 521, 530, 533, 110 P.2d 662. Having lost jurisdiction of the case some five months prior to the proceedings for contempt, its judgment was void. Kreling v. Superior Court, supra; Andrews v. Superior Court, 103 Cal.App. 360, 284 P. 494. Furthermore, if section 581a had never been enacted the court would be powerless to make orders in the action, which had by virtue of the plaintiff's appeal been transferred to the Supreme Court.

It is therefore ordered that the judgment of the Superior Court made on February 14, 1945, adjudging petitioner guilty of contempt and fining him $100 be and it is hereby annulled.

W. J. WOOD, and McCOMB, JJ., concur.

69 Cal.App.2d 486

PEOPLE v. DOETSCHMAN.

Cr. 491.

District Court of Appeal, Fourth District, California.

June 7, 1945.

Rehearing Denied June 19, 1945.

Hearing Denied July 5, 1945.

1. Criminal law 🔑507(7)
Infants 🔑20

In prosecution for contributing to minor's delinquency, minor's testimony against defendant need not be corroborated, as minor is not principal in sense that he or she may be prosecuted for same offense within statute requiring corroboration of accomplice's testimony. St.1937, p. 1033, § 702; Pen.Code, §§ 31, 1111.

2. Criminal law ⚷511(1)

Evidence corroborating prosecuting witness' testimony need only tend to connect defendant with commission of crime charged.

3. Criminal law ⚷878(4)

In prosecution for statutory rape and two violations of statute defining misdemeanor of contributing to minor's delinquency, jury's disagreement on counts of indictment charging rape and one violation of such statute was not equivalent to finding that none of evidence relating to such counts was true, and hence did not require holding that prosecutrix' testimony was not corroborated by so much of such evidence as tended to connect defendant with commission of offense charged in remaining count. St.1937, p. 1033, § 702.

4. Witnesses ⚷395

When witness is charged with improper motives or influences or with recent fabrication, hearsay statements may be introduced in evidence to show that witness made statements, consistent with his testimony, prior to alleged fabrication or existence of motive of interest.

5. Witnesses ⚷395

In prosecution for contributing to minor girl's delinquency, testimony that prosecutrix told district attorney's investigator of her relations with defendant was admissible to prove that prosecutrix was not controlled by threats and did not fabricate testimony solely for purpose of case, in view of evidence that her statement to investigator was made before her fears or threats against her were claimed to have been aroused or made. St.1937, p. 1033, § 702.

6. Witnesses ⚷395

In prosecution for contributing to minor girl's delinquency, a doctor's testimony that prosecutrix told him, when he examined her, that she had had sexual intercourse with defendant on four occasions and that act charged in count of indictment on which there was no conviction had previously been committed, was not admissible to show that prosecutrix was not controlled by threats and had not fabricated testimony solely for purpose of case. St. 1937, p. 1033, § 702.

7. Criminal law ⚷1169(2, 6, 11)

Admission of doctor's testimony that minor prosecutrix, to whose delinquency defendant was charged with contributing, told witness, when he examined her, that she had had sexual intercourse with defendant on four occasions and that act charged in one count of indictment had previously been committed, was not sufficiently prejudicial to defendant to justify reversal of conviction on another count, where prosecutrix repeated damaging part of such evidence several times in her testimony, all such part related to charges in counts on which there was no conviction, there was other evidence of similar statements by prosecutrix, and whole issue as to fears on her part or threats against her was gone into thoroughly. St.1937, p. 1033, § 702; Const. art. 6, § 4½.

8. Criminal law ⚷404, 510½

In prosecution for contributing to minor girl's delinquency, where prosecutrix testified that defendant asked her for some of her pubic hair, an envelope containing lock of hair from prosecutrix' head and samples of human pubic hair, which district attorney's investigator testified that he found in defendant's laboratory, was admissible in evidence as tending to corroborate prosecutrix' testimony and showing one of surrounding circumstances in case. St. 1937, p. 1033, § 702.

9. Criminal law ⚷706, 1170½(5)

The district attorney's questions on cross-examination of minor prosecutrix, who was unwilling witness and plainly showed her friendship for defendant, charged with contributing to her delinquency, as to whether defendant told prosecutrix that he had other girls in his laboratory, did not constitute prejudicial misconduct, where matter was dropped after objections to two of such questions were sustained. St.1937, p. 1033, § 702; Const. art. 6, § 4½.

10. Witnesses ⚷288(2)

In prosecution for contributing to minor girl's delinquency, district attorney's questions, as to defendant's conduct with another girl on her redirect examination after defendant went into such matters on cross-examination of such witness or during her cross-examination by prosecution after she was called as witness by defendant, were not improper. St.1937, p. 1033, § 702.

11. Criminal law ⚷706, 1170½(6)

The district attorney was not guilty of such intentional misconduct as to justify reversal of conviction for contributing to minor girl's delinquency in asking janitor at zoo laboratory, where defendant was working, about defendant's statements to witness respecting his conduct with another girl than prosecutrix, where objections to such questions were sustained, jury was instructed as requested by defendant, and his counsel went into similar matters to much larger extent at other times. St.1937, p. 1033, § 702.

12. Statutes ⟹71

The statute, providing for establishment of industrial farms or road camps in each county and authorizing sentence of persons convicted of misdemeanors to imprisonment in such camps or county jails in courts' discretion, is not unconstitutional as not general in nature or uniform in operation as between different counties with respect to punishment for like offenses. Pen.Code, § 19a; St.1921, pp. 1615, 1620, 1621, §§ 1, 10, 14; St.1939, p. 1508, § 6.

◆

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Willis H. Doetschman was convicted of contributing to the delinquency of a minor girl, and he appeals.

Affirmed.

Edgar B. Hervey, of San Diego, and Henry F. Walker, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Thomas Whelan, Dist. Atty., and Robert L. Barbour, Deputy Dist. Atty., both of San Diego, for respondent.

BARNARD, Presiding Justice.

The defendant was tried on an indictment containing three counts. Count I charged him with statutory rape in connection with a girl 16 years old, alleged to have been committed on July 10, 1944. Count II charged him with a violation of section 702 of the Welfare and Institutions Code, St.1937, p. 1033, alleged to have been committed with the same girl on the same day. Count III charged another violation of said section 702 in connection with the same girl, alleged to have been committed on June 30, 1944.

The jury was unable to agree on the charges set forth in Counts I and III but found the defendant guilty on the charge contained in Count II. The court sentenced the defendant to imprisonment in the Industrial Road Camp for one year, and he has appealed.

The appellant was a science instructor in one of the San Diego High Schools, and also was doing certain research work at the San Diego Zoological Hospital, using a laboratory room at the Zoo hospital for that purpose. The complaining witness had attended the appellant's biology and chemistry classes in high school and after school closed on June 16, 1944, she was voluntarily assisting him in his work in the laboratory at the Zoo hospital. According to the theory of the prosecution the acts involved in all three counts of the indictment took place in that laboratory. The appellant does not contend that the evidence is insufficient to support his conviction on Count II, but does contend that the only evidence in the record in support of that charge is that of the prosecutrix, that her testimony was entirely without corroboration, and that the evidence supporting a conviction on that count is extremely weak, making more prejudicial any errors which occurred. We are unable to agree with the contention that the evidence supporting this conviction is weak or unsatisfactory. We regard it as unusually strong for a case of this nature where the direct evidence of other eyewitnesses is not usually obtainable. On the other hand, the record indicates that the appellant was extremely fortunate in obtaining a disagreement among the jurors with respect to the charges involved in the other two counts. Without reviewing the evidence it may be observed that the testimony of the prosecuting witness, with respect to the offense alleged in Count II, is corroborated by many other facts and circumstances appearing in the record, including a most important admission made on the stand by the appellant himself.

[1] Appellant's first point is that the court erred in instructing the jury that "it is not essential to a conviction in this case * * * that the prosecutrix * * * should be corroborated by the testimony of other witnesses." While the appellant concedes that section 702 of the Welfare and Institutions Code, St.1937, p. 1033, does not contain any requirement for corroboration in such a case he argues that, since the prosecuting witness was concerned in the commission of this crime, she was a principal under section 31 of the Penal Code and thus liable to prosecution for the

identical offense, and that it follows that section 1111 of the Penal Code, requiring corroboration of the testimony of an accomplice, is therefore applicable.

Section 702 of the Welfare and Institutions Code does not require corroboration and none is necessary. People v. Lucas, 16 Cal.2d 178, 105 P.2d 102, 130 A.L.R. 1485. Moreover, the court here gave a cautionary instruction to the effect that such a charge is easily made and difficult to disprove, for which reason the testimony of the prosecuting witness should be carefully examined, as suggested in the case just cited. Under section 702 the minor involved is regarded as the victim and the offense there denounced is the harmful act to that victim with the resulting harm to society in general. By no stretch of the imagination can it be said, in a prosecution under that section, that the minor involved is a principal in the sense that he or she could be prosecuted for the same identical offense, within the meaning of section 1111 of the Penal Code. Such cases are analogous to statutory rape cases in which it has been consistently held that the minor victim is not an accomplice.

[2, 3] It is further argued in this connection that there was no corroboration of the testimony of the prosecuting witness aside from certain evidence relating to Counts I and III, upon which the jury disagreed, and that those facts cannot be used as corroboration in connection with Count II because it must be taken, in view of that disagreement, that the jury did not accept those facts as true. Corroborating evidence need only tend to connect a defendant with the commission of a crime. Not only is there much corroborating evidence which is not specifically related to the charges in Counts I and III, but the appellant is in error in contending that because the jury disagreed as to those counts it thereby found, in effect, that none of the evidence relating to those counts was true. The case was all tried together and most of the evidence was put in for its effect on the entire case. While the jury may have entertained a doubt with respect to some element involved in Counts I and III, respectively, this is far from a finding that none of the evidence which might have some relation to those counts was true. Much of that evidence may properly be considered in connection with Count II and much tends to connect the defendant with the commission of that offense. This and other evidence, including a part of the appellant's testimony, furnishes ample corroboration for the testimony of the prosecuting witness, if such corroboration were needed.

[4-7] It is next contended that the court erred in two instances in admitting hearsay evidence. In the first instance, an investigator in the district attorney's office was permitted to testify, over an objection, that on July 11, 1944, the prosecutrix told him of her relationship with the appellant and further told him that she had been hoping that something would come up which would stop those relations as she knew they were not right and wanted them broken. In the other instance, a doctor who examined the prosecutrix on July 20, 1944, was allowed to testify, over the objection of the appellant, that at that time the prosecutrix had told him that she had had sexual intercourse with the appellant on four occasions and that prior thereto the act charged in Count III had been committed. In each instance the evidence was admitted and the court instructed the jury that it was received not to prove the facts in this case, but for the sole purpose of tending to show that the prosecuting witness had not been controlled by threats and that she had not fabricated something for the purpose of this case alone. Later, in the general instructions, the court again instructed the jury to this effect and more in detail.

The prosecuting witness was an unwilling witness who was obviously friendly to the appellant and she tried in her evidence to protect him as much as she could. Appellant's counsel was contending that the prosecuting witness was frightened when she was taken to the district attorney's office for questioning and when she testified before the grand jury, and was trying to establish that she was threatened with a charge of perjury and with being taken from her parents and placed in a home, although she testified "I wouldn't say 'threatened.'" Apparently, the evidence here complained of was admitted under the rule announced in People v. Kynette, 15 Cal.2d 731, 104 P.2d 794, to the effect that when a witness has been charged with improper motives or influences, or with recent fabrication, hearsay statements may be introduced for the purpose of showing that consistent statements had been made at a time prior to the alleged fabrication or prior to the time the motive of interest existed. Under the circumstances here appearing, the evidence involved in the first instance was admissible under this rule, there being some evidence that the statement was made before the fears or threats were claimed to have been aroused or made. This is not true with respect to the statements to which the doctor testified. Clearly, the objection there made should have been sustained. However, this evidence was given as a part of the doctor's statement of his examination of the prosecuting witness and what he then found. The damaging part of this evidence was repeated several times by the prosecuting witness in her testimony while on the stand and all of the damaging part related to the charges involved in Counts I and III, on which there was no conviction. There was other evidence of similar statements made by the prosecuting witness before any investigation was started and the whole issue as to fears on her part or threats made against her was gone into thoroughly and at great length. Any error in this connection could not, under the circumstances shown by the record, be held sufficiently prejudicial to justify a reversal.

[8] It is next contended that the court erred in receiving in evidence an exhibit consisting of an envelope containing certain samples of hair. One of these was admittedly a lock of hair from the head of the complaining witness. Other samples were admitted to be human pubic hair. The complaining witness testified that the appellant had asked her for some of her pubic hair but that she had not given him any. The appellant testified that he had used this hair in making a study of crab lice. An investigator in the district attorney's office testified that this exhibit was found in the appellant's laboratory on July 11, 1944, the day the prosecuting witness was first brought to the district attorney's office; that the envelope was shown to the appellant; and that he stated that it contained pubic hair which he had obtained from "a lady friend", that one lock of the hair was obtained from the head of the prosecuting witness, and that she had submitted both kinds of hair to him. It is argued that this exhibit had no bearing upon the issues in the case and that its only possible purpose was to cause the jury to speculate as to what type of person would make a collection of pubic hair. This evidence tends to corroborate some of the evidence given by the prosecuting witness and it cannot be said that it bore no relation to or was not connected with the case. It was found in his possession, his explanation presented a question for the jury, and the evidence was properly admitted as one of the surrounding circumstances. People v. Cook, 148 Cal. 334, 83 P. 43.

[9] It is next argued that the district attorney was guilty of prejudicial misconduct in that he asked questions of three witnesses with the intention of implying that the appellant had had improper relations with other girls, knowing these matters to be inadmissible. In the first instance, the prosecuting witness was asked whether, in a conversation between herself and the appellant to which she had testified, there had been any conversation with him about "whether or not he had other girls up there." The witness replied "No." Appellant's counsel objected to the question but immediately withdrew the objection. The district attorney then asked "You say that he didn't tell you he had other girls up there?" An objection to this question was sustained. The district attorney then asked the witness to read certain lines of the transcript of her testimony before the grand jury to see if her recollection was refreshed as to whether or not the appellant had made that statement to her. An objection to this was sustained. The witness was an unwilling witness who plainly showed her friendship for the appellant and the district attorney was apparently attempting to impeach her but the matter was dropped when objections to two questions were sustained.

[10] Complaint is then made of certain questions asked of another girl who appeared as a witness, with reference to the appellant's conduct with her. The questions complained of were all asked on redirect examination after the appellant in his cross examination of the witness had gone into these matters, or later after this same witness had been called by the appellant and while she was being cross-examined by the prosecution. Insofar as this witness was concerned these matters were first raised by the appellant.

[11] Another witness, a negro janitor at the Zoo laboratory, was asked similar questions in connection with a conversation or conversations he testified he had had with the appellant. Not only were these questions as to statements made by the appellant to the witness, but objections were sustained and in this connection the appel-

lant made assignments of misconduct. In each instance the court sustained the objection and also instructed the jury as requested.

Conceding that these questions should not have been asked, there was some provocation and appellant's counsel, for an obvious purpose of his own, at other times went into the same and similar matters to a much larger extent. While the district attorney erred in asking the questions, no such intentional misconduct appears as would justify a reversal on that ground.

[12] Appellant's final contention is that the sentence imposed upon him is illegal and void. It is argued that section 19a of the Penal Code superseded section 21 of the Juvenile Court Act, St.1915, p. 1225 (now 702 of the Welfare and Institutions Code); that section 19a limits jail terms for misdemeanors to a period of one year and, in a second sentence, provides that where any county has established a penal farm or road camp, commitment thereto may be for such a period as the court may order, within the limits prescribed by statute for the particular offense; and that it was held in People v. Lewis, 13 Cal.2d 280, 89 P.2d 388, that the second sentence of 19a is unconstitutional. It is also argued that any other statutes which purport to permit counties to establish road camps or similar institutions, to which persons convicted of misdemeanors may be sent, are likewise unconstitutional because they provide for a different punishment of the same offense in such counties than that provided in other counties, and that such a statute is neither general in nature or uniform in operation.

In People v. Lewis, 13 Cal.2d 280, 89 P.2d 388, it was not directly held that the second sentence of section 19a is unconstitutional. The holding was that the first sentence of that section, limiting confinement in the county jail to a period of one year in misdemeanor cases, is valid and separable from the second sentence of that section even though it be assumed that the second is unconstitutional. Apparently, even the assumption that the second sentence was unconstitutional was based on the fact that the language there used might permit the imposition of a longer term in counties having penal farms than that imposed in other counties and not because the place of confinement was different. It was also pointed out in that case that under that statute a "penal farm", as provided for in 19a, would form no part of a county jail.

In 1921, the legislature passed an act providing for the establishment and administration of industrial farms or industrial road camps, which may be established in each county of the state. Stats.1921, p. 1615, amended by Stats.1935, p. 403, Stats. 1939, C. 252, p. 1507. Section 1 of that act states that its purpose is to make possible the substitution of constructive labor for profitless prison confinement in order to benefit the convicted person. Section 6 provides that any person convicted of a misdemeanor, in the superior court of any county having established such a farm or camp, may be sentenced to imprisonment therein or in the county jail, in the discretion of the court. Section 10 provides for the payment of certain compensation for the benefit of the prisoner or his dependents. Section 14 provides that "Any industrial farm or industrial road camp established under the provisions of this act shall be considered a county jail, * * * for all purposes not inconsistent with the provisions and purposes hereof."

By the provisions of this act an industrial road camp is considered as and declared to be a county jail. In effect, such a camp is made a second or alternate county jail under circumstances which are very much more favorable to the prisoner than are the conditions necessarily found and maintained in a county jail of the original type. So far as we are aware there are no provisions in law that a county may not maintain two county jails, and none that one jail must be handled and conducted in the same manner as another in the same county. This statute creates no lack of uniformity as between different counties in connection with the length of the term to be served, this matter being left to other statutes. The statute is general and uniform in that it permits all counties to establish such camps. In our opinion, there is no such a difference in punishment or lack of uniformity in operation, in connection with this statute, as to render its provisions unconstitutional, as here claimed, and no discrimination of which the appellant may complain.

While we have no doubt of the constitutionality of this statute and of section 6 thereof, insofar as that question is here raised, it may be pointed out that if the appellant were sustained in his contentions he would be harmed rather than benefited, as such a holding could only require a reversal for the limited purpose of resentencing him to confinement in the more conventional and longer established type of county jail. People v. Lewis, 13 Cal.2d 280, 89 P. 2d 388.

We find no errors which, especially in view of the provisions of section 4½ of article VI of the Constitution, are sufficient to require or justify a reversal.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

BROOKS v. METROPOLITAN LIFE INS. CO.*

Civ. 14704.

District Court of Appeal, Second District, Division 2, California.

June 7, 1945.

Rehearing Denied June 28, 1945.

Hearing Granted Aug. 2, 1945.

1. Appeal and error 🔑979(1)
New trial 🔑6

The granting of motion for new trial rests within discretion of trial judge whose order granting new trial will not be disturbed on appeal in absence of manifest abuse of discretion, but where there is no substantial conflict in evidence and evidence as a whole would be insufficient as matter of law to support a verdict in favor of moving party, order granting new trial cannot be sustained.

2. Insurance 🔑665(6)

Evidence established that insured's death in burning building resulted from suicide, precluding recovery on accident policy in which indemnity was doubled in case of death in consequence of a burning building and which did not cover death by suicide while sane or insane.

3. Evidence 🔑89

A disputable presumption is dispelled as matter of law when evidence is without substantial conflict and is wholly irreconcilable with presumption sought to be invoked.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Maxine Fogarty Brooks against the Metropolitan Life Insurance Company to recover on a policy. From an order granting the plaintiff a new trial on ground of insufficiency of the evidence to sustain the verdict for defendant, defendant appeals.

Reversed.

Ray Howard and W. W. Comstock, both of Los Angeles, for respondent.

Walker, Adams & Duque, of Los Angeles (A. Andrew Hauk, of Los Angeles, of counsel), for appellant.

W. J. WOOD, Justice.

Plaintiff seeks a judgment in the sum of $10,000 against defendant insurance company, claiming that her deceased husband met his death by violent and accidental means in a burning building. A jury returned a verdict in favor of defendant but the trial court granted a motion for a new trial on the ground of insufficiency of the evidence. From the order granting a new trial defendant has appealed.

The material portions of the policy which are applicable to the issues of the present litigation are as follows: "Metropolitan Life Insurance Company * * * hereby insures Sabetay Beraha (Brooks) * * * subject to the provisions and limitations herein contained, in the principal sum of Five Thousand Dollars * * * against the results of bodily injuries sustained while this policy is in force and caused by violent and accidental means, to wit:— * * * For loss of life * * *. The Full Principal Sum Above Specified. * * * Double Indemnities: If such injuries be received * * * in consequence of the burning of any building in which the insured shall be at the commencement of the fire, the amounts payable for any of the losses enumerated in the preceding clauses shall be doubled. * * * Risks Excluded: This insurance shall not cover suicide or any attempt thereat while sane or insane; * * * nor shall it cover accident, injury, disability, death or any other loss caused wholly or partly, directly or indirectly, by disease or bodily or mental infirmity or medical or surgical treatment therefor." In its answer defendant interposed several defenses, among them that the insured committed suicide, a defense which in our view of the evidence is the only one that need be considered.

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* Subsequent opinion 163 P.2d 689.

There was no substantial conflict in the evidence. About 7 o'clock a. m. on November 19, 1941, the insured, Mr. Brooks, suffered second and third degree burns which resulted in his death. For more than two years prior to his death Brooks had been suffering from rectal cancer, which was malignant and incurable. He suffered excruciating pain to such an extent that he was given increasingly large amounts of morphine in order to be relieved momentarily. He had undergone a major operation in the fall of 1939, at which time the lower portion of his intestines and rectum were removed, requiring the use of a permanent opening in his abdomen. Some months before his death he was forced to take to his bed although he was still able to and did get up and walk about the house. He was constantly attended by nurses both day and night. At times he appeared to be irrational for short intervals and was not permitted to shave outside the presence of nurses.

The plaintiff, the widow of decedent, had worked in decedent's flower shop as an assistant until their marriage on January 23, 1941. At the time of the marriage she knew of his physical infirmities and after the marriage and up to the time of the death of decedent she continued to work in the flower shop. After their marriage Mr. and Mrs. Brooks lived in the north half of a duplex home in the vicinity of the flower shop, the landlord living in the other half.

It was the custom of Mrs. Brooks to stay at home in the morning until the day nurse, Mrs. McCulley, arrived. But on the morning of November 19, she left earlier than usual, before 7 o'clock and prior to the arrival of the day nurse, because she had to be at the flower shop to pick up a floral piece. Shortly before going off duty at 7 o'clock a. m. on November 19, Mrs. Callahan, the night nurse, was in the kitchen having a cup of coffee when Mr. Brooks called from the bedroom and said, "Mrs. Callahan it is time you were going". She noted by her watch that it was fifteen minutes before 7 o'clock. Brooks had never before asked her to leave and she had never left before 7 o'clock on any other morning. When Mrs. Callahan left Brooks was lying quietly in his large bed with his eyes shut and when she said she was leaving and would see him again he replied by merely shaking his head. When she left the house she noted that Mrs. Brooks had already gone and that the front door was unlocked. She did not lock it but left it unlocked for the day nurse. When the night nurse and Mrs. Brooks left the house on the morning of November 19, the bedding on Mr. Brooks's bed and the nurse's cot was neatly arranged; there was no pile or accumulation of papers or magazines on the floor at any place in the bedroom; the living room cushion was not on the bedroom Morris chair; the bedroom windows were not entirely closed; the blinds and curtains throughout the house and in the bedroom were not closed or drawn; and the small gas heater was lighted and burning.

Mrs. McCulley arrived at ten minutes before 8 o'clock but found that the front door was locked, an occurrence which was unusual because the door had always been unlocked when she arrived. When the landlord, Mr. Olson, was called to the front door by the day nurse he found that the front door was locked and that he could not open it despite the use of two keys. He opened the front window and climbed in under the drawn blind to open the door from the inside. Olson found all the windows closed and the blinds drawn. He opened one of the windows and played water through a hose into the smoke-filled bedroom. When the smoke cleared he saw that Brooks was apparently dead and was lying on the small night nurse's cot. The bedding which had been neatly arranged on the bed and cot an hour earlier was found to be piled up on the head of the bed, on the floor between the cot and the bed, alongside the cot and on the cot. It was smoldering and on fire, as was the living room cushion which had been brought from the living room into the bedroom and put on the Morris chair adjacent to the cot. The head of the bed and the cot were both on fire immediately adjacent to Brooks' body, which was charred and burned from the waist down.

Shortly after the discovery of Brooks' body by Mr. Olson and the nurse, representatives of the fire department arrived. From their testimony it appeared that the fire in the gas heater had been extinguished and a bottle, which had been half full of rubbing alcohol and which had been left on the dresser, was found in the waste basket. The bottle was empty but the odor of alcohol was noticeable in the burned debris in the charred area about the cot, and particularly in the upper portion of Brooks' night clothes and in the charred lower portion of his body. This alcoholic odor was identical with the odor coming from the empty bottle of rubbing alcohol. An analysis showed that the contents of the bottle consisted of inflammable rubbing alcohol. There were two distinct burns completely through the floor in the charred area underneath and immediately adjacent to the small cot. The bedding on the cot had burned around and under Brooks' body, especially from the midriff down. In the charred area on the floor there was an amount of the burned debris of light texture and there was a large amount of unburned and partially burned papers underneath the cot and some badly charred paper was piled on the small cot with Brooks' body.

During the night before his death Brooks said to the night nurse that he hated to die without leaving his widow more money and that he wanted to leave her well protected. A physician testified that he had permitted Brooks to have progressively large amounts of morphine and pentapon so that at the time of his death he was in such a state of narcosis that in his opinion he would not have had any great feeling of pain from fire.

[1, 2] Although it is unquestionably the rule that the granting of a motion for a new trial rests within the discretion of the trial judge and that an order granting a new trial will not be disturbed on appeal in the absence of a manifest abuse of discretion, it is thoroughly established that where there is no substantial conflict in the evidence and the evidence as a whole would be insufficient as a matter of law to support a verdict in favor of the moving party an order granting a new trial cannot be sustained. From an examination of the record before us we are satisfied that the evidence points unerringly and conclusively to suicide on the part of the decedent. No other reasonable conclusion can be reached. Some one must have locked the door, closed the windows and pulled the blinds, rearranged the bedding and papers and applied rubbing alcohol to decedent's body and to his clothing. It is impossible to rationally conclude that any person did this other than Mr. Brooks himself.

[3] Respondent contends that she is entitled to rely upon certain disputable presumptions, such as the presumption of innocence of crime and that a person takes ordinary care of his own concerns. Appellant contends that these presumptions are not applicable to cases in which the issue is whether a party came to his death by accidental means, citing Postler v. Travelers' Ins. Co., 173 Cal. 1, 158 P. 1022. We do not regard this question of especial moment, however, for we are satisfied that the case comes within the rule that a disputable presumption is dispelled as a matter of law when the evidence is without substantial conflict, as in the present case, and is wholly irreconcilable with the presumption sought to be invoked. Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529.

Since the evidence would not support a judgment for plaintiff, it is ordered that the order granting a new trial be and it is reversed.

MOORE, P. J., and McCOMB, J., concur.

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69 Cal.App.2d 541

KATZ v. A. J. RUHLMAN & CO., Inc., et al.

Civ. 12823.

District Court of Appeal, First District,
Division 2, California.

June 12, 1945.

Rehearing Denied July 12, 1945.
Hearing Denied Aug. 9, 1945.

1. Evidence 🔑591

Plaintiff was bound by testimony of his own witness.

2. Executors and administrators 🔑233, 450

In action by administrator with will annexed to recover on note executed by corporation to decedent, evidence did not sustain finding that executor had not consented to offset obligation of note against corporation's claim against decedent, and that corporation failed to file a creditor's claim against estate because of executor's conduct.

3. Estoppel 🔑53

On issue of estoppel, fraud and mistake are treated in same category.

4. Executors and administrators 🔑232

When executor or administrator of an estate in probate has agreed to compromise of existing claim and has fraudulently or mistakenly advised a creditor that he need not file a claim against estate, the estate cannot repudiate the act of its representative and seek profit through fraud or mistake of its own agent.

5. Executors and administrators 🔑449

In action by administrator with will annexed to recover on note executed by corporation to decedent, testimony relating to status of corporation's account with co-owner of corporation was outside the issues and should have been excluded.

6. Executors and administrators 🔑87

An executor could compromise with approval of probate court an indebtedness represented by note payable to decedent. Probate Code, § 718.5.

7. Executors and administrators 🔑87

Where compromise and settlement ot note payable to decedent were made by executor with approval of court, administrator with will annexed could not repudiate such settlement after time to file claim had expired. Probate Code, § 718.5.

8. Executors and administrators 🔑121(1)

Where interest accumulating on amount due estate was due to fault of administrator with will annexed, such interest was not chargeable to debtor of the estate.

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Appeal from Superior Court, San Francisco County; Franklin A. Griffin, Judge.

Action by Phil C. Katz, as administrator with the will annexed of the last will and testament of Josephine Wester, also known as Josephine K. Wester, deceased, against A. J. Ruhlman & Co., Inc., and others, to recover upon a note delivered by named defendant to decedent. From a judgment for plaintiff, named defendant appeals.

Reversed.

Albert D. Elledge, of San Francisco, for appellant.

Henry F. Boyen and Frank J. Fontes, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff, as administrator with the will annexed, sued to recover upon a promissory note delivered by defendant to the decedent. The defendant answered alleging it had an offset against the note in money due from decedent which plaintiff was estopped to deny because of certain acts of the former executor of the estate. The trial court rejected the defense and gave judgment for the full amount of the note with interest.

In its appeal from the judgment defendant attacks the findings of fact as not supported by the evidence and argues that the executor waived the statutory requirement that a verified claim be filed, agreed upon a compromise of both claims, and is estopped from repudiating this agreement.

These facts are undisputed. Josephine Wester and A. J. Ruhlman were co-owners of the defendant corporation. In August, 1939, the corporation executed and delivered its promissory note in the sum of $2,500 to Mrs. Wester. In September, 1939, Mrs. Wester died. In the same month A. J. Ruhlman delivered the note to the executor, Monte A. Dernham. Thereafter conversations were had between Ruhlman and the executor through which it was agreed that the balance of $2,037.07 claimed by the corporation to be due from the decedent should be accepted as a partial offset to the promissory note, that no claim need be filed against the estate, and that the latter would assert as the sum due the estate the balance between the two conflicting claims, which was fixed at $462.93, and interest would be waived. Mr. Dernham was an attorney at law and for several years had been the legal adviser and attorney for Mr. Ruhlman. Acting upon the agreement of these parties the executor filed an inventory in April, 1942, and an inventory and appraisement in January, 1943. The first did not refer to the promissory note, the second stated the sum due on the note to be $262.93. (An obvious clerical error. Should be $462.93.) The corporation, also acting upon the agreement of the parties, and relying upon the legal advice of the executor, failed to file a claim against the estate. After the statutory time for filing had passed the administrator, who had been substituted for the executor, repudiated the compromise and sued for the full amount of the note.

The trial court found "That it is not true that Monte A. Dernham, as Executor of the Last Will and Testament of said decedent, cancelled any part of the principal or interest due upon said promissory note, or entered into any alleged agreement concerning the amount due for principal and interest on said promissory note, or consented to offset the obligation of said promissory note against any alleged claim of said corporation against Josephine Wester, and that it is not true that the defendant corporation failed to file a creditor's claim against the estate of said decedent by reason of any act or conduct upon the part of the personal representative of the estate of said decedent." This finding is not supported by any evidence direct or circumstantial, or by any inference or presumption. All the evidence is directly contrary to the finding. But two witnesses were called, Mr. Ruhlman and Mr. Dernham. The first testified:

"Q. Was there anything else at that time relative to the note and any possible offsets? A. He and I discussed that, yes, about the note and also the offset amount. I will say again, he stated, he said, 'We will let that go until we settle the estate,' he said, 'and then you can pay off the difference,' which was four hundred and sixty odd dollars; that was the end of that conversation.

"Q. Was there anything said about filing a claim against the estate of Josephine Wester? A. I asked Mr. Dernham, 'Should I file a claim?' He said, 'Oh, it won't be necessary. We will straighten this thing out. You don't have to do that.'"

[1, 2] Mr. Dernham testified on behalf of respondent as follows:

"Q. Have you told us the conversation that took place at the second meeting? A. Yes, just as Mr. Ruhlman testified. His testimony was substantially truthful, I think, to the effect that he called my attention to the fact that there were certain counter-claims against that note.

"Q. Tell us what was said on the subject of counter-claims if anything. A. I think Mr. Ruhlman's testimony as on that point was substantially correct, and I was—it impressed me as honest, and I am willing to repeat that with certain qualifications.

"Q. That is what I am trying to get from you, the conversation. A. (Continuing) However, I will answer counsel's question.

"Q. The court will judge of your credibility. I want you to tell us those variations, if any, if you will give them to us please. A. The only variations I noticed, as Mr. Ruhlman testified, was this: That to the best of my recollection I did not make the unqualified and absolute statement to Mr. Ruhlman that, 'This will be allowed when the estate is settled.' It was merely a casual remark that whatever will happen to it, or whatever the account was, it will be taken care of and properly set off. It was a casual statement, but intended as an agreement for a committal."

The witness was further interrogated by counsel for respondent in an effort to disprove the previous testimony that he had advised Mr. Ruhlman that it was unnecessary to file a claim against the estate. His most lucid answer was that Mr. Ruhlman's testimony may have been correct, that he had no distinct recollection of having advised him that "he was not required" to file a claim, "but I may have told him something to that effect." The respondent is bound by this testimony of his own witness. In view of all this evidence no inference or presumption can save the finding under attack.

[3, 4] Several interesting points of law are argued in the briefs which we do not find necessary to discuss because the case is controlled by the answer to this simple question—when an executor or administrator of an estate in probate has agreed to a compromise of an existing claim and has fraudulently or mistakenly advised a creditor that he need not file a claim against the estate may the estate repudiate the act of its representative and seek profit through the fraud or mistake of its own agent? (We do not imply that there is any suggestion of fraud on the part of the executor in this case, but, on the issue of estoppel, the authorities treat fraud and mistake in the same category.) An answer to the question does not find any case law directly in point. National Grocery Co. v. Kotzebue Fur & Trading Co., 3 Wash.2d 288, 100 P.2d 408; Franklin Fire Ins. Co. v. Holmes, 188 Ark. 1053, 69 S.W. 2d 281; and Thomasson v. Walker, 168 Va. 247, 190 S.E. 309, 110 A.L.R. 593, hold that the doctrine of estoppel applies to an administrator. In Farrell v. County of Placer, 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323, it was held that a county which had waived the filing of a claim for damages within the statutory period was estopped from attacking the claim as filed too late. There the county raised the plea of the statute in defense of a claim against it. Here the respondent raises it in seeking affirmative relief through the fraud practiced upon the claimant. There is sounder reason why the doctrine of waiver and estoppel should apply here than in the Farrell case because here the representations were made to appellant by one who had been a legal adviser and were accepted and relied on as professional advice upon matters of legal procedure.

[5, 6] The respondent argues that the "counterclaim" was improperly pleaded, and that its several items were not proved. It was not necessary to either plead or

prove a counterclaim. Appellant's defense to the action was that the parties compromised and agreed that appellant's debt to the estate was $462.93 and no more. All the testimony relating to the status of Mr. Ruhlman's account with the corporation was outside the issues and should not have been admitted. Whether the compromise was valid as between the executor and the estate is not involved in this proceeding. That he had power to compromise with the approval of the probate court is not questioned. Sec. 718.5, Probate Code; In re Estate of Lucas, 23 Cal.2d 454, 144 P.2d 340, 346. In the latter case it was said that the statutes requiring court approval "neither enlarge nor abrogate the common-law power of the executors and administrators to enter into a compromise or settlement, but merely afford them additional protection from liability."

[7, 8] Here the undisputed evidence is that such a compromise and settlement was made. The respondent had no right to repudiate that settlement after the time to file a claim had expired. He was entitled to recover from appellant the sum of $462.93 and this was conceded at the time of and prior to the trial. Any interest accumulating on this amount is due to respondent's fault and should not be charged to appellant.

The judgment is reversed with costs to appellant.

GOODELL, J., and DOOLING, J. pro tem., concur.

KROGER v. TRUITT.*

Civ. 14818.

District Court of Appeal, Second District, Division 2, California.

June 7, 1945.

Rehearing Denied June 25, 1945.

Hearing Granted Aug. 2, 1945.

1. Limitation of actions 🔑102(11)

Upon death of a voluntary trustee, the administrator of the estate becomes a constructive trustee and a cause of action immediately arises in favor of beneficiary of trust and statute of limitations commences to run. Code Civ.Proc. § 343.

2. Limitation of actions 🔑103(2)

Involuntary trust need not be repudiated in order to set statute of limitations in operation against action by beneficiary. Code Civ.Proc. § 343.

3. Limitation of actions 🔑102(5)

Recognition by an administrator of existence of trust does not change relation of administrator to trust property from that of an involuntary trustee to that of a voluntary trustee so as to toll running of statute of limitations against action by beneficiary. Code Civ.Proc. § 343.

4. Limitation of actions 🔑15, 102(5)

Administrator of deceased trustee did not waive statute of limitations running against action by beneficiary or toll its running by recognizing the existence of trust. Code Civ.Proc. § 343.

5. Limitation of actions 🔑102(11)

Action against administratrix of the estate of a deceased trustee by beneficiary to enforce an alleged trust in corporate stock was barred by statute of limitations, where action was not instituted within four years from date of death of the trustee. Code Civ.Proc. § 343.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by Fred W. Kroger against Rae Truitt, as administratrix of the estate of Charles C. Truitt, deceased, and as an individual, to enforce alleged trust in corporate stock. From a judgment for plaintiff, defendant appeals.

Reversed.

Haight, Trippet & Syvertson, of Los Angeles, for appellant.

Frank M. Gunter and Oscar C. Settinger, both of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff, after trial before the court without a jury, in an action to enforce an alleged trust in corporate stock, defendant appeals.

The evidence being viewed in the light most favorable to plaintiff (respondent), the essential facts are:

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* Subsequent opinion 163 P.2d 735.

In January, 1936, Charles C. Truitt was president of "Dried Food Products Company", a corporation. William H. Fisher was the owner of 75 shares of preferred stock of the aforementioned corporation. In order to finance the corporation, Mr. Truitt adopted a plan of borrowing shares of stock from various stockholders, selling the same and using the proceeds to finance the company. In January, 1936, Mr. Truitt borrowed from Mr. Fisher 75 shares of the preferred stock of the Dried Food Products Company, executing a written instrument addressed to Mr. Fisher which provided so far as material here as follows:

"You have this day loaned to us personally 75 shares of the Pref. Stock in above Company.

"We guarantee to return a like amount of Pref. as above to you within 90 days from date hereof and at the earliest possible date that the undersigned Truitt has same available or that the undersigned Kroger has same in his Trustee Account, but in any event not later than 90 days from date.

"Said Truitt has also attached hereto an order on the Commissioner of Corp. for transfer of 75 shares of Common stock of above Company as security and hereby authorizes said Fisher to have said stock transferred if his Pref. Stock is not returned within 90 days. * * *"

Before Mr. Fisher would loan the shares of stock to Mr. Truitt he required Mr. Walter W. Kroger (brother of the plaintiff herein) to join in the aforementioned document as a guarantor. The stock not being returned to Mr. Fisher according to agreement, he became discontented and on August 24, 1937, Mr. Walter W. Kroger purchased Mr. Fisher's rights against Mr. Truitt and the following document was executed:

"Los Angeles, Calif.
"847 East 75th St.
"August 24th, 1937

"For value received I hereby assign, set over, transfer and sell to Walter W. Kroger all of my right, title and interest in and to 750 shares of the free common stock of the Dried Food Products Co. due me from Chas. C. Truitt; also $100.00 in cash loaned to him on or about Jan 12th, 1934 together with interest thereon as agreed, and I hereby direct said Chas. C. Truitt to pay said $100.00 and interest and to deliver said 750 shares of stock to Walter W. Kroger.

"Wm. M. Fisher.
"Accepted Chas. C. Truitt"

At the time of the execution of the foregoing document, all of the preferred and common stock of the Dried Food Products Company had been converted pursuant to a permit of the Corporation Commissioner into new stock of the par value of $1. Ten shares of the new stock being given for each share of preferred stock.

On April 9, 1938, Mr. Truitt died, and thereafter Mr. Hendrix was appointed administrator of Mr. Truitt's estate. The administrator prepared and submitted to Mr. Walter Kroger a written demand for 750 shares of the common stock of the corporation. This document was executed and delivered to Mr. Hendrix upon his representation that Mr. Walter Kroger's interest would thereby be fully protected and that he would receive his stock in due time. This claim was not approved by the probate court. On July 16, 1939, Mr. Hendrix died and defendant Rae Truitt was appointed administratrix of Mr. Truitt's estate.

On March 23, 1940, Mr. Walter Kroger assigned all of his interest in the alleged trust to his brother and sister-in-law, the brother being the plaintiff herein. Defendant did not learn of this assignment until February 5, 1943.

In October and November of 1941, a dispute having arisen between the stockholders, the corporation and Mr. Truitt, a meeting was held, which Mr. Walter Kroger attended, and the following statements were made by Attorney Parr:

"I am attorney for Mrs. Truitt, who is administratrix of her husband's estate. She holds in that estate 17,145 shares of stock issued in Mr. Truitt's name. We are quite aware of that fact, that stock shown in the settlement of the estate must be delivered to various persons who traded with Mr. Truitt, gave him free stock in exchange for his promise to transfer from the escrow. We will have to keep those promises and will keep them, Mr. Lane, as I previously assured you, when the estate is closed. * * *

"I stated the other night that these people about whom we knew would most definitely receive stock. If I gave you the impression I had a complete list, I don't mean to. I assured one or two of your clients that I did know they were entitled to receive stock and I assured them, upon the closing of this estate, they would receive stock; and I now wish to assure everyone else here who has claim for stock in that estate, that without their being really able to prove their claim, but on reasonable showing that they have stock coming, they will receive it.

"You are quite true when you say the 'hand of death intervened'; and Mr. Truitt couldn't carry out all promises. * * * Those promises will be settled."

Various negotiations between the stockholders, the attorneys and Mr. Truitt resulted in an agreement that Mrs. Truitt should receive $43,500 from the corporation in consideration of which she executed a written agreement which was approved by the probate court, containing among others this provision:

"3. First Party as Administratrix agrees that she will pay all claims now or heretofore filed or presented against the Estate of Charles C. Truitt for stock of Dried Food Products Co. agreed to be delivered by said Charles C. Truitt to any such claimant excepting as to any such case to which she, as such Administratrix shall have a bona fide defense. Said claims which have been disclosed by First Party to Second Parties are the following:

	Shares
Walter W. Kroger	850*
Charles Reis	900
Wm. W. Stokes	575
George J. Busch	1,380
Dr. A. B. Wyckoff	90
Kenneth Fraser	750
Geo. Calvin	100
Geo. C. Sharp	3,080
R. K. Snow	1,720
J. R. Turner	709
Mary Kellogg	135
Anton Ruber	227
W. E. Wilson	436
O. V. Wykoff	150
G. Harold Jeneway	700
	11,802"

In the fall of 1942 there was some correspondence between Walter Kroger and defendant, Mrs. Truitt. Mr. Kroger writing Mrs. Truitt at one time as follows:

"I filed my claim when your father was Administrator for $100 cash and 750 shares of stock (Free) of the Dried Food Products Co. I had acknowledgment from Chas. (Truitt) of these items and the claim was allowed by the then Administrator."

On one occasion Mrs. Truitt wrote to Mr. Kroger as follows:

"I think your claim was filed in the estate, my attorney said. Wish you would write me or Mr. Newcomer of Haight, Trippet & Syvertson—Rowan Bldg., Los Angeles—what you would be willing to take now in cash for your claims and maybe we can get together."

On February 5, 1943, defendant first learned that Mr. Walter Kroger was not the real party in interest but had assigned his claim on March 23, 1940, to his brother and sister-in-law. Five days after learning this fact defendant notified plaintiff that she would not honor his claim. The present action was instituted May 3, 1943.

In July, 1943, pursuant to Mrs. Truitt's petition, the probate court distributed to her 5000 shares of the corporation stock.

This is the sole question necessary for us to determine:

Was plaintiff's cause of action barred by the statute of limitations, section 343 of the Code of Civil Procedure, since it was commenced more than four years after the death of Charles C. Truitt, the alleged trustee?

This question must be answered in the affirmative and is governed by the following pertinent rules of law:

[1] 1) Upon the death of a voluntary trustee the administrator of the estate becomes a constructive trustee, a cause of action immediately arises in favor of the beneficiary of the trust and the statute of limitations commences to run. (Norton v. Bassett, 154 Cal. 411, 415 et seq., 97 P. 894, 29 Am.St.Rep. 162.)

[2] 2) It is unnecessary to repudiate an involuntary trust in order to set the statute of limitations in operation. (Norton v. Bassett, supra.)

[3] 3) The recognition by an administrator of the existence of a trust does not change the relation of the latter to the trust property from that of an involuntary trustee to that of a voluntary trustee so as

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* The number of shares to which Mr. Walter Kroger was entitled was set forth as 850 shares. This was admittedly an error, and plaintiff has never claimed more than 750 shares.

to toll the running of the statute of limitations. (Norton v. Bassett, supra, 154 Cal. 418, 97 P. 894, 29 Am.St.Rep. 162. See also Whitehurst v. Dey, 90 N.C. 542, 549, 550 et seq., and Huntington v. Bobbitt's Heirs, 46 Miss. 528, 534.)

4) An administrator may not waive the statute of limitations. (Estate of Lucas, 23 Cal.2d 454, 466, 144 P.2d 340; In re Estate of Cates, 195 Cal. 319, 324, 232 P. 972; Reay v. Heazelton, 128 Cal. 335, 339, 60 P. 977.

[4, 5] Applying the foregoing rules to the facts of the present case, upon the death of Mr. Truitt on April 9, 1938, his administrator became an involuntary trustee of the alleged trust and plaintiff's cause of action, if any, immediately arose; and since the administrator could not waive the statute of limitations or toll its running by recognizing the existence of the trust, plaintiff's cause of action was barred by the provisions of section 343 of the Code of Civil Procedure, as the suit was not instituted within four years from the date of the death of Mr. Truitt. The complaint in the present case was not filed until May 3, 1943, which was more than five years and one month after plaintiff's alleged cause of action arose.

The case of Cohn v. Cohn, 7 Cal.2d 1, 59 P.2d 969, relied on by plaintiff, does not change the rule in the Norton case. The plaintiff was indebted to Charles Cohn, the deceased, in the sum of $5000. Certain property had been transferred to Mr. Cohn to hold as security for this debt. The debt remained unpaid at the time of Mr. Cohn's death and he still held title to the security. The question was whether or not the cause of action to recover the title accrued at Mr. Cohn's death. The court held that it did not; stating that where legal title is held as security for the payment of a debt and the debt remains unpaid when the holder of the title dies, there is no immediate duty to transfer the property held as security and the statute of limitations is not set in motion by the death of the holder of the legal title. The present case is factually distinguishable from the Cohn case, since in the instant case there is no contention that any property was held as security by Mr. Truitt to secure any debt.

In view of our conclusions it is unnecessary to discuss other points argued by counsel.

For the foregoing reasons plaintiff's cause of action was barred by the statute of limitations and the judgment in his favor is reversed.

MOORE, P. J., W. J. WOOD, J., concur.

PEWITT v. RILEY et al.*

Civ. 14759.

District Court of Appeal, Second District,
Division 3, California.

June 7, 1945.

Hearing Granted Aug. 2, 1945.

1. Automobiles ⇨172(4), 209

Under statute requiring motorist to give audible warning before overtaking "vehicle proceeding in the same direction" lines of progress of two vehicles need not be exactly parallel or identical but it is sufficient if they are proceeding substantially in the same direction. Vehicle Code, § 528, St. 1935, p. 182.

See Words and Phrases, Permanent Edition, for all other definitions of "Vehicle Proceeding in the Same Direction".

2. Automobiles ⇨172(4), 209

The failure to obey statute requiring motorist to give audible warning before overtaking vehicle proceeding in same direction is negligence as matter of law. Vehicle Code, § 528, St.1935, p. 182.

3. Automobiles ⇨172(4), 209

Under statute requiring motorist when traveling outside of business or residence district "and under other conditions where necessary to insure safety" to give audible warning before overtaking vehicle proceeding in same direction, quoted language has no application to duty of overtaking motorist when traveling outside of business or residence district, but refers only to duty to give audible warning when necessary to insure safety when traveling in a business or residence district. Vehicle Code, § 528, St.1935, p. 182.

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* Subsequent opinion 163 P.2d 873.

4. Automobiles ⇐209, 226(2)

The failure of driver of tractor and semi-trailer proceeding at 35 miles per hour to sound horn while attempting to pass defendant's truck and trailer proceeding in same direction at about four miles per hour preparatory to making left turn into filling station constituted contributory negligence as matter of law, which was proximate cause of collision precluding recovery for resulting damages. Vehicle Code, § 528, St.1935, p. 182.

5. Automobiles ⇐172(4), 209

Under statute requiring motorist to give audible warning before overtaking vehicle proceeding in same direction, audible warning required is for benefit of driver of overtaken vehicle to warn him that another vehicle is about to pass him. Vehicle Code, § 528, St.1935, p. 182.

◆

Appeal from Superior Court, Los Angeles County; Wm. B. McKesson, Judge.

Action by M. E. Pewitt against Foster Riley and another to recover for damages sustained in a collision between a tractor and semi-trailer operated by plaintiff and a truck and trailer owned by named defendant and operated by the other, wherein named defendant filed a cross-complaint. From a judgment for plaintiff, defendants appeal.

Reversed.

Gibson, Dunn & Crutcher, of Los Angeles, for appellants.

Charles X. Arnold and Edgar T. Fee, both of Los Angeles, for respondent.

FOX, Justice pro tem.

This is an appeal by the defendant, Gay, and the defendant and cross-complainant, Riley, from a judgment in favor of the plaintiff. The case arose out of a collision between a tractor and semi-trailer operated by the plaintiff and a truck and trailer owned by Riley which was being operated by Gay.

The collision occurred on July 22, 1943, about 2:25 a. m. on that portion of Highway 99, commonly known as the Ridge Route, at a point about 5 miles south of Gorman and opposite a filling station known as the Lemon. The highway runs in a northerly and southerly direction. Looking north from the Lemon it is straight for about 300 yeards, then a curve of about 20 degrees to the left begins. The paved portion of the highway is about 45 feet wide and has three traffic lanes which were clearly marked. It is slightly down grade to the south. The Lemon filling station is on the east side of the highway. There is a hard surfaced shoulder of sufficient width to permit the parking of a truck off the pavement on the west side opposite the filling station. The defendant, Gay, had been driving his truck and trailer, loaded with baled hay and weighing about 42,000 pounds, in a southerly direction. Desiring to obtain gasoline he stopped his equipment on the right-hand shoulder of the highway, alighted and walked across the road to the filling station for the purpose of requesting the driver of a northbound truck to move his equipment so that he, Gay, could drive up to the gas pumps. Defendant Gay returned to his equipment and proceeded to cross the highway with it to the filling station. He testified he did not see the plaintiff until he (Gay) was in the middle traffic lane crossing the highway. The plaintiff was traveling south. His equipment, loaded with apples, weighed about 62,000 pounds. According to plaintiff's testimony defendant Gay's equipment was "sitting still" when he first saw it, about 300 yards away. Plaintiff blinked his lights and "determined to go by him." Plaintiff traveled about 50 yards when defendant Gay started moving. Plaintiff was then some 250 yards to the rear. "He [Gay] was going south and moving a little east" which would be more toward or onto the paved portion of the highway. Plaintiff also described the situation by saying "it looked like he [Gay] was just going to go down along the highway." He also referred to defendant Gay's equipment as "easing along the shoulder" and as "easing straight ahead." When plaintiff observed defendant Gay's equipment moving he blinked his lights again "because," he testified, "I had started to, or intended to pass him, to go past him as he was coming out * * *." Defendant Gay testified that he started to make his turn immediately upon starting his truck and trailer. Such equipment, 40 or 45 feet in length and loaded as this was, would ordinarily be turned gradually as a part of its forward movement. That such was the character of defendant Gay's turn is indicated by the following questions and answers: "Q. [By Mr. Arnold] Now, when you had started across there, or turned sufficiently so you could look out of your cab, did you look back to see whether there were any lights coming? A. [By defendant Gay] Yes. * * *

"Q. Now, after you had started, did you look back again to see whether there was any traffic coming around the bend? A. After I started moving forward, you mean?

"Q. Yes. A. No, I looked south then to see if there was any traffic coming from that way."

Plaintiff admits he did not sound his horn. He was traveling, according to the findings, at approximately 35 miles per hour. Defendant Gay was traveling about four miles per hour, according to his testimony, when he first saw the plaintiff.

The collision took place in front of the filling station and while defendant Gay's truck and trailer were crossing the highway. The photographs, taken before the equipment was disentangled, show that the front of plaintiff's equipment hit the left side of defendant Gay's truck near the rear and his trailer near the front. As a result of the impact the hay truck and trailer were bent, in plaintiff's words, "in a U-turn."

Defendants' first contention is that plaintiff was guilty of negligence, as a matter of law, which proximately contributed to the collision, hence the judgment in plaintiff's favor cannot stand. This contention must be sustained.

[1, 2] It is unmistakably clear that plaintiff was overtaking defendant Gay and intended to pass him. Also, defendant Gay's equipment was "proceeding in the same direction" as plaintiff's when it started to move. It is said in Moore v. Miller, 1942, 51 Cal.App.2d 674, at page 680, 125 P.2d 576, at page 579, that: "The lines of progress of two vehicles need not be exactly parallel or identical in order to bring them within the meaning of the phrase last quoted. It is sufficient if they are proceeding substantially in the same direction." The initial movement of defendant's equipment and the direction thereof was seen and observed by plaintiff. Section 528 of the Vehicle Code, St.1935, p. 182, provided as follows, at the time of this collision: "The following rules shall govern the overtaking and passing of vehicles proceeding in the same direction, subject to the limitations and exceptions hereinafter stated: * * * (b) The driver of a motor vehicle, when traveling outside of a business or residence district and under other conditions where necessary to insure safety, shall give audible warning before overtaking a vehicle proceeding in the same direction." Subdivision (b) above was deleted by Chap. 590, p. 2173, Stats.1943. Effective Aug. 4, 1943. The collision happened at a point "outside of a business or residence district." It was therefore the plain statutory duty of plaintiff to give "audible warning" before overtaking defendant's equipment which was proceeding in the same direction. Plaintiff admittedly did not give any "audible warning." "Failure to obey the statute in this respect is, of course, negligence as a matter of law." Moore v. Miller, supra, 51 Cal.App.2d at page 680, 125 P.2d at page 579; Cadwell v. Anschutz, 1935, 4 Cal.2d 709, 52 P.2d 916.

[3] Plaintiff emphasizes the language "and under other conditions where necessary to insure safety" in subsection (b) of section 528 of the Vehicle Code. He suggests that it was a question of fact for the trial court to determine as to what other conditions were necessary to insure safety immediately preceding the collision. The quoted language must of course be considered in relation to the context in which it is used. When so considered it plainly has no application to the duty of one driving an overtaking vehicle to give an audible warning to the driver of another vehicle proceeding in the same direction when traveling outside of a business or residence district as the parties were in this case. The quoted language has reference to the duty to give an audible warning when necessary to insure safety when traveling in a business or residence district.

[4, 5] The conclusion that plaintiff's negligence in not sounding his horn was one of the proximate causes of the collision is inescapable. Defendant Gay was not aware of plaintiff's presence on the highway or of the fact that any vehicle was nearing and about to pass him until his truck was approximately in the middle of the highway on his way across it to the filling station. If plaintiff's horn had been sounded at the moment or just after plaintiff saw defendant's equipment begin to move, it is reasonably probable that defendant Gay would have heard it and at the speed he was then going, viz., four miles per hour, or perhaps even less as he was just starting up, he could and would have stopped his equipment, or at least his turn, and kept out of plaintiff's way. This case is much like Cadwell v. Anschutz,

supra, where plaintiff attempted to pass defendant's car without sounding his horn and the defendant, also without signal, turned slightly to the left to get off the dirt shoulder of the road and wholly onto the pavement. The court held under the provision of section 125 of the "California vehicle act" of 1923, St.1923, p. 558, as amended by St.1931, p. 2125, which required "the driver of an overtaking motor vehicle" to signal audibly "before passing or attempting to pass a vehicle proceeding in the same direction," that the plaintiff was negligent in not sounding his horn and that his negligence proximately contributed to the collision. The judgment in favor of the plaintiff was reversed. On the question of the plaintiff's negligence constituting one of the proximate causes of the collision the court had this to say [4 Cal.2d 709, 52 P.2d 917]: "It is reasonably probable that if plaintiff had sounded her horn before attempting to pass defendant's car, he would have delayed his change of course or have taken appropriate precautions. This being so, it seems clear that plaintiff's negligent act was a contributing factor to the injury * * *." This reasoning and conclusion is pointedly applicable to the instant case. Moore v. Miller, supra, is in many respects similar to our case. In that case the defendant was driving his truck easterly on Whittier Boulevard in Los Angeles County and plaintiff was going in the same direction and about 150 feet behind him when, according to his testimony, he first saw defendant's truck which was traveling more slowly than plaintiff. Defendant turned his truck a few feet to the right and then when plaintiff was from 50 to 90 feet behind him he turned left across the street in front of plaintiff. Defendant intended to make a U-turn. He testified that before turning he looked several times into his rear view mirrors but did not see plaintiff's car before the collision. Plaintiff did not at any time sound his horn. In holding that plaintiff's negligence in not sounding his horn was one of the proximate causes of the collision the court pointed out that defendant was not aware of plaintiff's presence on the street or of the fact that any vehicle was nearing and about to pass him, and then said (51 Cal.App.2d at page 681, 125 P.2d at page 580): "If plaintiff's horn had been sounded, even at the moment before or just after defendant began his left turn, it is reasonably probable that defendant would have heard it and that at the speed he was then going (estimated by him in his testimony at around fifteen miles per hour) he could and would have stopped his turn and kept out of plaintiff's way." It is also pointed out in that case (51 Cal.App.2d at page 680, 125 P.2d at page 579) that the "audible warning" required by section 528 of the Vehicle Code to be given by the overtaking vehicle is "for the benefit of the driver of the overtaken vehicle," and that its purpose is to warn him that another vehicle is approaching and is about to pass him.

Plaintiff particularly relies on Fate v. Gross, 1923, 61 Cal.App. 146, 214 P. 465, and Nix v. Woodworth, 1936, 11 Cal.App.2d 322, 53 P.2d 765. Neither of these cases is controlling here. The former case is analyzed in Moore v. Miller, supra. It is there said (51 Cal.App.2d at page 681, 125 P.2d at page 580): "the plaintiff who had not given warning of his approach was not passing or attempting to pass the defendant, who, after signaling his intention to park his car at the curb, suddenly and without warning turned left in front of plaintiff, who was only 15 feet away. The Vehicle Act then in force required a signal to be given 'before passing' and the court held that plaintiff had not violated it, and then added that it was a question of fact for the trial court whether plaintiff could have prevented the collision by sounding a warning * * *." In the Nix case defendant was driving from a service station and started across the boulevard to the west in order to make a southerly turn. Plaintiffs, riding a motorcycle, were traveling northerly on this boulevard. The collision took place as defendant was crossing the boulevard from the service station. The motorcycle was not "overtaking a vehicle proceeding in the same direction." Section 528, Vehicle Code, was not mentioned in the opinion for clearly it was not applicable to the factual situation there presented. The case is therefore of no assistance here.

Our conclusions on the points already discussed render it unnecessary to consider defendants' contentions that plaintiff was guilty of contributory negligence other than his failure to sound his horn, or their contention that the evidence does not support the finding that defendant Gay was guilty of negligence which proximately caused the collision.

The judgment is reversed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

69 Cal.App.2d 474

MOORE et al. v. BARTHOLOMAE CORPORATION.

Civ. 14725.

District Court of Appeal, Second District, Division 2, California.

June 4, 1945.

1. Mines and minerals 🔑79(7)

Evidence sustained findings that work performed by lessee on oil well constituted merely redrilling and reconditioning of an existing well, and did not constitute the drilling of a new or additional well, within meaning of provision in agreement authorizing reduction in royalty upon lessee drilling wells in addition to two mentioned.

2. Account stated 🔑3

A debt which is predicated upon breach of terms of an express contract cannot be basis of an account stated.

3. Account stated 🔑18(2)

Where action was instituted to recover damages arising from breach of express contract for payment of money, there was no issue before court relative to an account stated between the parties.

4. Accord and satisfaction 🔑1

The elements of an "accord" are a proper subject matter, competent parties, consent or meeting of minds of the parties, and consideration.

See Words and Phrases, Permanent Edition, for all other definitions of "Accord".

5. Contracts 🔑75(1)

Neither a promise to perform a duty nor performance of a duty constitutes a "consideration" sufficient to support a new contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

6. Accord and satisfaction 🔑8(1)

Where only consideration which defendant gave plaintiffs was payment of sums of money which defendant was expressly bound to pay according to terms of oil and gas lease, there was no accord and satisfaction which would defeat plaintiffs' claim for damages arising from breach of express contract for payment of money.

Appeal from Superior Court, of Los Angeles County; Alfred L. Bartlett, Judge.

Declaratory relief action by L. H. Moore and others against Bartholomae Corporation for purpose of construing a provision in an oil and gas lease. From a judgment in favor of plaintiffs, the defendant appeals.

Affirmed.

Earl D. Killion, of Los Angeles, for appellant.

Eugene Tincher, of Long Beach, for respondents.

McCOMB, Justice.

This is an appeal from a judgment in favor of plaintiffs, after trial before the court without a jury, in a declaratory relief action instituted for the purpose of construing a provision in an oil and gas lease.

The undisputed facts are these:

On March 28, 1923, plaintiffs leased to defendant a parcel of land in the city of Long Beach located in the Signal Hill oil field. The lease was for the purpose of permitting defendant to drill an oil well upon the demised premises and only required defendant to drill one well upon the property. Defendant agreed to pay a royalty of one-fifth of the oil recovered to plaintiffs pursuant to the terms of the lease. Defendant drilled a well known as Bartholomae #3 and placed the same upon production.

A few years later there was discovered in the Signal Hill oil field a sand deeper than the one from which Bartholomae #3 was producing. It was claimed that this sand was more productive than the higher one. Plaintiffs insisted that defendant drill a well into the deeper zone or allow them to do so. This contention on the part of plaintiffs resulted in an action being filed by them against defendant.

The litigation was compromised by an agreement of the parties, dated November 9, 1928, which so far as material here provided that (a) an additional well was to be drilled by defendant to the deeper sand and upon completion thereof the royalty on Bartholomae #3 and the additional well was to be reduced to one-sixth, and (b) defendant was granted the privilege of electing to drill wells in addition to the two hereinbefore mentioned and upon completion thereof and their being placed upon production the royalty upon all wells then drilled or thereafter drilled upon the demised premises should be "one-eighth (1/8) royalty and no more."

Subsequent to November 9, 1928, (a) defendant drilled and placed on production in the deeper sand a well known as Bartholomae #6, whereupon the royalty was reduced on #3 and #6 to one-sixth; (b) commencing March 12, 1940, defendant performed work on Bartholomae #3 which may be summarized as follows:

The well was on production at 3520 to 3580 feet. The 4¾ inch casing was cut at 2800 feet and pulled. The 8¼ inch and the 6¼ casing were left in the hole. The hole was plugged and abandoned from 2800 feet down. A whipstock was run through the 6¼ inch casing and 8¼ inch casing at 2709 feet. A new 5½ inch hole was drilled from 2709 feet to 3821 feet. A new string of 4¾ inch casing was run from 2800 to 3821 feet. This was perforated from 3787 to 3792 feet to test the sands at the level at which the well first stood when originally drilled. The test was unsatisfactory so the hole was plugged back to 3592 feet and tests were made in an upper zone without success. The next test was made from 3525 to 3540 feet. This is the same zone from which production was being obtained when the work started March 12, 1940. The bottom of the hole after the completion of the aforementioned work was approximately 80 feet in a horizontal direction from the bottom of the original well. The well was again placed on production at this depth in October, 1940, and the designation thereof changed to Bartholomae #3–A. Thereafter to and including the date of the trial (February 8, 1944) defendant mailed royalty checks to the Western Trust and Savings Bank of Long Beach, which was the agent of plaintiffs for the purpose of collecting and disbursing royalty payments. These checks were all based on a one-eighth royalty.

There are three questions presented for our determination which will be stated and answered hereunder seriatim:

[1] First: *Under the foregoing facts was there substantial evidence to sustain the trial court's finding that the work performed on Bartholomae #3, later designated as Bartholomae #3–A, as set forth above "did not constitute the drilling of a new or additional well" on the demised premises?*

This question must be answered in the affirmative. The foregoing facts, which were undisputed, substantially support the trial court's findings. Clearly the change in designation of the well from Bartholomae #3 to Bartholomae #3–A is without significance. The balance of the work constituted merely redrilling and reconditioning of an existing well. The same derrick was employed, the same hole was used for 2800 feet, and the net result of the operation found the well bottomed in the same sand from which the original well had been pumping and only some 80 feet distant in a horizontal line from the bottom of the original hole.

[2, 3] Second: *Was there substantial evidence to sustain the trial court's finding that there was not a series of accounts stated between the parties?*

This question must also be answered in the affirmative. The law is established in California that a debt which is predicated upon the breach of the terms of an express contract cannot be the basis of an account stated. (Rio Linda Poultry Farms v. Fredericksen, 121 Cal.App. 433, 435 et seq., 9 P.2d 262. See also 1 Cal.Jur.[1921] 194, sec. 51.) In the present case the action was instituted to recover damages arising from the breach of an express contract for the payment of money. Therefore there was not any issue before the court relative to an account stated between the parties, and the trial court properly found that defendant's defense that there had been an account stated between the parties was not true.

[4] Third: *Was there an accord and satisfaction between the parties as pleaded in defendant's answer?*

This question must be answered in the negative. The elements of an accord are: (1) A proper subject matter; (2) competent parties; (3) consent or meeting of the minds of the parties; and (4) consideration. (Sierra, etc., P. Co. v. Universal Electric, etc., Co., 197 Cal. 376, 387, 241 P. 76.)

[5] It is likewise settled that neither a promise to perform a duty nor the performance of a duty constitutes a consideration sufficient to support a new contract. (Eagan v. Crowther, 74 Cal.App. 674, 680, 241 P. 900.)

[6] In the instant action the fourth element of an accord is absent, for the rea-

son that the only consideration which defendant gave to plaintiffs was the payment of sums of money which defendant was expressly bound to pay according to the terms of the oil and gas lease which constitutes the basis of the present controversy. Hence, it is obvious that there was not an accord and satisfaction which would defeat plaintiffs' claim.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

* * *

69 Cal.App.2d 319

PRIDDEL v. SHANKIE et al.

Civ. 14769.

District Court of Appeal, Second District, Division 1, California.

May 28, 1945.

1. Pleading 🔑129(1)

In partition action, all material allegations in codefendant's cross-complaint setting up mortgage lien on defendant's interest were admitted by absence of denial thereof in defendant's answer.

2. Partition 🔑14, 77(3)

Ordinarily, where realty is owned by cotenants, one cotenant has absolute right to partition, and if partition cannot be made without great prejudice, the court under statute may order a sale. Code Civ.Proc. §§ 752–801, 763.

3. Partition 🔑12(3)

The recording of homestead declaration by one cotenant covering his undivided half-interest will not defeat the other cotenant's right to partition. Code Civ. Proc. § 752.

4. Partition 🔑77(4)

In partition action, finding that property could not be partitioned in kind was not unsupported by evidence, as contended by defendant, whose own testimony indicated that property was a city lot 40 by 140 feet located in middle of block and improved with two dwellings and one double garage and one single garage so situated that property could not be partitioned in kind without great prejudice. Code Civ. Proc. § 763.

5. Partition 🔑77(1)

Partition in kind is favored by the law.

6. Husband and wife 🔑212

In action between tenants in common to partition lot on which defendant and wife resided, wife was not necessary party, where defendant husband's undivided interest was acquired long prior to marriage and wife's only interest was under homestead declaration recorded after bringing of action.

7. Aliens 🔑16

A tenant in common was not barred from maintaining partition action against cotenant because plaintiff was an alien residing in Canada, and hence perhaps not eligible to take property by succession or testamentary disposition.

8. Judges 🔑42

In partition action between cotenants, where county, which had extended hospital care to defendant and taken mortgage note therefor, filed cross-complaint alleging neutrality as to partition but seeking payment in case of partition sale, fact that trial judge received part of salary from county did not disqualify him on ground of personal or public interest or public policy.

9. Partition 🔑57

In partition action between cotenants, cross-complaint whereby county, which had extended hospital care to defendant and taken mortgage note therefor, sought payment in case of partition sale, was not deficient because not alleging that defendant was an indigent resident of county, in view of statute making written instrument presumptive evidence of a consideration; county's claim being based on note and mortgage and not on any statutory liability to make reimbursement. Civ.Code, § 1614.

10. Mortgages 🔑137, 187

A mortgage gives mortgagee no right of possession and is not deemed a conveyance or transfer of title, in view of statutes. Civ.Code, §§ 2888, 2920, 2927; Code Civ.Proc. § 744.

11. Perpetuities 🔑4(1), 6(17)

A mortgage, which is not regarded as a conveyance of title, cannot violate rules against perpetuities and restraints on alienation. Civ.Code, §§ 715, 716, 2888; Code Civ.Proc. § 744; Const. art. 20, § 9.

12. Paupers ⟹44

Where county, having extended hospital care, took note therefor secured by mortgage on undivided interest of defendant in cotenant's partition action, wherein county filed cross-complaint seeking payment, defendant could not complain of inapplicable blanket clause of mortgage covering all other realty of defendant, who did not own any other realty.

13. Perpetuities ⟹6(17)

Where county had extended hospital care to defendant in cotenant's partition action, wherein county filed cross-complaint seeking payment of defendant's note and mortgage securing payment for aid advanced within four years previously or thereafter advanced to defendant or relatives, mortgage was not vulnerable to defendant's objection that it suspended power of alienation until death of last of defendant's relatives, none of whom had received any aid from county. Civ.Code, §§ 715, 716.

14. Perpetuities ⟹6(17)

Where county had extended hospital care to defendant in cotenant's partition action, wherein county filed cross-complaint seeking payment of defendant's note and mortgage securing payment for aid previously advanced or thereafter advanced to defendant or relatives, mortgage was not objectionable as creating perpetual lien, especially where judgment provided that lien should be extinguished on payment of county's claim. Const. art. 20, § 9.

15. Paupers ⟹44

The taking of mortgage as security for hospital aid advanced to mortgagor and for any aid advanced thereafter was not beyond county's authority, especially in view of statute authorizing taking of security for performance of future obligations. Civ. Code, § 2884.

16. Paupers ⟹44

Where county, having extended hospital care, took mortgage note therefor from defendant in cotenant's partition action, wherein county filed cross-complaint seeking payment from proceeds of partition sale, mortgage was not objectionable because of waiver therein of statutory provisions relating to foreclosure actions, inasmuch as county had never attempted to take advantage of such waiver. Code Civ. Proc. § 726.

17. Homestead ⟹95

Where county, having extended hospital care, took mortgage note therefor from defendant in cotenant's partition action, wherein county filed cross-complaint based on recorded mortgage, rights thereunder were superior to those under defendant's homestead declaration recorded subsequently, in view of statute subjecting homestead to execution on judgments on antecedent mortgage debts. Civ.Code, § 1241, subd. 4.

18. Acknowledgment ⟹20(3)

A mortgage taken by county for hospital aid to mortgagor was not void because acknowledged before county clerk, an officer of the mortgagee county.

19. Husband and wife ⟹267(4)

Wife's signature was not necessary on mortgage taken by county for hospital aid to husband covering his separate property, with a blanket clause covering all other realty in which husband had or might acquire an interest.

20. Appeal and error ⟹1071(6)

Where county, having extended hospital care, took mortgage note therefor from defendant in cotenant's partition action, wherein county filed cross-complaint, failure to make finding on defense that mortgage incorporated constitutional provisions releasing mortgages taken to secure reimbursement of old age security was not prejudicial to defendant, since any finding thereon must have been adverse to defendant, in view of uncontradicted evidence that none of aid extended was old age security. Const. art. 16, §§ 12, 13, adopted in 1940.

◆

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Partition action by John T. Priddel against Andrew Shankie and the County of Los Angeles, wherein the county filed a cross-complaint setting up a mortgage lien. From a judgment ordering a partition sale, the first named defendant appeals.

Affirmed.

Norval J. Cooper, of Los Angeles, for appellant.

Loeb & Loeb, of Los Angeles, for respondent.

J. H. O'Connor, Co. Counsel, and L. K. Vobayda, Deputy Co. Counsel, both of Los Angeles, for County of Los Angeles.

DORAN, Justice.

This is an appeal from a judgment of partition ordering the sale of certain real property and distribution of the proceeds from such sale, after payment of taxes, expenses of sale, etc., to appellant and respondents as their interests appear. The record discloses that the plaintiff, and defendant Shankie each owned an undivided one-half interest in the parcel which was the subject of the partition suit, and that Shankie's one-half interest therein was at all times separate property, having been acquired through a devise while Shankie was a single man. The County of Los Angeles extended certain hospital care to appellant Shankie and on December 19, 1941 Shankie executed and delivered to the county a promissory note secured by a mortgage covering his one-half interest in said property, agreeing to pay the county for all aid theretofore and thereafter extended. At the time of the commencement of the partition action, aid consisting of hospital care given to Shankie personally, had amounted to $1,295.22, which amount is not in dispute.

The real estate sought to be partitioned consists only of a rectangular city lot, 40 by 140 feet, located in the middle of a block and facing Buchanan Street in the City of Los Angeles, and having a paved alley in the rear. This lot is improved with two residential buildings,—one with four rooms which is occupied by tenants; the other described as a 2½ room house occupied by appellant and his wife Annie Shankie. There are also two garages,—one double and one single garage. The current market value is estimated by appellant to be $3,000.

The respondent County of Los Angeles, made a party defendant to the partition action by reason of its mortgage covering the interest of the defendant Shankie, filed a cross-complaint praying that if partition be granted, the mortgage in question be adjudged valid and that if a partition sale be ordered, the amount of the mortgage lien be paid to the county from the share of the defendant Shankie. The respondent county, in the words of its brief, "is not interested in the merits of the partition suit as between Priddel and Shankie and stands completely neutral on the question of whether or not any partition should be made." It was "the county's position only that if partition is made some proper disposition must be made of the county's mortgage."

The answer filed by the appellant Shankie to the complaint for partition admitted all of the material allegations of such complaint and set up three affirmative defenses; (1) that appellant is a married man residing upon the property with his wife Annie Shankie, that on August 4, 1943 appellant executed a Husband's Declaration of Homestead covering his undivided interest in said property, which was recorded August 5, 1943, and that a partition cannot be made without great prejudice nor can the property be sold without destroying such homestead; (2) that appellant's wife is a necessary party defendant; (3) that plaintiff is neither a citizen nor a resident of the United States and that therefore the Alien Property Custodian is a necessary party defendant in this action.

[1] Appellant's answer to the cross-complaint of the County of Los Angeles, admitted by failure to deny, all material allegations, and pleaded four affirmative defenses, namely, (1) that the county's mortgage incorporated by reference Sections 12 and 13 of Article 16 of the California Constitution, adopted on November 5, 1940, which releases mortgages taken to secure reimbursement of old age security; (2) that the provisions of such mortgage constitute a perpetual estate in and lien upon the property described therein and upon all other real property in which appellant has or may hereafter acquire any interest, and that such mortgage cannot be paid or satisfied within the lifetime of all persons in being at the date of its execution, or within a period of 25 years from the date of its creation, or within any other period, or at all, and that such mortgage is a perpetuity and void ab initio under Article 20, Sec. 9 of the Constitution of California; (3) that said mortgage perpetually suspends the absolute power of alienation of the title to the real property therein described and all other real property now owned or hereafter acquired by the appellant, in violation of Civil Code, Sections 715, and 716; and (4) that at the date of the execution of said mortgage appellant was and still is a married man residing on the property in question, and that on August 4, 1943, appellant executed a husband's declaration of homestead covering his one-half interest therein, which was recorded on August 5, 1943,

and that the residential lot on which they reside, cannot be sold without destroying the homestead "in flagrant disregard of the Homestead laws of the State of California."

The trial court found that the mortgage to the County of Los Angeles did not constitute a perpetual estate in or to or a lien upon the real property described therein or upon other property in which the appellant has or may hereafter acquire any interest; that such mortgage did not perpetually suspend the absolute power of alienation; that the plaintiff was neither a citizen nor a resident of the United States but was a resident and citizen of Canada; that neither the Alien Property Custodian of the United States, nor Annie Shankie, the wife of the appellant, were proper or necessary defendants; that the small residential lot sought to be partitioned, was so situated that partition could not be made without great prejudice and that a sale thereof was necessary. The judgment therefore ordered a sale by referees of said property at private sale and directed that the proceeds therefrom should be applied first, to the payment of taxes; secondly, to the payment of the referees' fees, disbursements and expenses of the sale; thirdly, to the payment to plaintiff of costs taxed at $23; fourthly, to the payment to the plaintiff of one-half of the balance remaining; one from the other half of the balance remaining, $1,295.22 to be paid the County of Los Angeles. If the balance remaining after payment to the plaintiff of one-half thereof, be insufficient to pay to the county the said sum, then the entire balance was ordered paid to the county. If the balance remaining after payment of the plaintiff's one-half should exceed the sum of $1,295.22, then the balance remaining after payment to the county of $1,295.22, was ordered paid to the appellant. Upon payment to the county of the moneys ordered to be paid, it was adjudged that the lien of the county should be extinguished and that the property in question should be released from the lien of the mortgage.

[2] There are two basic questions involved in this appeal, to-wit: (a) Where real property is owned by two persons as tenants in common, has one co-tenant an absolute right to have the property partitioned or sold, if it appears that a partition cannot be made without great prejudice to the parties, or is such right discretionary with the Court; and (b) Does the recording of a declaration of homestead by one co-tenant on his undivided interest deprive the other co-tenant from having the property partitioned or sold if it appears that a partition cannot be made without great prejudice to the parties.

The action of partition is a special proceeding regulated in great detail by the Code of Civil Procedure, Sections 752–801, and is said to be more comprehensive in California than in many other jurisdictions. Buhrmeister v. Buhrmeister, 10 Cal.App. 392, 102 P. 221. Sections 752, C.C.P., provides that "When several cotenants own real property as joint tenants, or tenants in common, in which one or more of them have an estate of inheritance, * * * an action may be brought by one or more of such persons * * * for a partition thereof according to the respective rights of the persons interested therein, * * *." and in Section 763 it is provided that "If it appears by the evidence * * * that the property or any part of it is so situated that partition cannot be made without great prejudice to the owners * * * the court may * * * order the sale thereof; otherwise, upon the requisite proof being made *it must order* a partition * * *." (Italics added.) As was declared by the court in Rich v. Smith, 26 Cal.App. 775, 783, 148 P. 545, 549, "Ordinarily, if the party seeking partition is shown to be a tenant in common, and as such entitled to the possession of the land sought to be partitioned, the right of partition is absolute, and cannot be denied, 'either because of any supposed difficulty, nor on the suggestion that the interest of the cotenants will be promoted by refusing the application or temporarily postponing action, * * *.' 30 Cyc. 177, 178, 189." The above rule was approved in Harper v. Superior Court, 140 Cal.App. 5, 6, 34 P.2d 1063.

[3] Appellant's contention that the recording of a homestead declaration by one co-tenant covering the undivided one-half interest of such co-tenant will defeat the other co-tenant's right to partition, cannot be sustained. In an annotation found in 140 A.L.R. pages 1170, 1171, it is said: "The cases uniformly hold or assume * * * that the homestead rights of a cotenant, or of his spouse or family, in respect of his interest in the common property are not a bar to partition." The reason no California cases are cited in said annotation is probably, as suggested by respondent's brief, be-

cause in California prior to 1929 a homestead could not be declared on property held in co-ownership. In the estate of Kachigian, 1942, 20 Cal.2d 787, 128 P.2d 865, 868, deciding that the probate court could set apart to a widow a homestead out of her deceased husband's undivided one-half interest in real property held by him and a third person as tenants in common, the court declared: "It cannot be said that the rights of the other cotenant are in any way prejudiced, as the homestead claimant, or his surviving family, acquires only such rights of occupancy as he had before the creation of the homestead, and the other cotenant's interest is in no way affected; * * *. *If he objects to his cotenant, his remedy is by partition.*" (Italics added.) The case of Mills v. Stump, 20 Cal.App. 84, 128 P. 349, 350, quoted at length in the appellant's brief, is not authority for the contention that a homestead declared upon an undivided interest of one co-tenant is a bar to the other co-tenant's right to partition. In the Mills case, the court in the administration of a deceased husband's estate comprising 320 acres of land, assigned a homestead to the widow of 25 acres including improvements, and the estate was distributed to the heirs as tenants in common, *subject to the homestead.* The court correctly held that the widow's homestead, "having been carved out of the husband's separate estate * * * for her sole use during her natural life," was incapable of compulsory partition or sale. In the case at bar the appellant does not possess the right to sole use of the property as did the widow in the Mills case. Moreover, the case of Mills v. Stump, supra, was decided prior to the amendment of 1929 permitting a homestead to be declared on an undivided interest. The other case cited by appellant, Walton v. Walton, 1943, 59 Cal.App.2d 26, 138 P.2d 54, 58, is likewise inapplicable to the present situation and merely held that after a wife has impressed premises with a valid homestead, the husband "cannot by an action in partition bring about the destruction of a homestead declared by her on property in which he owns a lesser estate, namely, only a joint tenancy interest." In the case at bar the appellant Shankie and the respondent Priddel are not husband and wife and Shankie's homestead covered only the undivided half interest of one tenant in common.

[4, 5] Under Point 2 of appellant's brief it is claimed that "The Superior Court's finding that the real property involved herein could not be partitioned in kind is not supported by any evidence whatsoever." However, the record discloses that appellant's own testimony indicates that the property is an inside lot, 40 by 140 feet, improved by two dwelling houses and three garages so situated that the property could not be partitioned in kind without great prejudice to the parties. Any other finding than that made would have been totally unsupported by the evidence. It is quite true, as stated by the court in Williams v. Wells Fargo Bank, 56 Cal.App.2d 645, 647, 133 P.2d 73, 75, that "partition in kind is favored by the law," but this case merely decided that in reference to a rectangular parcel of land, a mile long and a half mile wide, containing 310 acres, a finding that the property could not be partitioned in kind without great prejudice, was not supported by sufficient evidence.

[6] Annie Shankie, the wife of the appellant, was not a necessary party defendant to the action in partition, for according to the testimony appellant's undivided interest in the property was acquired in 1928 by a decree of distribution, at which time the appellant was a single man, not having married Annie Shankie until 1939, and no agreements or deeds had been made conveying any portion of appellant's interest to the wife. It therefore appears that Annie Shankie had no interest in the property except such as may have been acquired under the declaration of homestead, and according to the record such declaration was not recorded until after the complaint for partition had been filed and the lis pendens recorded.

[7] Appellant's argument that the respondent Priddel was barred from maintaining an action for partition for the reason that said respondent was a non-resident alien living in Ontario, Canada, and hence perhaps not eligible to take property by succession or testamentary disposition, is without merit. Priddel, in bringing this action of partition, was not seeking to acquire this property by either succession or testamentary disposition.

[8] That the judge who presided at the trial of the case at bar and later denied appellant's motion for a new trial, received a portion of his salary from the County of Los Angeles which is a defendant-cross-complainant herein, was not a fact presenting such personal interest as would dis-

qualify the judge from so presiding. Nor is there any matter of public interest or of public policy shown which would work such a disqualification. The case of Lindsay-Strathmore Irr. Dist. v. Superior Court, 182 Cal. 315, 187 P. 1056, cited as authority for this point, bears no resemblance to the facts in the case at bar.

[9] An entirely different phase of the present litigation is presented by the appellant's various objections to the mortgage security held by the County of Los Angeles for hospital aid advanced to appellant in the sum of $1,295.22, and the county's cross-complaint in reference thereto. In the judgment of partition this amount was ordered paid to the county out of appellant's share of the money derived from the partition sale. In appellant's Point 6 it is urged that the county's cross-complaint was deficient in that it did not allege that the mortgagor Shankie was an indigent resident of the county when the aid was extended to him, and that there was no evidence to establish the facts of indigency or residence. Such contention has no merit for the reason that the county's action is based not upon any statutory liability to make payment for aid furnished, but upon a promissory note and mortgage executed by Shankie in which he expressly agreed to pay the county. It is admitted by the pleadings that the aid was received by Shankie, and at the trial appellant's counsel admitted that the charge made therefor was reasonable. This objection does not appear to have been urged by Shankie or suggested during the course of the trial. Furthermore, it is provided by Section 1614 of the Civil Code that "A written instrument is presumptive evidence of a consideration." In County of Los Angeles v. Hurlbut, 44 Cal.App.2d 88, 111 P.2d 963, 972, the county in suing an adult child for reimbursement for old age aid rendered to the mother, prepared the complaint on the theory that it was presumed the mother had been found to have all necessary qualifications for the aid given, and no such allegations were inserted in the complaint. Nevertheless the Court said: "By referring to the resumé of the amended complaint in the fore part of this opinion, it will be observed that nothing is absent that is necessary to state a cause of action." The case of Johnson v. Santa Clara County, 28 Cal. 545, cited by appellant, was an action against a county, brought by a private physician who had contracted to care for infirmary inmates "who might be subjects of medical and surgical treatment," and the court held that plaintiffs were obliged to allege and prove that the persons they cared for were indigents whom the county had a duty to support. The Johnson case is not authority for appellant's contention.

[10, 11] Appellant's main argument concerning the county's mortgage covered by its cross-complaint is based upon the theory that such mortgage violates the rules against perpetuities and restraints upon alienation. But in California a mortgage gives the mortgagee no right of possession, Civil Code, Sects. 2920 and 2927, nor is it deemed a conveyance or transfer of title, Code of Civil Procedure, Sec. 744; Civil Code, Sec. 2888. It has been said that a trust deed cannot be a violation of either the rule against perpetuities or against restraints upon alienation. 25 Cal.Jur. 35. If a trust deed, which conveys technical title to the trustee, does not violate these rules, manifestly, a California mortgage could not do so.

[12] Appellant complains of the blanket provisions of the county's mortgage by which said mortgage is made to cover not only the property sought to be partitioned but "all other real property, wherever situated, in which said Mortgagor now has or shall hereafter acquire any interest * * *." Such blanket clause, however, can have no bearing on the present case for there is no evidence that the appellant owns or ever did own any other real estate and the county is not relying upon such clause nor attempting to assert its mortgage in respect to any property other than that specifically described therein.

[13, 14] The mortgage given by the appellant to the County of Los Angeles also contained a provision securing payment to the county "of all aid or relief heretofore advanced within four years from date hereof or hereafter advanced to Mortgagor or relatives of Mortgagor." Appellant submits that this provision invalidates the mortgage and that "the power of alienation has not only been suspended beyond the period prescribed by our statutes, Civ.Code Secs. 715 and 716, but forever or until the last relative of the mortgagor has passed on to the great beyond." However, as pointed out in the brief filed by the County of Los Angeles, such provision securing the payment of aid rendered to relatives of the mortgagor has

no bearing upon the issues of this case since the aid was all rendered to the mortgagor himself. So far as the mortgage creating a perpetual lien is concerned, it should be noted that the judgment rendered provided that upon payment of the sum of $1,295.22 to the county, "its lien on the hereinafter described property shall be extinguished and shall and it is hereby ordered to release said property from the lien of its said mortgage." The appellant is therefore adequately protected against any possibility that the mortgage in question has created some kind of a perpetual and indefinite lien from which there is no escape. There appears to be no possibility or probability that, "an indestructible and perpetual estate has been so created in and to said real property in violation of the rules against perpetuities", nor has attention been directed to any case suggesting that the mortgage in question is vulnerable to such objections.

[15] It cannot be said that the taking of such a mortgage is beyond the authority of the county, nor that the mortgage had no lawful object. The object of the mortgage given by the appellant was merely the taking of security for hospital aid which appellant admits was received. Moreover, Sec. 2884 of the Civil Code authorizes the taking of security "for the performance of obligations not then in existence."

[16] The case of Winklemen v. Sides, 31 Cal.App.2d 387, 405, 88 P.2d 147, 156, has been relied upon as supporting a contention that the mortgage is void because it contains a provision waiving the provisions of Code Civ.Proc. Sec. 726, relating to actions for foreclosure of mortgages. There is no question but that that case declares void such a waiver in a deed of trust, but the court did not hold that the entire deed of trust was void, merely saying, "We regard the *portions* of the deed of trust we are now considering as contrary to the policy of the California law." (Italics added.) In any event the validity of the waiver contained in the present mortgage is not in issue because the county never attempted to take advantage of said waiver.

[17] With reference to appellant's argument that the homestead declaration and rights accruing thereunder are superior to the mortgage rights of the county, it is sufficient to point out that the county's mortgage was recorded on April 10, 1942 and that the declaration of homestead was not recorded until August 5, 1943. Civ. Code, Sec. 1241, subd. 4, expressly provides that "The homestead is subject to execution or forced sale in satisfaction of judgments obtained: * * * 4. On debts secured by mortgages on the premises, executed and recorded before the declaration of homestead was filed for record."

[18-20] Appellant's contentions that the mortgage was void because acknowledged before the County Clerk, an officer of the mortgagee, County of Los Angeles, is without merit, as is also the argument that the mortgage was void because not signed by the appellant's wife. In respect to the latter point it will be remembered that the property mortgaged was the sole and separate property of Mr. Shankie, and there was no necessity for the wife's signature. The failure of the trial court to make a finding in respect to appellant's first defense set up in the answer to the county's cross-complaint, relating to the provisions of the California Constitution, Article 16, Sections 12 and 13, releasing mortgages taken to secure reimbursement of old age security only, cannot be deemed prejudicial error in view of the fact that no evidence on this defense was offered by appellant and the uncontradicted evidence shows that none of the aid extended under the mortgage was old age security. Any finding on this defense must therefore have been adverse to the appellant.

The record discloses that the appellant's rights both in respect to the matter of partition and in reference to the mortgage security held by the County of Los Angeles, have been adequately protected at all points, and the judgment is therefore affirmed.

YORK, P. J., and DRAPEAU, Justice pro tem., concur.

69 Cal.App.2d 503

PEOPLE v. CHAIT et al.

Cr. 2327.

District Court of Appeal, First District,
Division 2, California.
June 8, 1945.

1. Larceny 🔑28(2)

Counts of indictment charging grand theft did not fail to plead offense because all the "material elements" of the offense for which they were tried were not pleaded. Pen.Code, § 952.

2. Conspiracy 🔑43(4)

An indictment charging conspiracy to defraud persons of money and property by false promises that defendants would consummate leases with oil companies which would pay royalties and bonuses, that such promises were known to be false, and were made with fraudulent intent not to perform them, was not defective as failing to charge that defendants knew the promises were false at time they were made. Pen. Code, § 182, subd. 4.

3. Indictment and Information 🔑110(10)

An indictment charging conspiracy to obtain money and property by false promises with no intent to perform them was not defective for failure to allege the value of property taken so that it might be determined whether offense was a felony or misdemeanor, where indictment was couched in words of conspiracy statute, and under Penal Code it is sufficient to charge accused "in the words of the enactment describing the offense". Pen.Code, §§ 182, subd. 4, 952.

4. Criminal law 🔑200(6)

Where defendants were charged in first 10 counts with grand theft in fraudulently obtaining money or property on 10 different dates from 10 different persons and were charged in eleventh count with conspiracy to obtain money and property from others by false pretenses, conviction on first 10 counts did not foreclose conviction on conspiracy charge. Pen.Code, § 182, subd. 4.

5. Criminal law 🔑414

In conspiracy prosecution self-serving declaration of a defendant's intention to withdraw from the conspiracy was of no evidentiary value. Pen.Code, § 182, subd. 4.

6. Conspiracy 🔑40
Criminal law 🔑315

If one involved in conspiracy desires to withdraw therefrom he cannot escape responsibility by intent alone, but some affirmative act bringing home the withdrawal to knowledge of his confederates is necessary, otherwise conspiracy once established will be presumed to continue until ends are accomplished or its abandonment is established. Pen.Code, § 182.

7. Criminal law 🔑419(1)

In prosecution for conspiracy to sell interests in realty upon false promises with no intent to perform them, victim's testimony that a defendant accompanied codefendant when transaction was completed was not inadmissible as hearsay. Pen. Code, § 182, subd. 4.

8. Conspiracy 🔑47

In prosecution for conspiracy to sell interests in realty upon false promises with no intent to perform them, testimony of victim that defendant accompanied codefendant when transaction was completed was sufficient to show that act charged as a separate offense was participated in by defendant while an active member of conspiracy. Pen.Code, § 182, subd. 4.

9. Conspiracy 🔑44½

Once a conspiracy is established it is unnecessary to prove that conspirator personally participated in each overt act performed in furtherance of the conspiracy. Pen.Code, § 182, subd. 4.

10. Conspiracy 🔑44½

In prosecution for conspiracy to sell interests in realty upon false promises with no intent to perform them, it was not necessary to prove that false representations made were the sole inducing cause of victim's parting with his money or property. Pen.Code, § 182, subd. 4.

11. Conspiracy 🔑47

In prosecution for conspiracy to sell interests in realty upon false promises with no intent to perform them, evidence that a defendant had been engaged for 15 years in selling promotional land schemes of the type involved, and that there was nothing in exhibits upon which he relied which would cause him to believe that representations might be true, established such defendant's knowledge of falsity of such representations. Pen.Code, § 182, subd. 4.

12. Conspiracy ⚷=47

An unlawful conspiracy may be proved by circumstantial evidence.

13. Conspiracy ⚷=48

In prosecution for conspiracy to sell interests in realty upon false promises with no intent to perform them, whether all conspirators had mutual and common understanding to engage in the conspiracy in manner and for purposes alleged in indictment was for jury. Pen.Code, § 182, subd. 4.

14. Conspiracy ⚷=47

In prosecution for conspiracy to sell interests in realty upon false promises with no intent to perform them, testimony showing use of uniform plan and pattern and the practically uniform statement of the "false pretense" was sufficient to corrobate testimony of each victim. Pen.Code, §§ 182, subd. 4, 1110.

15. Criminal law ⚷=427(2)

In conspiracy prosecution, testimony of acts and declarations of coconspirators out of presence of defendant was properly admitted where existence of conspiracy was proved by independent evidence. Pen.Code, § 182, subd. 4.

16. Criminal law ⚷=670

In prosecution for grand theft and for conspiracy, that some of testimony of witness tended to prove a conspiracy did not affect its admissibility while testifying with reference to first count of indictment under which all defendants were charged with grand theft. Pen.Code, § 182, subd. 4.

17. Criminal law ⚷=680(1)

The order of proof is for trial court to control.

18. Criminal law ⚷=680(1)

If in proving 10 separate acts of grand theft the state also proved a conspiracy on part of all defendants to commit the same separate or similar overt acts, the order in which proof was made was immaterial. Pen.Code, § 182, subd. 4.

19. Criminal law ⚷=801

In conspiracy prosecution, court did not err in refusing a defendant's request that jury be instructed "at this time, not at the close of the case," that no evidence was binding against such defendant until a conspiracy had first been proven, where instructions given at close of trial fully covered the point and were given at proper time. Pen. Code, § 182, subd. 4.

20. Conspiracy ⚷=45

In prosecution for conspiracy to sell interests in realty upon false promises with no intent to perform them, documents taken from files of a conspirator, which bore directly upon charge of conspiracy, which in many cases were the means by which offense was committed, and many of which were written by defendant and tended to prove his participation in conspiracy, were properly admitted. Pen.Code, § 182, subd. 4.

21. Criminal law ⚷=670
Larceny ⚷=44

Where first 10 counts of indictment charged grand theft from 8 individuals and eleventh count charging conspiracy to obtain money and property by false promises with no intent to perform them specified 10 overt acts committed in relation to 6 individuals only 2 of whom were named in former counts, evidence offered in support of first 10 counts was admissible for purpose of showing the "plan, scheme, design and guilty knowledge" of several defendants, and fact that when such evidence was piled on to evidence of conspiracy it was pertinent evidence tending to prove both charges did not make such evidence inadmissible. Pen.Code, § 182, subd. 4.

22. Criminal law ⚷=200(6)

Accused charged with grand theft and conspiracy to obtain money and property by false promises with no intent to perform them was not subjected to second jeopardy or double punishment for same offense because evidence supporting counts charging grand theft also proved conspiracy. Pen. Code, § 182, subd. 4.

23. Criminal law ⚷=200(1)

A defendant may be convicted of two separate offenses arising out of same transaction when each offense is stated in separate count and when the two offenses differ in their elements and one is not included in the other.

24. Criminal law ⚷=372(6)

In prosecution for conspiracy to obtain money and property by false promises with no intent to perform them, permitting a victim to testify that she was deeded property different from that described in victim's contract of sale was not error, where many of other victims had same experience and it was part of defendants' general scheme of defrauding purchasers to give them deeds to worthless lands which were not even mentioned to purchasers during negotiations. Pen.Code, § 182, subd. 4.

25. Criminal law ⚷655(9)

Trial judge was not guilty of misconduct in admonishing witness to testify to facts without equivocations and without expression of opinion or conjectures.

26. Criminal law ⚷1129(3)

Assignment of error in refusing to give 14 instructions listing them by number only, and without any statement of their context or any argument in support of assignment, would not be considered by the appellate court.

27. Criminal law ⚷447

The rules of evidence in civil cases as to direct or collateral attack upon a contract do not apply in prosecution for conspiracy to obtain money and property by false promises with no intent to perform them, since the people prosecuting for a crime committed in relation to a contract are not parties thereto and may show true nature of transaction. Pen.Code, § 182, subd. 4.

28. Criminal law ⚷447

In prosecution for conspiracy to sell interests in realty upon false promises with no intent to perform them, admission of parol evidence at variance with written contracts executed by defendants in sale of such interests was not error. Pen.Code, § 182, subd. 4.

29. Criminal law ⚷675

In prosecution for conspiracy to obtain money and property by false promises with no intent to perform them, admission of corroborative and cumulative evidence showing criminal intent of conspirators was not error on theory that jury was prejudiced because there was too much of such evidence, and because some of witnesses who had been defrauded were aged and in poor financial state. Pen.Code, § 182, subd. 4.

30. Conspiracy ⚷48

In prosecution for conspiracy to obtain money and property by false promises with no intent to perform them, whether activities of a defendant who allegedly was merely a collector for other conspirators were an important and necessary part of general conspiracy was for jury. Pen. Code, § 182, subd. 4.

31. Licenses ⚷40

Defendants were not improperly convicted of violating the Corporate Securities Act on ground that defendants made single sales of fee title to land which were not sales of "securities" within contemplation of the act, where lands were not sold as farming land or for grazing purposes, but as speculative interest in promised "dividend" from pending leases on "proven oil land". St.1931, p. 950, § 18.

32. Criminal law ⚷823(10)

Instructions were not erroneous because they failed to contain all the admonitory language such as "If you are satisfied from the evidence" and "If you find from the evidence in this case," where such admonitory language and more was found in another instruction given.

33. Criminal law ⚷395

The question of legality of search and seizure of personalty cannot affect question of admissibility of such property in evidence in criminal case and cannot be inquired into on appeal from a conviction.

34. Criminal law ⚷814(1)

Instructions which had no bearing upon any of issues being tried were properly refused.

35. Criminal law ⚷1141(1)

Reviewing court does not search for error but assumes that judgment is sound unless error is disclosed by parties interested.

36. Indictment and information ⚷81(2, 5)

Where accused was born in Russia where he was given the name "Charkel Chait", and some time after coming to the United States he assumed the name of "Sam Hoit" or "Sam Hoytt," and he was admitted to citizenship by naturalization when he was given permission to use the name of "Sam W. Hoytt", indictment properly charged him under names of "Charkel Chait" and "Sam W. Hoytt".

37. Criminal law ⚷667(2)

Whether in criminal case trial proceedings shall be transcribed daily and a copy furnished accused is within discretion of trial court. Code Civ.Proc. § 269.

38. Criminal law ⚷667(2)

Under statute requiring court reporter to transcribe from his notes a record of proceedings within such reasonable time after trial as court may designate, denial of request of accused that court reporter be ordered to furnish accused a daily transcript of trial proceedings was no evidence of passion or prejudice. Code Civ.Proc. § 269.

39. Criminal law ⚷1131(4)

Where no argument was made in support of appeals from order denying probation, appeals would be treated as having been abandoned, and hence would be dismissed.

◆

Appeal from Superior Court, Alameda County; Benjamin C. Jones, Judge.

Chaskel Chait, also known as Samuel W. Hoytt, and others were convicted of grand theft, of violating the Corporate Securities Act and of conspiracy to defraud persons of money and property by false promises with fraudulent intent not to perform such promises, and they appeal from orders denying them a new trial and probation.

Judgments and orders denying motions for new trial affirmed, and appeals from order denying probation dismissed.

Cannon & Callister and David H. Cannon, all of Los Angeles, for appellant Hoytt.

Ben L. Blue, of Los Angeles, for appellant Weil.

Maurice Gleason, of Los Angeles, for appellants Goldberg and Buchbinder.

Edward S. Cooper, John L. Fleming, and John Boyce Smith, all of Los Angeles, for appellant Singer.

Robert W. Kenny, Atty. Gen., David K. Lener, Deputy Atty. Gen., and Ralph E. Hoyt, Dist. Atty., and Cecil Mosbacher, Asst. Dist. Atty., both of Oakland, for respondent.

NOURSE, Presiding Justice.

The appellants appeal from judgments on conviction on all counts of an indictment containing ten counts of grand theft, two counts of violation of sec. 18 of the Corporate Securities Act, St.1931, p. 950; and one count of conspiracy (alleging overt acts committed in the course of the conspiracy to effect its object) to defraud persons of money and property by false promise with fraudulent intent not to perform such promises, a violation of Penal Code, § 182 (4). They also appeal from the orders denying them a new trial and probation. The cause took more than ten weeks in trial; the transcript of the evidence on file herein consists of sixteen volumes with a total of 5,481 pages of testimony. Each of the defendants was given ten consecutive sentences on counts one to ten and concurrent sentences on the remaining three counts.

The activities of the defendants upon which the charges in the indictment were based consisted in the sale to various individuals of fractional lots of land upon the representation that they were either proven oil lands, were located in a proven oil district, or that negotiations were then pending with major oil companies operating in the district, and that leases would be made with these companies by virtue of which the purchasers would receive large bonuses or royalties and a comfortable income.

The witnesses for the State had had dealings with Hoytt, with Williams, with Singer, with Buchbinder and with Weil, either singly or with two or more of the defendants. In 1938 Hoytt and his associates were selling small acreages of a tract of land in New Mexico called the Pajarito grant. This land was of little value for any purpose but was represented by Hoytt and his agents as prospective oil land in which over $100,000 had been spent in drilling operations. From 1938 through 1943 the appellants continued to sell tracts of land in the Pajarito grant and in Kern, Tulare and Kings counties in California. One or two of the appellants would call on a prospect, build up appellant Hoytt as a wealthy, educated oil man who had conducted many charities and was interested in helping the poor. The prospect would be sold a 1½ or 2-acre tract of land for many times its value, on the representation that the land was proven oil land and that Hoytt was negotiating for a lease with several major oil companies who would pay bonuses of several hundred dollars per acre, plus a royalty on oil produced. In truth no major oil companies were negotiating for the lease of any of these tracts during the time covered by the indictment. The buyer would later be approached by one or more of the appellants with the statement that the oil companies refused to lease unless the buyer owned a larger tract and had a deed; and that the owner must have paid the entire price in order to get a deed. Those who paid the price demanded were often given deeds to land other than that described in their purchase agreements without notice or explanation to the purchaser. The purchase agreements were in most cases on a form approved by the Real Estate Commissioner and had a report of the Real Estate Commissioner printed on the reverse of the form, stating that the land was being sold only for speculative purposes and that the report was not an approval or disapproval of prices charged. The buyers either did not read the report, or were told that it was a mere form, or that it was a state approval of the project. Some of the buyers were told that a syndicate was to be formed, of which Hoytt and his father were to be parties, and that the buyer on buying additional land would be let into the syndicate.

As a part of their plan to deceive the prospective purchasers the defendants worked upon a uniform plan or formula, an important part of which was the creation of a picture of Hoytt as a man of high integrity, ability, and financial standing. A review of the evidence relating to these circumstances is fairly stated in respondent's brief from which we quote in part:

"The victims were told that S. V. Hoytt was the son of an English father and Spanish mother; that he was born in Santa Clara Valley; that his father was a millionaire; that he was an only child and heir to his father's millions; that Hoytt was a geologist, a university graduate who spent his time in the oil fields; that he understood the oil business from the ground up; that he had drilled wells not only in California but in many places including a number of foreign countries; that he owned a number of producing oil wells in California; that he was constantly flying back and forth to Washington to advise government officials about oil conservation and to negotiate leases with major oil companies; that the firm of S. W. Hoytt Company was founded by S. W. Hoytt, Sr., who, now a man between 80 and 90 years of age, was still actively engaged in the oil business; and still doing business on the same corner where he had first established the company 50 years ago.

"In order to make aged victims think that Hoytt was particularly interested in elderly people and solicitous of their welfare, the prospective purchasers were told that appellant Hoytt was very devoted to his father; that he always spent the holidays with him even though it necessitated his crossing the continent to do so; that appellant Hoytt was a very generous and philanthropic man who contributed liberally to all charitable projects; that because of his wealth it was not necessary for him to work but having retired once he decided to go back into the oil business and help out working people by offering them the opportunity to participate in the fabulous returns to be gained from these proven oil properties.

"Where the intended victim was an ardent member of a particular religious group, Hoytt and his confederates would frequently represent that they were devout members of the same faith. Thus, to a Seventh Day Adventist Hoytt and Singer represented themselves to be members of that church and represented that Hoytt's father was one of the leaders of that denomination in Los Angeles. To a Catholic Hoytt stated that he was a Catholic and that he had been to mass that morning. On one occasion he said he had dined with the Pope.

"The victims were also told that Hoytt was an unmarried man for the purpose of establishing a somewhat romantic relationship with his clients who were either widows or spinsters past middle age. If the client were too old to be interested in Hoytt personally she was told that she resembled Hoytt's mother and that was the reason he was taking a special interest in her welfare, and Hoytt asked some of his victims if he might call them 'mother.' To build up and foster this personal relationship victims were sent gifts, most often a purse which carried the suggestion that it would soon be filled with money obtained from the oil land. Such gifts at times were purportedly sent by Hoytt's father.

"The true facts concerning Hoytt's personal history were briefly these:

"He was born in Kiev, Russia, in 1894 or 1895 and was the youngest of ten children. His name was Chaskel Chait. His father, Aaron Chait, died in Kiev, Russia, in 1909 and never came to the United States. In 1912 Hoytt came to the United States with his mother and then took the name of Sam Hoit or Sam Hoytt. In August, 1942, he became an American citizen by naturalization and at that time the court authorized him to use the name of Sam W. Hoytt.

"Hoytt was not a geologist. He was not a university graduate and even had difficulty writing the English language. Hoytt did not come to California until 1931. He first worked as a real estate salesman for the Norins Realty Company selling Pajarito Grant lands and in 1933 worked for the appellant Williams who was operating as the Federal Realty and Development Company. Hoytt worked as a real estate salesman on various questionable promotional schemes until 1938 when he obtained a real estate broker's license, and began operating as the S. W. Hoytt Co. These various appellants and others then started working for him. In November, 1928, Hoytt married Lillian Epstein, to whom he was still married at the time he was indicted by the Grand Jury of Alameda County.

"The record shows that neither Hoytt nor any other of these appellants ever drilled an oil well and that Hoytt never owned an oil well in the State of California. There was no evidence that he had ever owned an oil well in any other place. The record further indicates that up to the time of the indictment Hoytt had no negotiations with any major oil company for a lease of any land owned by him in the State of California for a bonus of $300 or $1,500 per acre or any other price, except that he did lease 2½ acres to the Standard Oil Company for a period of three years for a total sum of $25 * * *. Representatives from each of these (the major oil) companies, with the exception of Standard Oil, testified that neither Hoytt nor any other one of these appellants ever had negotiations with his company for the leasing of any of the lands referred to in these proceedings at any price prior to the date of the indictment."

In their appeal from the judgment four separate briefs have been filed by appellants but each appellant has adopted by reference the briefs filed on behalf of the others.

[1] When the cause was called for oral argument the appellants for the first time raised the point that the first ten counts of the indictment failed to plead a criminal offense because all the "material elements" of the offense for which they were tried were not pleaded. People v. Walther, 27 Cal.App.2d 583, 81 P.2d 452, and a statement found in 12 California Jurisprudence, page 464 (published in 1923), are relied on. Appellants overlook the amendments to section 952 of the Penal Code which were enacted in 1927 for the express purpose of eliminating the objections here made. The same error was made by the court in the Walther case and the error was conceded by the same court in People v. Dunn, 40 Cal.App.2d 6, 104 P.2d 119, where it was said that in the Walther case the court had failed to take into consideration the provisions of the amendment that the information or indictment "may be in the words of the enactment describing the offense." But the appellate court in the Walther case also overlooked the clear and comprehensive opinion of the Supreme Court in People v. Fewkes, 214 Cal. 142, 4 P.2d 538, where the purpose and the effect of these amendments to the Penal Code is fully explained and numerous authorities to the same purport were cited. Since the same appellate court declined to follow the rule of the Walther case in its later decision, and since it is contrary to all other authorities, we must assume that it can no longer be regarded as an authority.

[2] In the opening brief of appellant Singer, he expressly limited the attack upon the indictment to the eleventh count. The gist of this count is the charge that defendants conspired to defraud persons of money and property by false promises that defendants would consummate leases with oil companies which would pay royalties and bonuses, that such promises were known to be false, and were made with the fraudulent intent not to perform them. These allegations are followed by designation of the separate overt acts committed in the course of the conspiracy. It is argued that the allegations are defective because they do not charge that appellants knew the promises were false at the time they were made, and People v. Campbell, 1 Cal.App.2d 109, 36 P.2d 198, is cited as authority. In that case the two defendants were charged with conspiracy to obtain a quantity of hay from another for which Campbell would deliver his check in payment. The indictment charged that "defendant Campbell" knew he did not have sufficient funds to cover the check which was thereafter delivered and that "defendant Campbell's" promise to pay was made with a fraudulent intent not to perform. The appellate court held that since it was not charged that the other defendant knew or intended that the check would not be good

the indictment failed to charge a conspiracy to obtain property by false promises with fraudulent intent not to perform them. The same cannot be said of the indictment before us which pleads the promises which were agreed to be made, that they "were to be and would be false and known to said defendants to be false", and would be made by "said defendants" with fraudulent intent not to perform the same.

[3] Appellants also argue that the indictment in respect to the eleventh count is faulty because it does not allege the value of the property taken so that it may be determined whether the offense is a felony or a misdemeanor. Appellants rely on People v. Barnard, 63 Cal.App. 562, 219 P. 756, which was decided before the Legislature in 1927 amended the Penal Code to eliminate many of the frivolous technicalities found in the decisions relating to criminal procedure. The gist of the opinion in the Barnard case is found at page 571 of 63 Cal.App., at page 760 of 219 P.: "Where the punishment of a crime, as in the case of larceny or the obtaining of money or property by false pretenses, is made to depend upon the value of the money or property taken or obtained, the value must be stated in the indictment. Woodring v. Territory, [14 Okl. 250, 78 P. 85], 2 Ann.Cas., [855], 857, note; 25 Cyc. 85; 25 C.J. 634." Here the gist of count eleven of the indictment is the charge of conspiracy to sell certain persons interests in real property upon false promises and with fraudulent intent not to perform the promises. There is no substantive offense of defrauding persons of money and property upon promises made with a fraudulent intent not to perform. Hence the indictment is to be tested in the view of section 952 of the Penal Code—whether it is sufficient to give the accused notice of the offense of which he is charged. Since under that section it is sufficient to charge the accused "in the words of the enactment describing the offense" the attack upon the indictment falls because it is "in the words" of section 182 of the Penal Code which includes in the definition of conspiracy "to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform such promises." For these reasons we conclude that the indictment states a public offense in all respects in harmony with the applicative statutes and decisions.

[4] The appellants argue somewhat vaguely that if they had a fraudulent intent to obtain money or property by false pretenses, then the first taking constituted a completed crime and each subsequent taking constituted a separate offense. Whether appellants infer from this that there was some defect in the indictment, or that they were placed in double jeopardy, or that there was some error in the admission of evidence cannot be ascertained from the briefs. Manifestly if the appellants fraudulently obtained money or property on ten different dates from ten different persons as alleged in the first ten counts of the indictment they committed ten separate offenses. People v. Caldwell, 55 Cal.App.2d 238, 130 P.2d 495. But they were also charged in the eleventh count with conspiracy to obtain money and property from others by false pretenses, and conviction on the first ten counts does not foreclose a conviction on the conspiracy charge. People v. Hoyt, 20 Cal.2d 306, 125 P.2d 29.

[5, 6] The argument is made on behalf of appellant Singer that his conviction on the conspiracy charge was error because of his testimony that he terminated his employment with S. W. Hoytt on August 5, 1942, after he had made his last sale to Johansen. The self-serving declaration of the appellant's intention to withdraw from the conspiracy is of no evidentiary value. His testimony that he told the victim that he was going to withdraw was directly denied by that witness. If one involved in a conspiracy desires to withdraw therefrom he cannot escape responsibility by intent alone. Some affirmative act bringing home the withdrawal to the knowledge of his confederates is necessary, otherwise the conspiracy once established will be presumed to continue until the ends are accomplished or its abandonment is established. People v. Tinnin, 136 Cal.App. 301, 28 P.2d 951; Coates v. United States, 9 Cir., 59 F.2d 173. See generally 5 Cal.Jur. p. 523.

[7, 8] Upon a similar line of reasoning this appellant argues that the evidence was insufficient to convict him on the first count because the money was obtained after his "withdrawal" from the conspiracy and because the testimony of the victim that this appellant accompanied Hoytt when the transaction was completed is hearsay. Neither point has any merit. The testimony that he accompanied Hoytt at the very time the sale was made was direct

testimony of a fact material to the issues. The same testimony negatives his claim of a previous withdrawal from the conspiracy. It was sufficient to show that the act charged in count one as a separate offense was participated in by this appellant while an active member of the conspiracy charged. This appellant's argument that since the transactions upon which the sixth and seventh counts rest occurred after his "withdrawal" the evidence is insufficient to convict him on those counts falls for the same reason.

[9-11] The next point raised by appellant Singer is based upon a misconception of the record. He states that the only transaction with which he was connected by the evidence was the sale to Johansen. But the evidence is that he accompanied Hoytt, or one of the other conspirators, on numerous other occasions and joined with his associate in the representations made, though the other party was the active one in making the sale. It is axiomatic that once a conspiracy is established it is unnecessary to prove that each conspirator personally participated in each of the several overt acts performed in furtherance of the conspiracy. People v. Breitenstein, 111 Cal.App. 746, 296 P. 87. Nor is it necessary to prove in a case of this type that the false representations made were "the sole inducing cause" of the owner parting with his money or property. People v. Steffner, 67 Cal.App. 1, 227 P. 690; People v. Whiteside, 58 Cal.App. 33, 208 P. 132; 35 C.J.S., False Pretenses, § 22, p. 664. Directing his attack particularly to the ninth count this appellant argues that the evidence is insufficient to show that he knew the representations were false. But he testified that he had been engaged for fifteen years in selling promotional land schemes of this type, had been so engaged by Hoytt in these sales of "potential" oil lands, and knew there was nothing in the exhibits upon which he said he relied which would cause him to believe that any of the false representations might be true.

[12, 13] The appellant Singer makes a general attack upon the evidence relating to counts two, three, four, five, eight and ten arguing that the evidence is insufficient to support the verdicts in that it does not show that he had a mutual understanding with his co-conspirators to commit the unlawful acts relied on. Authorities holding that such proof is essential are cited and portions of the testimony of several witnesses are referred to. It is not necessary to say more than that the authorities support the general rule and that the testimony quoted is incomplete. At the outset it is conceded that an unlawful conspiracy may be proved by circumstantial evidence. People v. Goldaber, 17 Cal.App.2d 195, 197, 61 P.2d 975; People v. Bucchierre, 57 Cal.App.2d 153, 163, 134 P.2d 505. The circumstances supporting the inference that each of the conspirators had formed the mutual intent to commit the unlawful acts alleged are too numerous to recite in detail. It is sufficient to refer to the uncontradicted evidence that all of the appellants had been engaged for more than five years in selling to the public practically worthless lands upon the false representations that they were proven oil lands, or that they were of such potential value that leases would be made with established oil developing companies which would bring large returns to the purchasers. The evidence was that before the sales were made to the parties named in the indictment the appellants knew that previous sales made by them had proved failures, and that, notwithstanding this knowledge, they continued their operations with the same misrepresentations, the same technique, and in the same manner, always selecting as their customers persons of advanced years and women known to be without business experience. The scheme of operations in every instance followed a uniform pattern of approach to and dealings with each customer, a pattern so uniformly followed by each of the appellants that the jury could not have avoided the conclusion that all the conspirators had the mutual and common understanding to engage in the conspiracy in the manner and for the purposes alleged in the indictment.

[14] The appellant Singer cites section 1110 of the Penal Code and argues that the testimony of each of the victims covering the false representations made was not corroborated. For this purpose the testimony of all the purchasers must be taken into consideration. This testimony which shows the use of the uniform plan and pattern and the practically uniform statement of the "false pretense" was sufficient. The accepted rule is clearly stated in People v. Wymer, 53 Cal.App. 204, 206, 199 P. 815, 816, where the court said: "In this class of cases the circumstances connected with the transaction, the entire conduct of the defendant, and his declara-

tions to other persons, are proper matters for the consideration of the jury, and may be looked to, to furnish the corroborative evidence contemplated by the law." This was followed with approval in People v. Whiteside, 58 Cal.App. 33, 41, 208 P. 132, and People v. Helmlinger, 69 Cal.App. 139, 142, 230 P. 675.

[15] Under the heading "Errors of the Court" the appellant Singer argues that testimony of acts and declarations of co-conspirators out of the presence of this appellant was inadmissible. People v. Busby, 40 Cal.App.2d 193, 104 P. 531, and similar authorities are cited to the point that the existence of the conspiracy must be proved by independent evidence before acts and declarations of a co-conspirator may be admitted. The respondent does not question the rule of the cited cases, but does resist the appellant's assertion that "The record is devoid of any evidence of a conspiracy." Reference to the portions of the evidence which have heretofore been stated is a sufficient answer to appellant's contention.

[16-18] The first instance of claimed error to which this appellant directs attention occurred during the examination of Adele Anderson who was testifying for the State in reference to the first count of the indictment under which all the defendants were charged with grand theft. The testimony of this witness was admissible for the purpose for which she was called. The fact that some of her testimony tended to prove a conspiracy did not affect its admissibility. It was impossible of course for the State to prove each of the acts charged in the first ten counts before it proved the others. The order of proof is always a matter for the trial court to control. People v. Breitenstein, 111 Cal.App. 746, 749, 296 P. 87. If in proving the ten separate acts of grand theft the State also proved a conspiracy on the part of all the defendants to commit the same separate or similar overt acts the order in which the proof is made is immaterial. Hence, the rule of the cases upon which this appellant relies does not cover a case of this type where the circumstances of the commission of the separate acts are of the same character as the circumstances upon which the State relies as the indirect evidence from which the existence of the conspiracy might be inferred. Those cases relate to instances where direct evidence of the conspiracy is available and the effect of the rule is that in such type of case the State may not withhold the direct proof of the conspiracy while offering evidence of acts and declarations of the alleged conspirators. The absurdity of the application of the rule for which this appellant contends to this type of case is apparent. The five defendants usually worked in pairs under a uniform pattern. Two of them approached the prospect and laid the foundation for a sale. Sometimes one of them, sometimes both, and sometimes one of the other conspirators returned and made the actual sale. Evidence tending to prove the charge of grand theft as to one necessarily included the activities of the other and all this evidence tended to prove the conspiracy. Hence the evidence of these circumstances was properly admitted.

[19] This appellant argues that the court erred in refusing his request that the jury be instructed "at this time, not at the close of the case" that no evidence was binding against him until a conspiracy had first been proven. He cites People v. Doble, 203 Cal. 510, 265 P. 184, and People v. Gonzales, 20 Cal.2d 165, 124 P.2d 44. Neither is in point and no authority which we have found supports the position. The instructions which were given at the close of the trial fully covered the point and were given at the proper time.

[20] There was no error in the admission in evidence of the documentary evidence taken from the files of the S. W. Hoytt Company. The documents bore directly upon the charge of conspiracy, in many cases were the means by which the offense was committed, many of them were written by appellant Singer and tended to prove his participation in the conspiracy. The case of People v. Zoffel, 35 Cal.App.2d 215, 95 P.2d 160, has no application.

[21] This appellant's assignment that the evidence is insufficient to sustain the conviction on the conspiracy count is in effect an argument that the evidence was too much and too soon. On the premise that all the evidence tending to prove the charges of grand theft found in the first ten counts also tended to prove the charge of conspiracy found in count eleven this appellant argues that the State split the one conspiracy into eleven and therefore the evidence disclosed that several conspiracies were committed rather than the one charged in count eleven. The argument rests upon a misunderstanding of the charg-

ing parts of the indictment. The first ten counts charge grand theft from eight separate individuals. The eleventh count charging conspiracy specifies ten separate overt acts committed in relation to six separate individuals only two of whom were named in the former counts. All the evidence offered in support of the first ten counts was admissible for the purpose of showing the "plan, scheme, design and guilty knowledge" of the several defendants and the fact that when this evidence was piled on to the evidence of a conspiracy to obtain money and property by false promises with no intent to perform them it was substantial and pertinent evidence tending to prove both charges does not make such evidence inadmissible upon any reasonable theory. To restate the proposition when the evidence received to prove the general conspiracy discloses that more "overt acts" were committed in the conduct of the conspiracy than those alleged in the indictment it cannot be said that the evidence is "insufficient" to prove the conspiracy charged because such evidence proves that the conspiracy was in fact more widespread in its operations than was charged in the indictment. If the evidence as offered was irrelevant to the issues tried that would be ground for a different objection than the one here raised. But since the evidence here referred to was admissible to prove the general plan and guilty knowledge of all the conspirators it was likewise admissible to prove their participation in the conspiracy charged in the eleventh count.

[22, 23] If this appellant intends by his argument to imply that there is some sort of second jeopardy or double punishment for the same offense the answer is found in People v. Hoyt, 20 Cal.2d 306, 317, 125 P.2d 29, 35, where the Supreme Court said: "The crimes of criminal conspiracy, robbery and murder here involved are separate and distinct offenses. The test is the identity of the offenses as distinguished from the identity of the transactions from which they arise. A defendant may be convicted of two separate offenses arising out of the same transaction when each offense is stated in a separate count and when the two offenses differ in their elements and one is not included in the other. People v. Martin, 114 Cal.App. 392, 300 P. 130; People v. Venable, 25 Cal.App.2d 73, 74, 76 P.2d 523."

[24] The assignment of error that one of the witnesses was permitted to testify that she was deeded property different from that described in her contract of sale is not substantial. If it were it would reach the testimony of several other witnesses. That transaction was not unusual as the evidence as a whole disclosed that many of the other victims had the same experience and that it was a part of appellants' general scheme of defrauding the purchasers to give them deeds to worthless lands which were not even mentioned to the purchasers during the negotiations.

[25] The criticism of the conduct of the trial judge is wholly without merit. It would serve no purpose to cite the portions of the transcript referred to. It is sufficient to say that in each instance the trial judge was merely admonishing the witness to testify to facts without equivocations and without the expression of opinion or conjectures.

[26] The assignment of error in refusing to give fourteen instructions listing them by number only, and without any statement of their context or any argument in support of the assignment, does not call for consideration. See 2 Cal.Jur. 731.

[27, 28] The appellant Weil, adopting all that is said in the brief of appellant Singer, raises the question whether there was error in the admission of parol evidence at variance with the written contracts. He cites and relies upon People v. Carter, 131 Cal.App. 177, 21 P.2d 129, as giving comfort to the proposition that innocent persons should not be made the victims of careless or vindictive individuals through relaxation of the settled rules of evidence. The rule is settled and of long standing that the rules of evidence in civil cases as to direct or collateral attack upon a contract do not apply in cases of this type. People v. Martin, 102 Cal. 558, 566, 36 P. 952. The people prosecuting for a crime committed in relation to a contract are not parties to the contract and are not bound by it. They are at liberty in such a prosecution to show the true nature of the transaction. People v. McEntyre, 32 Cal.App.2d Supp. 752, 760, 84 P.2d 560; People v. Jones, 61 Cal.App.2d 608, 620, 143 P.2d 726.

[29] This appellant contends that the trial court erred in the admission in evidence of corroborative and cumulative evidence showing the criminal intent of the conspirators. That the evidence was competent and relevant cannot be denied. But it is argued that there was so much of it,

and that some of the witnesses who had been defrauded were so aged, and in such poor financial straits, that it all had a bad effect upon the jury. No authorities are cited to the point raised. When the evidence was tendered the trial court was required to rule whether it was admissible on legal grounds, and in this case there was no error.

[30] Finally this appellant argues that he was merely a collector for the other parties and therefore could not be a party to the conspiracy. All the reliable evidence is to the contrary, but, even if it were true that he was merely a collector for the other conspirators, the jury could conclude that his activities in that capacity were an important and necessary part of the general conspiracy.

[31] The appellants Goldberg and Buchbinder direct their attack upon the convictions for violating the Corporate Securities Act and upon a number of the trial court's instructions. Their argument on the first point is that the sales which they made were single sales of the fee title to land and were not sales of "securities" within the contemplation of the Act. But the undisputed evidence is that the lands were not sold as farming land or for grazing purposes but as a speculative interest in a promised "dividend" from pending leases on "proven oil land." The case is in line with Securities and Exchange Comm. v. Bailey, D.C.S.D.Fla., 41 F.Supp. 647, where similar sales were made upon representations that the purchasers would participate in a "development" contract of a large tract of land to be used in the growing of tung trees. In holding that the sales came within the purview of the Securities Act the Court said, 41 F.Supp. at page 650: "An 'investment contract,' as contemplated by the Act, is one which contemplates the entrusting of money or other capital to another, with the expectation of deriving a profit or income therefrom, to be created through the efforts of other persons. * * * In essence, what the defendants are really offering, and certainly what the average purchaser is really buying is, not land for its intrinsic value, but a producing tung grove as a source of income, without which he would not be interested in purchasing the land." To the same effect is Domestic and Foreign Petroleum Co. v. Long, 4 Cal.2d 547, 51 P.2d 73; People v. Jackson, 24 Cal.App.2d 182, 74 P.2d 1085; People v. Daniels, 25 Cal.App.2d 64, 76 P.2d 556; People v. Yant, 26 Cal.App.2d 725, 80 P.2d 506; Moore v. Stella, 52 Cal.App.2d 766, 127 P.2d 300.

[32] The same appellants criticize a number of instructions given by the trial judge upon his own motion. The objection is not that they contain an incorrect statement of the rules of law, but that they fail to contain all the admonitory language such as "If you are satisfied from the evidence" and "If you find from the evidence in this case." The five instructions listed defined a conspiracy in general terms, explained the necessity of knowledge of the conspiracy by each party, the conditions of liability of each, the necessity of proof of at least one overt act, and the circumstances under which one member of a proved conspiracy is bound by the acts and declarations of his co-conspirators, and when evidence of such acts and declarations becomes inadmissible.

It is not clear why these appellants raise the point for decision. It is so obvious that the instructions follow well-established rules of law that no criticism is made of the soundness of the legal principles they contain. All that these appellants contended for, and more, is found in the instruction reading:

"The court has given you instructions embodying such rules of law as may be necessary to assist you in arriving at a verdict. As to some of these instructions, their application depends upon the light in which you view the evidence.

"The fact that the court has given you instructions as to particular rules of law must not be taken by you as an indication that such rules are necessarily applicable. Where there is a conflict of evidence, the question as to whether a particular rule of law is applicable depends frequently and solely upon the conclusion as to what the facts are, and the jury are the sole judges of the facts.

"If any instruction is applicable only if a particular situation or state of facts exists, and if you find that no such situation or state of facts exists, then you should not take such instruction into consideration in your deliberations."

The appellant Hoytt assigns error in the use in evidence of papers and documents which had been seized under a search warrant at his place of business.

The circumstances upon which the argument is based are that the articles were seized under a search warrant issued by a judge of the superior court upon an affidavit which charged the crimes of grand theft and a violation of section 182 of the Penal Code, that the articles were described as "Forms, reports, circulars, * * * maps, letters, memoranda, books, etc.," that they were used and were intended to be used by appellants as a means of committing other and similar crimes. Appellants state in their brief that "by far the largest amount of documentary evidence offered and received in this prosecution was taken under the search warrant * * *" and that the conviction could not have been obtained without that evidence. In all fairness appellants should concede that such documentary evidence as was received was competent and relevant evidence.

Appellants made several unsuccessful attempts to recover the books and documents by proceedings in the Municipal Court, in the Superior Court, and in the District Court of Appeal, and filed an application for a writ of prohibition in the Supreme Court to restrain the trial of this action on the ground that the search and seizure was illegal. This application was denied.

[33] It is the settled rule in this State that the question of the legality of a search and seizure of personal property cannot affect the question of the admissibility of the property in evidence in a criminal case and that it cannot be enquired into on an appeal from a conviction. People v. Mayen, 188 Cal. 237, 205 P. 435, 24 A.L.R. 1383; People v. Gonzales, 20 Cal.2d 165, 124 P.2d 44; People v. Beilfuss, 59 Cal.App.2d 83, 138 P.2d 332. In the Gonzales case the Supreme Court states the conflicting federal and state rules, with authorities supporting each, in clear and concise language. We quote 20 Cal.2d at pages 168, 169, 124 P.2d at page 46: "The Fourth Amendment to the Constitution of the United States prohibits unreasonable searches and seizures by federal officers. Pursuant to this mandate the federal courts forbid the introduction in court of evidence obtained by an illegal search or seizure if a timely motion for its exclusion is made by the accused. Byars v. United States, 273 U.S. 28, 47 S.Ct. 248, 71 L.Ed. 520; Go-Bart Importing Co. v. United States, 283 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374; Gouled v. United States, 255 U.S. 298, 302, 41 S.Ct. 261, 65 L.Ed. 647; Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319; Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746; Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 [L.R.A.1915B, 834, Ann.Cas.1915C, 1177]; Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307; Ex parte Jackson, 96 U.S. 727, 733, 24 L.Ed. 877; Amos v. United States, 255 U.S. 313, 41 S.Ct. 266, 65 L.Ed. 654; Agnello v. United States, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145. The California Constitution contains an identical provision (Cal.Const. Art. I, sec. 19), but the accepted rule in this state, as in many others, permits the introduction of improperly obtained evidence on the ground that the illegality of the search and seizure does does not affect the admissibility of the evidence. People v. Mayen, 188 Cal. 237, 205 P. 435, 24 A.L.R. 1383; In re Polizzotto, 188 Cal. 410, 205 P. 676; People v. Le Doux, 155 Cal. 535, 102 P. 517; Herrscher v. State Bar [of California], 4 Cal.2d 399, 49 P.2d 832. See cases cited in 88 A.L.R. 348. The defendant may have civil and criminal remedies against the officers for their legal acts (see Cal.Pen.Code, sec. 146; Silva v. MacAuley, 135 Cal.App. 249, 26 P.2d 887, 27 P.2d 791; Ryan v. Crist, 23 Cal.App. 744, 139 P. 436; 15 So.Cal.L.Rev. 139, 141 et seq.), but the state is not precluded from using the evidence obtained thereby."

[34] This appellant complains of the refusal of the trial judge to give certain proposed instructions. The first two referred to contained lengthy extracts from the State Real Estate Act, St.1919, p. 1252, relating to the licensing of real estate brokers and the duties of the real estate commissioner in relation to the supervision of such brokers and agencies, his right to inspect lands to be offered for subdivision, the publication of his report and similar matters which had no possible bearing upon the issues being tried. The only conceivable purpose of the proposed instructions is that they were intended to convey to the jury the impression that some of the appellants depended upon some of the reports of the commissioner as showing that the lands sold were "potential" oil lands. But all the appellants testified that they did not make any representations to the purchasers as to the possibilities of oil and that they did not represent to any one of these purchasers that leases with adjoining oil companies were being negotiated for large royalties and bonuses. Such being the case the proposed instructions had no bearing upon any of the issues being tried.

[35] It is also suggested that there was some sort of error in the refusal to give two other proposed instructions. But the appellants have not argued the point and have not said what error they have discovered. The reviewing court does not search for error but assumes that the judgment is sound unless error is disclosed by the parties interested. 2 Cal.Jur. p. 731.

[36] This appellant gathers a number of charges under the general heading of "manifest passion and prejudice." He lists as one instance the "unlawfulness" of the search and seizure which has heretofore been covered. He states that he was required to post unreasonable bail—without any reference to the record. That "unwarranted bitterness" was shown by the district attorney in indicting him "under his Jewish name of Chaskel Chait." The purpose of this objection is not apparent since several of the substantive offenses were shown to have been committed while this appellant was legally known as Chaskel Chait and before he was given legal permission to change his name to Hoytt. It is not disputed that this appellant was born in Kiev, Russia, and given the name of Chaskel Chait, that he came to this country in 1912 and at some time not disclosed in the record assumed the name of Sam Hoit or Sam Hoytt, that he was admitted to citizenship in August, 1942, by naturalization and was then given permission to use the name of Sam W. Hoytt. The indictment properly charged him under both names. If the former name was "Jewish", as he now asserts, there is no evidence in the record that such fact was presented to the jury or that anything was done or said for the purpose of creating prejudice in the minds of the jurors because of that relation.

[37, 38] Equally untenable is the claim of "passion and prejudice" in the denial by the trial court of appellants' motion that the court reporter be ordered to furnish them a daily transcript of the trial proceedings. Section 269 of the Code of Civil Procedure requires the court reporter to transcribe from his note a record of the proceedings "within such reasonable time after the trial" as the court may designate. Whether, in a criminal case, these proceedings shall be transcribed daily and a copy furnished the defendant is a matter properly left to the discretion of the trial court. Where discretion is thus imposed the mere denial of the request of one of the parties is not evidence of passion or prejudice. If there was an abuse of discretion in this case it is incumbent upon the appellants to show more than they have done here.

[39] No argument has been made in support of the appeals from the order denying probation and they should be treated as having been abandoned, and so dismissed.

The judgments and the orders denying the motions for a new trial are affirmed. The appeals from the order denying probation are dismissed.

STURTEVANT, J., and DOOLING, Justice pro tem., concur.

69 Cal.App.2d Supp. 805

STILLER v. ROGERS et al.

C. A. 5963.

Appellate Department, Superior Court, Los Angeles County, California.

May 29, 1945.

1. Appeal and error 🔑931(1)

Reviewing court, in determining whether evidence supported findings, must view the evidence most favorably in support of judgment.

2. United States 🔑90

United States treasury notes are "negotiable instruments".

See Words and Phrases, Permanent Edition, for all other definitions of "Negotiable Instruments".

3. United States 🔑90

Where money found on person of client charged with stealing money and deposited with sheriff was turned over to county treasurer as depositary, and there mingled with general funds, assignment by client of part of the funds to her attorney amounted only to an assignment of interest, if any, of client in part of fund under control of sheriff and not of particular United States Treasury notes.

4. Assignments 🔑84

Rules by which priority as between an assignee and a third person claiming fund assigned is to be determined are the same as those affecting right of a holder of a negotiable instrument.

5. Bills and notes ⚷337

Generally, mere knowledge of facts sufficient to put a prudent man on inquiry or mere suspicion of a defect does not disqualify purchaser of a negotiable instrument from becoming a "holder in due course" unless he is guilty of bad faith, but they may evidence bad faith.

See Words and Phrases, Permanent Edition, for all other definitions of "Holder in Due Course".

6. Bills and notes ⚷337

Generally, a transferee, purchaser or assignee of a negotiable instrument, where there is nothing about circumstances attending negotiation of instrument to excite suspicion, is not called upon to make inquiry in order to avert "bad faith," but he cannot shut his eyes to surrounding circumstances, where circumstances are so obvious that to remain passive would constitute bad faith.

7. Attorney and client ⚷26
Money received ⚷18(3)

Evidence supported finding that of the $200 received by defendant from sheriff on order of client charged with stealing money, $149 was money stolen from plaintiff and that defendant knew or should have known that money was stolen and such knowledge disqualified him from becoming a holder in due course. Civ.Code, §§ 19, 1758.

8. Attorney and client ⚷26
Money received ⚷9

Where plaintiff claimed that part of money which defendant received from his client, charged with theft, through order on sheriff with whom money found on client's person was deposited, was money stolen from plaintiff by client, and that defendant knew or should have known that money was stolen, cause of action based upon common count of money had and received was proper.

9. Money received ⚷5

Action for money had and received may be maintained, even though not founded upon allegations showing an express privity of contract between the parties, upon theory that if one party has received money due and owing to the other under circumstances making it his duty to surrender the money to rightful owner, law will imply promise to do so.

◆

Appeal from Municipal Court of Los Angeles; James H. Pope, Judge.

Action for money had and received by Frank Stiller against Betty Rogers and Bertram S. Harris. From a judgment for plaintiff, defendant Harris appeals.

Affirmed.

Joseph Duchowny and Bertram S. Harris, both of Los Angeles, for appellant.

Paul G. McIver, of Montebello, for respondent.

KINCAID, Judge.

The real question before us for determination is whether the evidence supports the court's findings that of the $200 received by the defendant lawyer from the Sheriff, on order of Betty Rogers, $149 was money stolen from plaintiff by her and that the defendant knew or should have known that such money was so stolen. The fact that she did steal $918 from him is not questioned here, and the evidence is ample to show it.

[1] Viewing the evidence, as we must, most favorably in support of the judgment, the record discloses facts readily sufficient to warrant the trial court in finding that, of the $501 found on the person of Betty Rogers at her arrest and deposited with the Sheriff under a "Sheriff's hold order," all but $51 thereof belonged to plaintiff and had been stolen from him by her. The $918 in currency so stolen from plaintiff was mostly in $50 bills and $450 of the money found on the person of Miss Rogers was in the form of nine $50 bills, the balance of $51 being in small currency. After its deposit with the Sheriff, it had been turned over to the County Treasurer as depositary and there commingled with general funds. The evidence further shows that such money was booked on September 29 and, on October 19, after the preliminary hearing of Miss Rogers, the defendant Harris was retained, received a written order upon the Sheriff to pay him $200 of the deposited moneys as attorney fees, and upon presentation was informed by the Sheriff that such moneys had a "hold" upon them. After some delay and at such defendant's insistence, the Sheriff

delivered the $200 to defendant from such deposited funds.

The appealing defendant is an attorney at law. In accepting employment to represent Betty Rogers, he must have known that she was charged with the theft of $918 in currency from the plaintiff and that evidence sufficient to bind her over to the Superior Court for trial on such charge had been adduced at the preliminary hearing. He knew from both her and the Sheriff that a considerable sum had been found on her person at her arrest and had been impounded with a "hold order" thereon.

These facts would seem to bring the defendant within the provisions of section 19, Civil Code, which reads: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

Such facts would seem to deprive the defendant of the benefit of receiving the assignment of the currency as a negotiable instrument under the provisions of section 1758, Civil Code, as being one who paid value therefor in good faith, without notice of the theft of such money.

[2-4] While United States treasury notes are negotiable instruments of the highest character (10 C.J.S., Bills and Notes, p. 428, § 23), when the defendant Harris received and presented the order from his client under which he now claims, such treasury notes had disappeared as such by having been commingled with the county's general funds. The order amounted only to an assignment of the interest, if any, of Miss Rogers in part of a fund under the control of the Sheriff. It would appear, however, that the rules by which priority as between an assignee and a third party claiming the fund assigned is to be determined, are the same as those affecting the right of a holder of a negotiable instrument. First Nat'l Bank v. Perris Irrig. Dist., 1895, 107 Cal. 55, 64, 40 P. 45; Mohr v. Byrne, 1901, 135 Cal. 87, 90, 67 P. 11; Weiner v. Roof, 1937, 10 Cal.2d 450, 452, 74 P.2d 736. The rights of the defendant Harris as an assignee of such fund as against the claim of the plaintiff herein as the legal owner thereof may properly be tested in the light of the law applicable to a claim by such defendant that he is a holder in due course of a negotiable instrument.

[5, 6] As to negotiable instruments, it is the general rule that a transferee, purchaser or assignee, where there is nothing about the circumstances attending the negotiation to excite suspicion, is not called on to make inquiry in order to avert the imputation of bad faith. Generally, mere knowledge of facts sufficient to put a prudent man on inquiry, or mere suspicion of a defect, does not disqualify a purchaser from becoming a holder in due course unless he is guilty of bad faith, but they may evidence bad faith. 10 C.J.S., Bills and Notes, pp. 817, 818, § 324. "A purchaser, however, cannot shut his eyes to the surrounding circumstances, and, where the circumstances are so cogent and obvious that to remain passive would constitute bad faith, or are such as to justify the conclusion that the failure to make such inquiry arose from a suspicion that inquiry would disclose a vice or defect in the instrument or transaction, such purchaser is charged with knowledge. Intentional ignorance, such as a willful evasion of knowledge of the facts, constitutes bad faith disqualifying the purchaser from becoming a holder in due course. Where circumstances which put him on inquiry are within his knowledge, he is chargeable with knowledge of all facts which an inquiry would have revealed." 10 C.J.S., Bills and Notes, p. 820, § 324. See also 8 Corp. Jur. 501. That these general rules are followed in California is shown by the following cases: Imperial Gypsum and Oil Corp. v. Chaplin, 1935, 4 Cal.App.2d 109, 112, 40 P.2d 596; Barthelmess v. Cavalier, 1934, 2 Cal.App.2d 477, 487, 38 P.2d 484; Siebenhauer v. Bank of California Nat'l Ass'n, 1930, 211 Cal. 239, 241, 294 P. 1062; Smith v. Armstrong, 1927, 85 Cal. App. 624, 631, 260 P. 347.

It has also been held that a purchaser is not charged with the duty to make inquiry by the fact alone that he had knowledge of the want of honesty in business matters of the party from whom he received the instrument. Smith v. Armstrong, supra, 85 Cal.App. page 631, 260 P. 347. But with other circumstances it may show bad faith. "* * * [I]t has been held that a purchaser who acquired a note without making an investigation, notwithstanding he knew that the seller was hard pressed and was an embezzler laboring under an expectation of a criminal prosecution, was chargeable with notice that the seller held the note as trustee." 10 C.J.S. Bills and Notes, p. 837, § 335, citing Bergheim v. McRae, 190 Minn. 571, 252 N.W. 833.

[7] The trial court was warranted by the evidence in concluding that the defendant either knew or should have known that at least part of the moneys so received by him were stolen funds, and that such knowledge disqualified the defendant from becoming a holder in due course.

[8, 9] A cause of action based upon the common count of money had and received is proper under the facts here. "An action for money had and received 'may be successfully maintained even though not founded upon allegations showing an express privity of contract between the parties. This is so upon the theory that if one of the parties has received money due and owing to the other under circumstances which make it his duty to surrender the money to the rightful owner, the law will imply the promise to do so, and thereby create the requisite contractual privity.'" Coombs v. Minor, 1943, 60 Cal. App.2d 645, 649, 141 P.2d 491, 494; see 17 Cal.Jur. 602, Par. 1, p. 610, Par. 7.

The court's findings, being amply supported by the evidence, the judgment is hereby affirmed, respondent to recover his costs of appeal.

SHAW, P. J., and BISHOP, J., concur.

26 Cal.2d 509

PACIFIC INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

(two cases).

L. A. 19289, 19290.

Supreme Court of California.

June 8, 1945.

1. Workmen's compensation 🔑1939

The reviewing court, in considering question of compensable nature of employees' deaths, could not determine weight to be given to evidence or which of two opposing inferences should be drawn therefrom. St.1937, p. 269, § 3600(b, c).

2. Workmen's compensation 🔑652

The mere fact that employee is performing personal act when injured does not per se exclude him from purview of Workmen's Compensation Law. St.1937, p. 269, § 3600(b, c).

3. Workmen's compensation 🔑606

An injury is compensable if received while employee is doing those reasonable things which his contract of employment expressly or impliedly authorizes him to do. St.1937, p. 269, § 3600(b, c).

4. Evidence 🔑20(1)

It is common knowledge that field workers employed in picking grapes become soiled and dirty.

5. Workmen's compensation 🔑653

Where employer maintained free camp for ranch employees near which was an irrigation reservoir regularly used by employees for washing up after work, deaths of two minor grape pickers who drowned in reservoir after they had quit work on a Saturday noon and had gone to their home a few miles away to pick up their work cards which showed amount of money due them for the week, and on returning to ranch and before going to office for their pay stopped to wash up in reservoir, were compensable as "arising out of and in course of employment." St.1937, p. 269, § 3600(b, c).

See Words and Phrases, Permanent Edition, for all other definitions of "Arising Out of and in Course of Employment".

6. Workmen's compensation 🔑606

In determining whether particular act is reasonably contemplated by employment so that injury received while performing such act may be compensable, nature of the act, nature of employment, custom and usage of particular employment, terms of employment contract, and other factors, should be considered, and any reasonable doubt should be resolved in favor of employee, in view of policy of liberal construction in favor of employee. St.1937, p. 269, § 3600(b, c).

7. Workmen's compensation 🔑653

Though mere fact of employment and permissive use of premises incidental thereto does not give rise to a blanket protection under Workmen's Compensation Law, a reasonable use of facilities provided for convenience of employees would include action of minor employees in stopping at irrigation reservoir near camp maintained for ranch workers to wash and remove dirt accumulated from their Saturday morning's work as grape pickers before proceeding to employer's office for their pay. St.1937, p. 269, § 3600(b, c).

8. Workmen's compensation 🔑606

Whether a given accident is so related or incident to work in which employee is engaged to be compensable depends on its own particular circumstances, and no exact formula can be laid down which will automatically solve every case, question being primarily for Industrial Accident Commission to determine. St. 1937, p. 269, § 3600(b, c).

9. Workmen's compensation 🔑1939

A conflict in evidence in workmen's compensation case is a matter for Industrial Accident Commission to resolve.

10. Workmen's compensation 🔑653

Where employer permitted grape pickers to wash up in irrigation reservoir after work, fact that one of two minor pickers who drowned in such reservoir had finished his ablutions and was waiting for the other, his brother, when he heard brother cry for help, and in attempting to rescue brother himself was drowned, did not break causal connection between the employment and the deaths, since both employees were on employers' premises in performance of act contemplated by employment. St.1937, p. 269, § 3600(b, c).

11. Workmen's compensation 🔑1471, 1939

Where evidence established practice of father to pool earnings of members of family and use such earnings as a unit for support of family, death benefit awards for death of two minor sons to father as trustee for use of the family as "partial dependents" was supported and would not be disturbed. St.1937, p. 285, § 4704.

See Words and Phrases, Permanent Edition, for all other definitions of "Partial Dependent".

12. Workmen's compensation ⟹1734

Where it was stipulated that each of two deceased minor employees contributed $5 a week to support of family in event that dependency should be found, no finding by Industrial Accident Commission as to earnings of such deceased employees was necessary as basis for finding of their contribution to family pool of earnings. St.1937, p. 269, § 3600(b, c).

13. Workmen's compensation ⟹1795

Industrial Accident Commission's denial of rehearing was within its discretion where record did not show why alleged newly discovered evidence could not, with reasonable diligence, have been discovered and produced at the hearing. St.1937, p. 303, § 5903.

◆

In Bank.

Proceeding under the Workmen's Compensation Law by Pacific Indemnity Company, insurance carrier, to annul two separate awards of the Industrial Accident Commission in favor of Salome Vallez and others, claimants, for the death of Thomas Vallez and Adolfo Vallez, employees.

Awards affirmed.

Prior opinion 153 P.2d 573.

Herlihy & Herlihy, of Los Angeles, for petitioner.

Everett A. Corten and R. C. McKellips, both of San Francisco, for respondents.

SPENCE, Justice.

Petitioner seeks to annul two separate awards made by the Industrial Accident Commission for the deaths of Tomas Vallez, age 12, and of his brother Adolfo Vallez, age 15, both of whom were drowned on the premises of their employer. It is urged by petitioner that the deaths did not arise out of, nor did they occur in the course of, the employment, and that therefore they are not compensable under the Workmen's Compensation Law. Lab.Code, § 3600(b), (c), St.1937, p. 269.

Tomas and Adolfo Vallez resided in the family home with their parents, two brothers and four sisters. The two boys, and other members of their family, were employed by petitioner's assured as grape pickers on a piece-work basis. On Saturday, September 5, 1942, the two boys had picked grapes for their employer in the morning. All the grape pickers quit work that day at noon. At that time Tomas and Adolfo, accompanied by their sister, Margaret, and two friends, Chano Silva and his brother—all fellow-workers—went by automobile to the Vallez home, some few miles distant, to pick up their work cards, which showed the amount of money due them for the week. Chano testified that the boss told the workers they would get their pay at the office "after 1 o'clock"; that they left the Vallez home on their return trip about 12:30 p. m.; that on the way they stopped at about 12:40 p. m. at an irrigation reservoir, located on their employer's property about one-half mile from the office, to wash their hands, face and feet as they "were dirty"; and that they were then going on to get their pay. Adolfo and Chano had finished their ablutions and were standing by their automobile when Tomas, then in the reservoir and unable to swim, called for help. Both Adolfo and Chano plunged into the reservoir in answer to the younger boy's cries; neither was successful in the attempted rescue; and only Chano managed, with the aid of an unidentified woman, to pull himself out of the reservoir. Tomas and Adolfo were drowned. Chano's testimony would indicate the drowning occurred within a few minutes after he and the Vallez boys had arrived at the reservoir. There was other evidence indicating that the fatal accident occurred somewhat later. Except for being barefoot, the boys were clothed when drowned. The commission found that the two Vallez boys "sustained injury arising out of and occurring in the course of [their] employment, proximately resulting in [their] death on the same day"; and that they left surviving, "partially dependent," their parents, brothers and sisters. Accordingly, the death benefit awards were made with the direction that "the entire amount [thereof] be paid directly to Salome Vallez (the father) for the support of himself and said dependents, to be disbursed in his discretion for such purpose."

The evidence establishes the following points with respect to the reservoir, the scene of the fatal accident: It was eighty by one hundred feet in area and ten feet deep, and was enclosed by a concrete wall rising about twelve to eighteen inches above the surrounding land. The outside wall was perpendicular; the interior was vertical for about twelve inches, then a ledge, which was covered with mud and debris, protruded horizontally about a foot, and then the concrete sloped at an approximate angle of 45 degrees. A square outward jog in this wall, forming a cement box on the same level with the wall, marked the reservoir's outlet. The reservoir was "shallow around the edge and then [went] off suddenly into deep water."

To one side of the reservoir a camp was maintained for the ranch workers. It was stipulated that the camp accommodations were furnished by the employer to the employees free as an incident of their employment. While the Vallez family did not live at the camp but occupied a house some few miles distant, the Vallez boys, like the other grape pickers on the ranch, regularly used the reservoir for washing after work. Margaret Vallez testified that one of the employer's foremen lived at the camp and was often present when the reservoir facilities were being used for washing. She also testified that the reservoir was "sort of a meeting place"; "we meet there at 7 o'clock, we all get in the truck and then we start to work, we meet there every morning, then the truck leaves us there in the afternoon at 5 o'clock." The reservoir was immediately adjacent to what was called the "sand road" and "anybody * * * driving along the road could stop and wash if they wanted to." There was no fence around the reservoir and no signs of warning as to its use. Many of the employees also went swimming in the reservoir, and a diving board was located there.

It is the theory of petitioner that the boys' use of the reservoir was wholly for their personal benefit and had nothing to do with their employment as grape pickers; that their drowning cannot be traced to any risk or condition reasonably incident to that employment; and that therefore the commission exceeded its jurisdiction in making the awards. On the other hand, it is the commission's position that the boys' procedure was reasonably contemplated by their employment as grape pickers; that in the handling of the fresh fruit in the field they would normally become "grimy and dirty" and would need to avail themselves of the washing facilities provided by their employer at the site where their day's work began and ended; and that within this concept the awards are not open to challenge.

[1] In considering the problem of the compensable nature of the deaths in question, it must be remembered that the reviewing court is not to determine the weight to be given the evidence (Dearborn v. Industrial Acc. Comm., 187 Cal. 591, 594, 203 P. 112; Newton v. Industrial Acc. Comm., 204 Cal. 185, 189, 267 P. 542, 60 A.L.R. 1279) or which of two opposing inferences should be drawn therefrom. Western Pacific R. R. Co. v. Industrial Acc. Comm., 193 Cal. 413, 417, 224 P. 754; Hartford A. & I. Co. v. Ind. Acc. Comm., 202 Cal. 688, 693, 262 P. 309, 58 A.L.R. 1392; Schaller v. Industrial Acc. Comm., 11 Cal. 2d 46, 51, 77 P.2d 836. A review of the record in the light of these principles of law sustains the commission's findings and awards.

[2, 3] The mere fact that an employee is performing a personal act when injured does not per se bring him without the purview of the Compensation Law. The test is stated in Employers', etc., Corp. v. Industrial Acc. Comm., 37 Cal.App.2d 567, 573, 99 P.2d 1089, 1092: "The true rule to be derived from the cases is that the injury is compensable if received while the employee is doing those reasonable things which his contract of employment expressly or impliedly authorizes him to do." Application of this concept is found in the so-called "bunk-house rule," to the effect that where the contract of hire contemplates that the employee shall live on the employer's premises, any injury received while he is making a reasonable use of such premises is considered an incident of the employment and compensable, even though received during the employee's leisure time. Campbell, Workmen's Compensation, vol. I, § 196, p. 188; 27 Cal.Jur. § 90, p. 392; Larson v. Industrial Acc. Comm., 193 Cal. 406, 224 P. 744; State Compensation Ins. Fund v. Industrial Acc. Comm., 194 Cal. 28, 227 P. 168. Analogous considerations demonstrate that the death of the two Vallez boys on their employer's premises occurred in the course of, and arose out of, their employment.

[4-6] Aside from the direct testimony that "a lot of dirt would be accumulated in

picking grapes," it is a matter of common knowledge that such employment causes the field workers to become soiled. It was therefore but natural that the employer should furnish some washing facilities for his employees. Upon this premise it was a reasonable inference that the employment here contemplated the employees' use of the reservoir for cleansing purposes as an incident of the employment. Had the two Vallez boys, after leaving the field, gone immediately to the reservoir to wash while on their way to the office to collect their pay, there would be little question but that injuries received in the course of such procedure would be considered incidental to the employment and compensable. As was aptly said on this point in Employers', etc., Corp. v. Industrial Acc. Comm., supra, 37 Cal.App.2d 567, at pages 573, 574, 99 P.2d 1089, 1092: "If the particular act is reasonably contemplated by the employment, injuries received while performing it arise out of the employment, and are compensable. In determining whether a particular act is reasonably contemplated by the employment, the nature of the act, the nature of the employment, the custom and usage of a particular employment, the terms of the contract of employment, and perhaps other factors should be considered. Any reasonable doubt as to whether the act is contemplated by the employment, in view of this state's policy of liberal construction in favor of the employee, should be resolved in favor of the employee."

[7] The Vallez boys' incidental deviation to their home did not interrupt the continuity of their employment during the trip and upon their subsequent return to their employer's premises and their use of the reservoir. The trip, as the evidence indisputably established, was for the purpose of obtaining their work cards in order to settle their accounts with their employer and, as such, was an act to the mutual advantage of the parties. "The duty to pay and the right to receive the compensation were integral parts of the contract of employment." State Compensation Ins. Fund v. Industrial Acc. Comm., supra, 194 Cal. 28, at page 34, 227 P. 168, at page 170. The industrial nature of the Vallez boys' trip is significant only in that it brings this phase of the case within the rule of Western Pacific R. R. Co. v. Industrial Acc. Comm., supra, 193 Cal. 413, 224 P. 754, where a messenger on a rainy night went to his home to obtain a slicker to use in the performance of his duty. In combining such personal act with the business of his employer as the employment would reasonably contemplate, the employee was held to be acting within the course of his employment. But aside from showing that the scope of their employment would have encompassed the Vallez boys throughout the period of their travel and that an injury sustained during such period would have been compensable, their short trip home is not a material fact in view of their safe return to the employer's premises en route to the office to collect their pay. Upon the record it would appear reasonable that the Vallez boys should stop at the reservoir, on their direct road of travel to the office, in order to wash. Margaret Vallez testified that the boys "did not clean up [for lunch], they just came home and got the cards and went right back"; and Chano testified that they all washed at the reservoir before going to get their pay check because "we were dirty."

While the mere fact of employment and permissive use of the premises incidental thereto does not give rise to a blanket protection under the Compensation Law (Campbell, Workmen's Compensation, vol. I, § 205, p. 197), a reasonable use of the facilities provided for the convenience of the employees, upon analogy to the "bunkhouse rule" above mentioned, would comprehend the boys' stop at the reservoir to wash and remove the dirt accumulated from their Saturday morning's work before proceeding to their employer's office. The employer here had placed no restrictions as to hours for the use of the reservoir by the employees for washing purposes; the Vallez boys' procedure was in accordance with the prevailing practice at the camp site; and the risk attendant upon the doing of such act was therefore an incident of the employment. The fact that the reservoir was not maintained primarily as a washing convenience for the employees is immaterial, for its permitted ancillary use by the employees for such purpose establishes the compensable character of an injury caused thereby. Associated Indem. Corp. v. Industrial Acc. Comm., 18 Cal.2d 40, 112 P.2d 615. That the reservoir was likewise available for use by members of the public does not detract from the boys' right to resort to such washing accommodations by reason of their distinct status as employees and as an incident of their employment. Smith v. Industrial Acc. Comm., 18 Cal.2d 843, 118 P.2d 6; City and

County of San Francisco v. Industrial Acc. Comm., 61 Cal.App.2d 248, 142 P.2d 760.

Wholly distinguishable here upon factual considerations are the cases cited by petitioner to the effect that employees sustaining injury while engaged in the performance of personal acts unrelated to the express or implied incidents of the employment do not come within the protection of the Compensation Law. Graf v. Montecito County Water Dist., 1 Cal.2d 222, 34 P.2d 138, 139, injury occurred on the company train in the course of claimants' "excursion of pleasure wholly aside from their duties as employees"; Fireman's Fund Indemnity Corp. v. Industrial Acc. Comm., 123 Cal.App. 142, 11 P.2d 1114, injury occurred off the employer's premises and claimant had previously terminated his employment; Langendorf United Bakeries, Inc. v. Industrial Acc. Comm., 6 Cal.App.2d 46, 43 P.2d 1106, injury occurred while employee was repairing his own car on the employer's premises, but on the day in question his employment required him to be elsewhere; Pacific Indemnity Co. v. Industrial Acc. Comm., 27 Cal.App.2d 499, 81 P.2d 572, 574, injury occurred while employee solely "for her own personal benefit" was attending union meeting on the employer's premises.

[8, 9] Whether a given accident is so related or incident to the work in which the employee is engaged depends upon its own particular circumstances. No exact formula can be laid down which will automatically solve every case. Larson v. Industrial Acc. Comm., 193 Cal. 406, 224 P. 744; Enterprise Foundry Co. v. Industrial Acc. Comm., 206 Cal. 562, 275 P. 432. The question is, of course, primarily one for the commission to determine. Pacific Employers' Ins. Co. v. Industrial Acc. Comm., 19 Cal.2d 622, 122 P.2d 570, 141 A.L.R. 798. Petitioner's reference to testimony in the record to establish that the Vallez boys were wading rather than "washing their hands, face and feet" in the reservoir is of no force here, for such observation merely demonstrates a conflict in the evidence which was for the commission to resolve. Moreover, it might be said in this connection that the description and photographs of the reservoir, showing the precipitous drop of the walls from the narrow muddy ledge as above recited, negative the likelihood that the boys could have engaged in any wading activity. While Margaret Vallez testified that the employees washed at the reservoir outlet, it does not appear from the evidence that that was the only part of the reservoir so used, that it was less hazardous for such purpose, or what section the Vallez boys had chosen for their ablutions on the day in question. In such condition of the record the inference may reasonably be drawn that washing at the reservoir was generally unrestricted, that its use by the Vallez boys was consonant with custom and practice in connection with the performance of their field duties as grape pickers, that an injury occurring in the course of such procedure was a risk incident of the employment, and accordingly the death of Tomas Vallez as above recited is compensable. Employers, etc., Corp. v. Industrial Acc. Comm., supra, 37 Cal.App.2d 567, 99 P.2d 1089.

[10] The next matter to be considered is the causal connection between the employment and the death of Adolfo Vallez. He had finished his ablutions and was standing by the automobile near the reservoir when he heard his brother and co-employee, Tomas, cry for help. In the attempted rescue, Adolfo himself was drowned. These circumstances establish the industrial nature of his death and its compensable character. United States Fidelity, etc., Co. v. Industrial Acc. Comm., 174 Cal. 616, 163 P. 1013; Ocean Acc. & Guarantee Corp. v. Industrial Acc. Comm., 180 Cal. 389, 182 P. 35; County of Los Angeles v. Industrial Acc. Comm., 89 Cal. App. 736, 265 P. 362. The fact that in the cited cases the injured or deceased employee was in the active discharge of his duties at the time of the accident in question is of no material importance, for here the Vallez boys were on their employer's premises in the performance of an act contemplated by their employment. In either situation the same legal principles would apply in support of the commission's compensation award. Ocean Acc. & Guarantee Corp. v. Industrial Acc. Comm., supra, 180 Cal. at page 393, 182 P. at page 36.

[11, 12] The only other point requiring consideration is petitioner's challenge of the respective dependency awards in these cases. In the course of the hearing before the commission, the referee expressed his understanding of the agreement of the parties as follows: "It is stipulated that in the event that dependency be found, and that the claimants are found entitled to benefits under the [compensation] act, that the weekly contribution from each of the deceased shall be $5.00 a week. * * *" Claimants' attorney then added: "As I understand, when we say $5.00 a week, it is understood whatever other moneys they earned, they used for themselves * * * the money they used for themselves, we have deducted." The employer's attorney agreed to this statement and said: "So stipulated." With regard to the point of inquiry as to the financial upkeep of the family, Salome Vallez, father of the two deceased boys and trustee for the remaining six minor children, testified that he "would take the money [earned by Tomas and Adolfo] and use it for the family for what was needed for the family." In view of this direct testimony establishing the practice of the father to pool the earnings of the working members of the family and use them as a unit, the death benefit awards to him as trustee, for the use of the "partial dependents," find ample support in the record and will not be disturbed. Lab. Code, § 4704, St.1937, p. 285; 27 Cal.Jur. § 193, p. 540. While the commission did not make a finding as to the earnings of the two deceased boys, that was unnecessary by reason of the scope of the stipulation covering the matter of their contribution to the family pool and constituting the basis for the finding that each "employee left surviving him, partially dependent," his parents, brothers and sisters, "the annual amount devoted to whose support was $260.00." Great Western Power Co. v. Industrial Acc. Comm., 196 Cal. 593, 238 P. 662.

[13] In connection with this stipulation petitioner raises the point that throughout the proceedings before the commission prior to the time of the issuance of the findings and awards, the employer had a mistaken understanding as to the amount of the earnings of the two Vallez boys, and therefore the agreement as to the amount of their contribution to the family unit was based on a false premise. Petitioner assigns as the reason for the mistake a clerical error on the part of the employer's timekeeper. This matter was unavailingly presented to the commission in a petition for rehearing, and petitioner here argues that the "newly discovered evidence is material in that it bears on the issue of whether or not the surviving members of the deceased employees' family were dependent upon them." Without elaborating the point of contention, suffice it to say that the commission, in its denial of a rehearing, acted within the exercise of its discretion, for the record does not show why the so-called new evidence "could not, with reasonable diligence, have [been] discovered and produced at the hearing." Lab.Code, § 5903, St.1937, p. 303.

The awards are, and each of them is, affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

26 Cal.2d 453

In re MADISON'S ESTATE.

RILEY, State Controller, v. MADISON et al.

S. F. 16970.

Supreme Court of California.

May 31, 1945.

1. Appeal and error 🔑1010(2)

Where decedent's intention was clearly set forth in trust instruments and no attempt was made to show that he had any other intention, and no question as to construction of such instrument was presented, question was whether the transfers intended and made were covered by inheritance tax statute, and there was no question of fact. whether transfer was intended to take effect in possession or enjoyment at or after death on which court's finding, supported by substantial evidence would be conclusive. Gen.Laws Supp.1935, Act 8495, §§ 2(3) (a, b).

2. Statutes 🔑176

The construction of a statute and its applicability to a given situation are matters of law for court.

3. Taxation 🔑879(1)

Where deceased trustor created irrevocable trusts for benefit of three children which were to terminate and corpus was to be delivered to beneficiaries on trustor's death, with provision therein that during trustor's lifetime an amount not exceeding $50,000 plus one-half of any addition to the corpus could be paid to two of the beneficiaries with trustee's consent, and during trustor's life one child received 20 per cent.

of corpus and the other received 30 per cent. of corpus, portions released in trustor's lifetime were not taxable, but, to extent that transfers took effect at death as trustor intended, the transfers were subject to inheritance tax as "intended to take effect in possession and enjoyment at or after death" of trustor. Gen.Laws Supp. 1935, Act 8495, §§ 2(3) (a, b).

See Words and Phrases, Permanent Edition, for all other definitions of "Transfer Intended to Take Effect After Death".

4. Statutes ⚿219

Mere failure of controller in 1923 to tax similar trust to that involved did not constitute an "administrative construction" of inheritance tax statute which became conclusive when the Legislature subsequently re-enacted the statute. Gen.Laws Supp.1935, Act 8495, §§ 2(3) (a, b).

See Words and Phrases, Permanent Edition, for all other definitions of "Administrative Construction".

5. Statutes ⚿219, 225¾

An erroneous administrative construction does not govern interpretation of a statute, even though the statute is subsequently re-enacted without change.

6. Taxation ⚿879(1)

The purpose of statute imposing a tax on transfers intended to take effect at or after death is to prevent avoidance of the inheritance tax. Gen.Laws Supp.1935, Act 8495, §§ 2(3) (a, b).

7. Taxation ⚿879(1)

The statute imposing a tax upon the transfer of any property, when transfer is intended to take effect in possession or enjoyment at or after death, does not impose a tax upon certain precisely defined transfers, but is an attempt to impose tax in all cases, regardless of form of transfer of property, in which possession or enjoyment does not take effect until donor's death. Gen.Laws Supp.1935, Act 8495, §§ 2(3) (a, b).

8. Taxation ⚿879(1)

Where trusts for trustor's children providing for payment of corpus to children on trustor's death contained spendthrift provisions, beneficiaries could neither have disposed of their interests in the corpus nor requested that the trusts be terminated before trustor's death, and hence transfers were subject to inheritance tax. Gen.Laws Supp.1935, Act 8495, §§ 2(3), (a, b).

9. Taxation ⚿879(1)

Where irrevocable trusts for trustor's children were to continue for life of trustor and upon trustor's death the corpus was to vest in the respective beneficiaries but, if beneficiary did not survive trustor, property was to go as beneficiaries might appoint by will, otherwise to children and their heirs, trust could not have been terminated before trustor's death, since other persons, some perhaps not yet born, had possible interest in the trust, and hence transfers were subject to inheritance tax. Gen.Laws Supp.1935, Act 8495, §§ 2(3) (a, b).

SCHAUER and SHENK, JJ. dissenting.

In Bank.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Proceeding in the matter of the estate of Frank D. Madison, deceased. From a judgment fixing the inheritance tax, Harry B. Riley, as State Controller, appeals, opposed by Marshall P. Madison as executor and others.

Reversed.

Prior opinion, 148 P.2d 668.

Raymond G. La Noue, Inheritance Tax Atty., Arthur W. Brouillet, Deputy Inheritance Tax Atty., and Richard C. O'Connor, Asst. Deputy Inheritance Tax Atty., all of San Francisco, for appellant.

Pillsbury, Madison & Sutro, of San Francisco, for respondents.

TRAYNOR, Justice.

On August 19, 1935, the decedent created three trusts, one each for his two daughters and one for his son. The corpus of each trust consisted of stocks and bonds valued at approximately $100,000. The provisions of the trusts material to this case were identical.

Each trust was to continue for the life of the trustor, during which time the income from the son's trust was to be accumulated, while the income from the daughters' trusts was to be paid to them. Each trustee was authorized, if he deemed it in the best interest of the beneficiary, to deliver to him upon request portions of the corpus not to exceed an aggregate of $50,000 plus 50 per cent of any property that the trustor might add to the trust. Under this provision, one daughter received 20 per cent and the other 30 per cent of the corpus of her trust before their father's death.

Upon the termination of each trust upon the trustor's death, the corpus (together with the accumulated income in the case of the son's trust) was then "to go to and vest in" the respective beneficiaries. If a beneficiary did not survive the trustor, the property, both income and principal, was to go as the beneficiary might appoint by will; in default of such appointment it was to go to his or her children and their heirs.

Each trustee was given complete authority to manage and control the respective trust estates. None of the trusts could be revoked or amended, and the trustor made no reservations in his favor, although he expressed the wish that his consent be obtained before the trustee sold or otherwise displosed of the trust property. The interests of all beneficiaries were protected by spendthrift provisions and thus could not be assigned or subjected to the claims of creditors. The decedent's son was named trustee of his sisters' trusts. The decedent himself became trustee of his son's trust. In 1938, however, a law partner of both the decedent and his son was appointed trustee of the latter trust.

At the time of the execution of the trusts, decedent wrote a letter to his son, stating that the transfers were made, not in contemplation of death, but to avoid high income taxes, to make his daughters independent of the monthly allowances that he had previously been giving them, and to place his son in a position substantially equal to theirs. The trustor was then 68 years old, healthy, active and vigorous. He died six years later from causes unforeseen at the time the trusts were executed.

The controller seeks to collect an inheritance tax upon the transfers on the grounds that they were intended to take effect in possession or enjoyment at the donor's death and that they were made in contemplation of the donor's death. Inheritance Tax Act of 1935, Deering's Gen.Laws, 1935 Supp., Act 8495, § 2(3) (b) and § 2 (3) (a), Stats. 1935, ch. 358, § 2(3) (b) and § 2 (3) (a). There was no conflict in the evidence on either issue. The trial court entered judgment in favor of respondents and the controller appeals.

[1, 2] Section 2 (3) (b) of the Inheritance Tax Act of 1935 imposes a tax upon the "transfer of any property * * * in trust or otherwise * * * (3) When the transfer is of property made by a resident or by a nonresident * * * (b) Intended to take effect in possession or enjoyment at or after such death, or in which a life income or interest is reserved by the grantor, either expressly or impliedly, or by the grantee promising to make payments to or care for the grantor." Respondents contend that whether a given transfer was intended to take effect in possession or enjoyment at or after death is a question of fact, on which a decision of the trial court supported by substantial evidence is conclusive. This contention may be valid when the transferor's intention is not set forth in a written instrument but must be determined from the surrounding circumstances, or when there is an attempt to tax an otherwise nontaxable transfer by proof of a parol agreement inconsistent with the terms of the instrument of transfer. Kelly v. Woolsey, 177 Cal. 325, 170 P. 837; Spreckels v. State, 30 Cal.App. 363, 158 P. 549; McDougald v. Wulzen, 34 Cal.App. 21, 166 P. 1033; In re Estate of Schmidt, 49 Cal.App.2d 86, 121 P.2d 104. In this case, however, decedent's intention was clearly set forth in the trust instruments. No attempt was made to show that he had any other intention. No question as to the construction of the trust instrument is presented. The issue is simply whether the transfer intended and made is a transfer covered by the statute. The construction of a statute and its applicability to a given situation are matters of law to be determined by the court. County of Sierra v. County of Nevada, 155 Cal. 1, 14, 99 P. 371; City of Signal Hill v. County of Los Angeles, 196 Cal. 161, 168, 236 P. 304; Bodinson Mfg. Co. v. California Employment Comm., 17 Cal.2d 321, 326, 109 P.2d 935; In re Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825; Mitchel v. Brown, 43 Cal.App.2d 217, 222, 110 P.2d 456; see 23 Cal.Jur. 719; 10 Cal.Jur. 882.

Respondents contend that regardless of the provisions in the gift instrument, an inter vivos gift is never taxable under section 2 (3) (b) unless title, possession, or enjoyment are retained by the donor until his death. The precise question has never been passed upon in this state. Respondents call to our attention the case of In re Estate of Schmidt, supra, which they deem conclusive. In that case a gift of shares from a husband to his wife was held not taxable on the ground that it had been made "without any reservation and without any intention that it should take effect in possession or enjoyment at or after the death of the deceased." 49 Cal.App.2d 86, 89, 121 P.2d 104, 106. The ground upon which the controller relies here was not available to him in Re Estate of Schmidt, for there was no trust or other restrictions on the possession and enjoyment of the property in that case.

The transfer that the controller seeks to tax is that which occurred in 1935 when the trusts were created. Hunt v. Wicht, 174 Cal. 205, 162 P. 639, L.R.A.1917C, 961; In re Estate of Potter, 188 Cal. 55, 204 P. 826. The issue is not whether the donor retained some power or interest until his death, but rather whether he tied up the property with so many strings, which could not be loosened until his death, that the transfer may be regarded as having been intended to take effect in possession or enjoyment at his death within the meaning of the statute. It should be noted at the outset that the statute speaks, not of title, but of possession and enjoyment. Were it not for worthy authority to the contrary, a gift of income for the trustor's life with remainder at the trustor's death would appear from the plain wording of the statute to be a transfer intended to take effect in possession or enjoyment at or after death. In the early case of In re Cruger, 54 App. Div. 405, 66 N.Y.S. 636, affirmed 166 N.Y. 602, 59 N.E. 1121, in which the facts as to part of the property transferred were similar to those of the present case, the court said: "If there were no authority, we should think that the plain reading of the statute brought this case within its terms." 54 App.Div. 405, 66 N.Y.S. 636, 638. More recently, in Hartford v. Martin, 122 N.J.L. 283, 4 A.2d 31, 121 A.L.R. 354, the court said: "There would seem to be no reason in principle why the settlor's reservation of an interest in the trust res should be the test of taxability. The question is, after all, one of statutory construction; and the statute, in language that does not reasonably admit of doubt as to the legislative intention, renders taxable all transfers '* * * intended to take effect in possession or enjoyment at or after * * * death.'" 122 N.J.L. 283, 286, 4 A.2d 31, 32, 121 A.L.R. 354.

Yet the courts are sharply divided on the question of the taxability of trusts such as these under statutes similar to ours. The leading case against taxability is Reinecke v. Northern Trust Co., 278 U.S. 339, 49 S.Ct. 123, 73 L.Ed. 410, 66 A.L.R. 397, construing section 402(c) of the Revenue Act of 1921, 42 Stat. 278, now § 811(c) of the Internal Revenue Code, 26 U.S.C.A. Int. Rev.Code, § 811(c), in which the United States Supreme Court held that trusts like those here involved were not intended to take effect in possession or enjoyment at or after death. The court pointed out that in its plan and scope the tax was one imposed on transfers made at death or in contemplation of death and that the only section imposing the tax, section 401, 42 Stat. 277, did so on the net estate of a decedent. The court then continued: "In the light of the general purpose of the statute and the language of section 401 explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in section 402(c) 'to take effect in possession or enjoyment at or after his death,' include any others than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under section 401." 278 U.S. 339, 348, 49 S.Ct. 123, 126, 73 L.Ed. 410, 66 A.L.R. 397. That doubt the court resolved in favor of the taxpayer.

The Reinecke case arose under an estate tax statute, whereas our statute imposes an inheritance tax. There are distinctions between the federal estate tax system and the inheritance tax system prevailing in most states—distinctions to which this court had occasion to refer in Re Estate of Miller, 184 Cal. 674, 195 P. 413, 16 A.L.R. 694, as follows: "The California tax is a succession tax, a tax on the beneficial interest of each beneficiary or heir. * * * The federal tax * * * on the other hand, is not a succession tax, but an estate tax, not a tax on what comes to the beneficiaries or heirs, but upon what is left by the decedent." 184 Cal. 674, 678, 195 P. 413, 414, 16 A.L.R. 694.

Section 401 of the federal act imposes the tax upon the decedent's net estate "to the extent of the interest therein of the decedent at the time of his death." § 402 (a), 42 Stat. 278. In the California act there is no provision making the reservation of an interest by the donor the test of taxability. Moreover, while Reinecke v. Northern Trust Co., supra, has not been overruled, the authority of that case has been considerably diminished by subsequent decisions of the United States Supreme Court.

Reinecke v. Northern Trust Co., supra, was decided in 1929. Less than two years later the United States Supreme Court held in May v. Heiner, 281 U.S. 238, 50 S.Ct. 286, 74 L.Ed. 826, 67 A.L.R. 1244, that a gift with a reservation of a life estate to the donor was not a transfer intended to take effect in possession or enjoyment at or after death. In retrospect, it does not seem surprising that a court that was about to interpret section 402(c), supra, so strikingly in terms of a shift in title rather than a shift in possession or enjoyment should have decided the Reinecke case as it did. To a state court, however, that long before the decision in May v. Heiner, supra, had upheld the taxability of gifts reserving a life estate to the donor, (see In re Estate of Felton, 176 Cal. 663, 169 P. 392; In re Estate of Murphy, 182 Cal. 740, 190 P. 46; In re Estate of Potter, supra) the Reinecke case might not appear authoritative. In Helvering v. Hallock, 309 U.S. 106, 60 S.Ct. 444, 84 L.Ed. 604, 125 A.L.R. 1368, the United States Supreme Court itself made a significant change in its approach to problems involving transfers intended to take effect at or after death. In that case the donor retained no life estate, but the property was to revert to him if he survived the life tenant. If he did not, the remainder went to his children. The donor died first and the court sustained the inclusion of the corpus in his gross estate for estate tax purposes. In May v. Heiner, supra, the lapse at the donor's death of his interest in the property, a life estate, was not enough to support the tax, for according to the court, no interest then passed from the dead to the living. It is difficult to believe that the court found in the lapse of the donor's possibility of reverter in Helvering v. Hallock, supra, an interest passing from the dead to the living sufficient to satisfy the requirements of May v. Heiner, supra. It is more likely that the court had ceased to "subordinate the plain purposes of a modern fiscal measure" (Helvering v. Hallock, supra, 309 U.S. at page 112, 60 S.Ct. at page 448, 84 L.Ed. 604, 125 A.L.R. 1368) to technical considerations of property law. In fact the court said as much in Helvering v. Hallock in refusing to distinguish, for estate tax purposes, the various casuistries of the law of remainders.

The extent to which the Supreme Court has departed from its early interpretation of the federal act is shown even more clearly in Fidelity-Philadelphia Trust Co. v. Rothensies, 324 U.S. 108, 65 S.Ct. 508, 89 L.Ed. 560, construing the corresponding sections of the Revenue Act of 1926, 44 Stat. 70. There the trustor retained a life estate, after which the property was to go to her two daughters for life with a remainder to their surviving issue. If no issue survived the daughters, the corpus was to go as the trustor might appoint by will; in default of such appointment named charities were the ultimate beneficiaries. Taxability was conceded, but the estate sought to avoid paying a tax on the entire value of the property at the time of the trustor's death. Since the trustor had retained a life estate, all that was needed to sustain a tax on the entire value was to overrule May v. Heiner, supra. The court, however, rested its decision on the ground that the trustor retained a string, which, upon certain contingencies, would have permitted her to direct by will the further disposition of the corpus. The retention of such a string, the court said, "might have resulted in altering completely the plan contemplated by the trust instrument for the transmission of decedent's property * * *." 65 S.Ct. 508, 510. Consequently the value of the entire corpus was subject to the tax. The retention of that string, however, could have no effect on the daughters' life estates. It gave the trustor control over the disposition of the property only after the daughters' interests had terminated, or after the death of both daughters in the trustor's lifetime precluded their life estates from coming into existence. The daughters' interests were contingent upon their surviving their mother; but that contingency was created by the mother's retaining a life estate, not by her retaining a reversionary interest. See Nelson, The Stinson Case, 23 Tax Magazine 245. A quotation from Commissioner v. Estate of Field, 324 U.S. 113, 65 S.Ct. 511, 89 L.Ed. 786, a companion case, shows even more clearly the court's present approach: "The estate tax is not based on the value of the reversionary interest of the decedent at the time of his death but on the value * * * of the property to which that * * * interest relates. It makes no difference * * * how remote or uncertain may be the decedent's reversionary interest. If the corpus does not shed the possibility of reversion until at or after the decedent's death, the value of the entire corpus on the date of death is taxable." 65 S.Ct. 511, 512. Although the decedent in Fidelity-Philadelphia Trust Co. v. Rothensies, supra, retained a reversionary interest until his death, the tax was not measured by the extent of his interest at the time of his death. The value of the entire corpus was taxed, not merely the value of the reversionary interest. If a reversionary interest has no more than a nominal value, a tax measured by the entire corpus is necessarily imposed on the transfer of an interest that the decedent had not retained but had allowed to pass to the living before his death. The fact that the value of the entire corpus of a trust is now subject to the federal tax, even though the interest retained by the trustor is unsubstantial, suggests that the retention of an interest by the donor has become less significant as a test of taxability than the restrictions imposed by him on the possession or enjoyment of the property until his death. See 1 Paul, Federal Estate and Gift Taxation, 297; Inter vivos Transfers and The Federal Estate Tax, 49 Yale L.J. 1118, 1123.

Respondents rely on cases from several states in addition to Reinecke v. Northern Trust Co., supra, In re Prange's Will, 201 Wis. 636, 231 N.W. 271, was decided exclusively on the authority of the Reinecke case. Nor is there any compelling argument in favor of plaintiffs' position in People v. Welch's Estate, 235 Mich. 555, 209 N.W. 930. Safe Deposit, etc., Co. v. Bouse, 181 Md. 351, 29 A.2d 906, is not in point, for the transfer there in question took place before the enactment of the statute. Cases from New York are cited by the controller as well as by respondents. The law in that state appears unsettled. Compare In re Cruger, supra; In re Patterson's Estate, Sur., 127 N.Y.S. 284, affirmed 204 N.Y. 677, 98 N.E. 1109; In re Dunlap's Estate, 205 App.Div. 128, 199 N.Y.S. 147; with In re Schweinert's Estate, 133 Misc. 762, 234 N.Y.S. 307; In re Kirby's Estate, 228 App. Div. 171, 239 N.Y.S. 390, affirmed 254 N.Y. 624, 173 N.E. 894. In Re Dolan's Estate, 279 Pa. 582, 124 A. 176, 49 A.L.R. 858, the court refused to sustain the tax even though the donor reserved a power of revocation. That case is therefore not pertinent here, although it no doubt indicates that a jurisdiction that does not allow taxation when a power of revocation is reserved would a fortiori reject it when no reservation whatever is made by the grantor. In Illinois, the rule against taxability seems to have originated in an unsupported dictum in People v. McCormick, 327 Ill. 547, 158 N.E. 861, a case in which the transfer was held taxable. Moreover, it should be noted that Illinois is another minority jurisdiction in which gifts with the reservation of a power of revocation are held not taxable. People v. Northern Trust Co., 289 Ill. 475, 124 N.E. 662, 7 A.L.R. 709; see Rottschaefer, Taxation of Transfers Taking Effect in Possession at Grantor's Death, 26 Iowa L. Rev. 514, 529.

Respondents contend that the cases upon which the controller relies all come from jurisdictions with rules of property law opposed to the rules adopted in California. Whether that be true or not is immaterial, for the reasoning in these cases is based on realistic considerations regarding the possession and enjoyment of the property that are as relevant here as in those jurisdictions. Moreover, the case upon which respondents rely as establishing the California rule of property law does not preclude taxation in the present case. Hunt v. Wicht, supra, holds merely that the statute does not apply retroactively. Nor is respondents' position improved by considering the trustee an agent of the beneficiary. The trustee no doubt acquired possession before the trustor's death, but his enjoyment was as limited as that of the beneficiary.

[3] With the trustee's consent, each beneficiary could have obtained, and decedent's daughters did obtain, portions of the trust property. The controller does not seek to tax the portions thus advanced, but only the balance remaining in the trusts at the time of the father's death. It is true that, since the value of each trust might have fallen in the trustor's lifetime below the limit of $50,000 set upon withdrawals, the trusts might conceivably have terminated before his death. This provision shows no more than that the trustor had alternative intentions. He made dispositions intended to take effect at his death, yet indicated his willingness that they be defeated under certain contingencies. It is irrelevant that his dispositions were subject to certain contingencies now that those contingencies can no longer occur. In fact, the trusts lasted until the trustor's death, and the trustor certainly intended

that the transfer of what remained of the corpus should take effect in possession or enjoyment at his death. No tax is imposed upon the transfer of the portions released in his lifetime. But to the extent that the transfers took effect at death, as he intended, the tax should be upheld. "In a possible contingency * * * enjoyment * * * might have begun while the grantor was yet in being. We think this feature is insufficient to take the case out of the rule. * * * We are to view the sequence of events in the order of the actual rather than the possible." Matter of Schmidlapp's Estate, 236 N.Y. 278, 285, 286, 140 N.E. 697, 699.

[4, 5] Respondents finally contend that the controller's admitted failure in 1923 to tax similar trusts, the trusts involved in Wheeler v. Commissioner, 20 B.T.A. 695, amounted to an administrative construction of the statute, and that this construction was adopted by the Legislature in 1935 when it reenacted the statute, and now precludes taxation in this case. Mere failure to act, however, does not constitute an administrative construction. City of Louisville v. Board of Education, 154 Ky. 316, 157 S.W. 379, and cases cited in 2 Sutherland, Statutory Construction, 3d Ed., p. 520, n. 9. Moreover, an erroneous administrative construction does not govern the interpretation of a statute, even though the statute is subsequently reenacted without change. Whitcomb Hotel, Inc., v. California Emp. Comm., 24 Cal.2d 753, 757, 758, 151 P.2d 233, and cases therein cited.

[6, 7] The purpose of the Legislature in imposing a tax on transfers intended to take effect at or after death is to prevent avoidance of the inheritance tax. "The sole reason for mentioning dispositions inter vivos * * * is to prevent the evasion of the tax * * * by such dispositions. In contemplation of that law [the inheritance tax law], the gifts inter vivos therein mentioned are all presumed to have been made with the intent to evade the tax imposed on transfers taking effect by succession at death." In re Estate of Potter, supra, 188 Cal. 63, 204 P. at page 830. Section 2(3)(b) does not impose a tax upon certain precisely defined transfers; it is rather an attempt to impose a tax in all cases, regardless of the form of transfer adopted, in which possession or enjoyment does not take effect until the donor's death.

Even though a trustor may have parted with all interest in the property, limitations that he has imposed will last as long as the trust lasts. Decedent's children were all over 21 years of age at the time the trusts were created. The daughters were married. It is unlikely, therefore, that decedent entertained any doubts as to the ability of the beneficiaries to manage the property. If it had been because of such doubts that he chose to make the gifts in trust rather than outright, he hardly would have provided that the trusts should terminate upon his death. Moreover, since the trusts are not in the nature of a family settlement, with the usual provisions for life estates to children and remainders to grandchildren, the conclusion is inescapable that decedent advisedly chose to make gifts in trust so that, for the rest of his lifetime, the principal would be kept intact and the income would be paid to the family of which he was the head. "The case presents a typical one of a donor possessed of large property interests denuding himself of his possessions and placing them in the friendly hands of his immediate family, taking care to see that they do not get away from his own superior control as head of the family during his lifetime. * * * It is said that no income was reserved to the grantor. In literal terms this is true * * * but in substance it was otherwise. The highest instincts of the family are to guard and protect, and, if necessary, provide for its members. The close relation of its members could leave no doubt that the donor was placing the property in the hands of those to whom he could look with every assurance that any or all of the income would be his for the asking. It was as to the income potentially within the donor's reach and as to the entire principal a transfer intended to take effect at his death." Koch v. McCutcheon, 111 N.J.L. 154, 156, 157, 167 A. 752, 753. To the same effect are In re Hollander's Estate, 123 N.J.Eq. 52, 195 A. 805; Hartford v. Martin, supra; State Street Trust Co. v. Treasurer, 209 Mass. 373, 95 N.E. 851, and Coolidge v. Commissioner, 268 Mass. 443, 167 N.E. 757. The United States Supreme Court reversed the latter case, but on grounds that had nothing to do with the construction of the statute. Coolidge v. Long, 282 U.S. 582, 51 S.Ct. 306, 75 L.Ed. 562. Of all the cases that support the controller's position, perhaps none contains so clear an analysis of the problem involved as a recent Connecticut case, Bridgeport City Trust Co. v. McLaughlin: "* * * The necessary intent existed that some change in the son's rights in the trust property should take effect on his (the trustor's) death. * * * The next question is, was this change a transfer of possession or enjoyment * * * taxable under the statute? * * * The death of the settlor broke the shackles of the trustee's management of the trust and gave the son the right to use the principal as his own property. * * * To most persons the transfer of the unbridled right to handle money which they have previously been unable to invest or spend at all except as the net income is doled out to them by a trustee, would constitute a transfer of a considerable amount of enjoyment in the money. * * *" Prentice-Hall Inheritance and Transfer Tax Service, vol. 2, p. 1025 of Connecticut section. Although the Supreme Court of Errors of Connecticut has had no opportunity to pass upon that case, its position on the question is clearly stated in Bryant v. Hackett, 118 Conn. 233, 244, 171 A. 664, 668: "This purpose and policy might be as completely defeated by a transfer of property in such a way that the owner has parted with all control and dominion over it as by one where he reserves such control. Such a reservation might perhaps make taxable a transfer which otherwise would not be, but the lack of it does not prevent the taxation of transfers falling within the terms of the statute."

[8, 9] It should be noted that the "shackles" of the trusts were stronger in the present case than in some of the cases just cited. The respondents' interests were contingent upon their surviving the trustor. Each trust contained spendthrift provisions so that the beneficiaries could neither dispose of their interest in the corpus (Seymour v. McAvoy, 121 Cal. 438, 442, 53 P. 946, 41 L.R.A. 544; McColgan v. Walter Magee, Inc., 172 Cal. 182, 186, 155 P. 995, Ann.Cas.1917D, 1050; In re Estate of Edwards, 217 Cal. 25, 27, 17 P.2d 116; Kelly v. Kelly, 11 Cal.2d 356, 362, 79 P.2d 1059, 119 A.L.R. 71, see 23 Cal.Jur. 519) nor request that the trusts be terminated before the trustor's death. Fletcher v. Los Angeles Tr. & Sav. Bank, 182 Cal. 177, 179, 187 P. 425. Moreover, irrespective of spendthrift provisions, the trusts could not be so terminated, since other persons, some perhaps not yet born, had possible interests in the trust property. Gray v. Union Trust Co., 171 Cal. 637, 154 P. 306; In re Estate of Washburn, 11 Cal.App. 735, 106 P. 415; Woestman v. Union Trust, etc., Bank, 50 Cal.App. 604, 195 P. 944; Hunt v. Lawton, 76 Cal. App. 655, 245 P. 803; In re Estate of Easterday, 45 Cal.App.2d 598, 114 P.2d 669.

In view of our decision that the gifts here involved were intended to take effect in possession or enjoyment at death, there is no need to consider the contention that they were made in contemplation of the donor's death.

The judgment is reversed.

GIBSON, C. J., CARTER, J., and PETERS, Justice pro tem., concurred.

SCHAUER, Justice (dissenting).

I dissent. Under our system of government wherein the basic power reposes in the people as distinguished from the state it is a fundamental principle that "tax proceedings are in invitum, tax laws are strictly construed in favor of the taxpayer and against the state * * * because presumptively the Legislature has given in plain terms all the power intended to be exercised. A statute will not be held to have imposed a tax unless it is clear and explicit." (See 24 Cal.Jur., § 11, pp. 27-28, and cases there cited.) Here the involved statute provides that "A tax shall be and is hereby imposed upon the transfer of any property, real or personal, or of any interest therein or income therefrom, in trust or otherwise, to persons, institutions or corporations, * * * said taxes to be upon the market value of such property at the date of death of the decedent [transferor] * * * in the following cases: * * * (3) When the transfer is of property made by a resident * * * (a) In contemplation of the death of the grantor, * * * or donor, or, (b) Intended to take effect in possession or enjoyment at or after such death, or in which a life income or interest is reserved by the grantor, either expressly or impliedly, or by the grantee promising to make payments to or care for the grantor * * * (d) By a revocable trust created before or after the taking effect of this act.

"When such person, institution or corporation becomes beneficially entitled in possession or expectancy to any property or the income therefrom by any such transfer, whether made before or after the passage of this act.

"In all transfers inter vivos the value of the property transferred shall be taken as of the date of death of the transferor and with the rates and exemptions then in effect. * * *." (Italics added. Deering's Gen.Laws,1937, Act 8495, § 2, pp. 3955, 3956.)

The trial court found upon ample evidence that the transfers in question were not made in contemplation of the death of the grantor. It is also indisputable that the trusts created were and are irrevocable, but the majority opinion, after a discussion of decisions of both the United States Supreme Court and the courts of other states, reaches the conclusion that the California Legislature intended by its use of the words "Intended to take effect in possession or enjoyment at or after such death" to include as subject to an inheritance tax an irrevocable transfer in trust of property, made several years prior to the transferor's death and at a time when he was in excellent health, even though by such transfer the transferor completely divested himself of all ownership or interest in the property transferred and of all power to control its use or disposition.

The sole ground advanced or relied upon by such opinion to justify imposition of the tax is that the trusts were to, and did, terminate at the end of a period of time measured by the transferor's life; and the conclusion is asserted in face of the fact that several years before the transferor's death the transfers had been completed and both enjoyment and possession of the property had passed irrevocably from the transferor to the joint unit of trustee and beneficiary in each of the respective trusts.

It apparently is not contended that if the duration of the trusts had been measured by any event other than the termination of the transferor's life the transfers would have been subject to an inheritance tax upon the death of the transferor, and it is my opinion that the mere fact that the death of the transferor is selected as the event upon which the legal title to the corpora of the estates shall be conveyed by the trustees to the beneficiaries is not sufficient to justify us in holding that as a matter of law the transferor intended the transfer of the property "to take effect in possession or enjoyment at or after" his death within the meaning of those words as employed by the Legislature in the Inheritance Tax Act. The possession and enjoyment of the property, and its control, passed completely from the transferor when he created the trusts. Such possession, enjoyment, and control of the property, upon creation of the trusts, vested irrevocably in the trustees and beneficiaries. The effect of the majority opinion is to impose a penalty upon the beneficiaries solely because the transfers were made in trust for them instead of directly to them. I am aware of no policy of the law which justifies such a holding.

In Reinecke v. Northern Trust Co. (1929), 278 U.S. 339, 49 S.Ct. 123, 73 L.Ed. 410, 66 A.L.R. 397, the decedent, several years before his death and at a time when there was no federal gift tax, created five trusts with life estates in the incomes on terms not disclosed in the opinion. "In one the life interest was terminable five years after the death of the settlor or on the death of the designated life beneficiary should she survive that date, with a remainder over. In the other four, life interests in the income were created, terminable five years after the settlor's death or on the death of the respective life tenants, which ever should first happen, with remainders over. The settlor reserved to himself power to supervise the reinvestment of trust funds, to require the trustee to execute proxies, to his nominee, to vote any shares of stock held by the trustee, to control all leases executed by the trustee, and to appoint successor trustees. With respect to each of these five trusts a power was also reserved 'to alter, change or modify the trust,' which was to be exercised in the case of four of them by the settlor and the single beneficiary of each trust, acting jointly, and in the case of one of the trusts, by the settlor and a majority of the beneficiaries named, acting jointly.

"The settlor died without having * * * modified any of the five trusts except one, and that in a manner not now material." (278 U.S. at page 344, 49 S.Ct. at page 124, 73 L.Ed. 410, 66 A.L.R. 397.) The federal estate statute imposed a tax "upon the transfer of the net estate of every decedent" and provided that in calculating the tax there should be included in the gross estate all property, tangible and intangible. "To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death."

The Supreme Court, in holding that the transfers were not subject to the federal estate tax, stated (pages 346–348 of 278 U.S., page 125 of 49 S.Ct., 73 L.Ed. 410, 66 A.L.

R. 397), "Nor did the reserved powers of management of the trusts save to decedent any control over the economic benefits or the enjoyment of the property. He would equally have reserved all these powers and others had he made himself the trustee, but the transfer would not for that reason have been incomplete. *The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made.* [Italics added.] His power to recall the property and of control over it for his own benefit then ceased and as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift *inter vivos* not subject to the tax. * * *

"In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred. * * * It is not a gift tax * * *. One may freely given his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos,* equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute. * * * In the light of the general purpose of the statute and the language of section 401 explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in section 402(c) 'to take effect in possession or enjoyment at or after his death,' include any others than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under section 401. That doubt must be resolved in favor of the taxpayer."

It is argued in the majority opinion that the Reinecke case has been weakened by subsequent decisions of the Supreme Court. Suffice it to point out that such case has not been overruled, that its sound logic remains unimpaired, and that the facts and circumstances of the litigation now before us present a manifestly stronger case for the taxpayer than did those of the Reinecke case. Here the transferor reserved no control over the property conveyed and all of it vested immediately in full possession and enjoyment in the respective units of trustees and beneficiaries. Furthermore, our statute undertakes to specifically enumerate the "cases" in which the tax shall be operative and in such enumeration lists a transfer "By a *revocable* trust created before or after the taking effect of this act." (Italics added.) This statute is creative and in such a case it is a well established rule of construction that the enumeration of certain powers or items is exclusive of all others. (23 Cal.Jur., § 118, p. 740; 2 Sutherland, Statutory Construction (Horack's ed. 1943) § 4915, p. 414; People v. McCreery (1868), 34 Cal. 432, 442; San Joaquin, etc., Irri. Co. v. Stevinson (1912), 164 Cal. 221, 234, 128 P. 924; Pasadena University v. Los Angeles County (1923), 190 Cal. 786, 790, 214 P. 868; Gruben v. Leebrick & Fisher, Inc. (1938), 32 Cal.App. 2d Supp. 762, 765, 84 P.2d 1078; see, also, Johnston v. Baker (1914), 167 Cal. 260, 264, 265, 139 P. 86; Moore v. Webb (1933), 219 Cal. 304, 309, 26 P.2d 22, 89 A.L.R. 925; In re Peart (1935), 5 Cal.App.2d 469, 472, 43 P.2d 334.) There is no sound basis for assuming that the Legislature would have specifically designated a "*revocable* trust" as being subject to the tax, without any mention of irrevocable trusts, if it had intended also to tax the latter.

It is to be noted that the Supreme Court in May v. Heiner (1930), 281 U.S. 238, 244, 50 S.Ct. 286, 74 L.Ed. 826, 67 A.L.R. 1244, followed the Reinecke case and that Helvering v. Hallock (1940), 309 U.S. 106, 60 S.Ct. 444, 84 L.Ed. 604, 125 A.L.R. 1368, does not purport to overrule it. In fact the author of the opinion in the Helvering case expressly states (page 110 of 309 U.S., page 447 of 60 S.Ct., 84 L.Ed. 604, 125 A.L.R. 1368) that "Whether the transfer made by the decedent in his lifetime is 'intended to take effect in possession or enjoyment at or after his death' *by reason of that which he retained,* is the crux of the problem." (Italics added.) As previously observed, in the case now before us, the grantor retained nothing. In Fidelity-Philadelphia Trust Co. v. Rothensies (1945), 324 U.S. 108, 65 S.Ct. 508, 510, 89 L.Ed. 560, the Supreme Court again had a tax question before it but again did not depart from the Reinecke holding. Mr. Justice Douglas, in a concurring opinion, specifically pointed out that "The District Court found that this trust was 'intended to take effect in possession or enjoyment at or after' the death of the decedent. The Circuit Court of Appeals agreed. [3 Cir., 142 F.2d 838]. Certiorari was not granted on that question but only on the question whether the entire value of the corpus of the trust at the time of decedent's death should be included in her gross estate. [323 U.S. 693, 65 S.Ct. 60]." The trust involved was one in which the grantor *reserved to herself* during her life the income of the trust.

Subsequent to the execution of the trust grants here involved the people of this state enacted the Gift Tax Act of 1939. Such act provides a tax upon the transfer of property as an *inter vivos* gift and specifically provides that the word "transfer," as used therein, "includes the passing of property or any interest therein, in possession or enjoyment, present or future, by gift, or any transfer made with donative intent" (Gift Tax Act of 1939, Deering's Gen. Laws, Act 8495c, § 4) and that "The tax applies whether the transfer is in trust or otherwise, whether the gift is direct or indirect * * *." (id., § 13). It seems to me that common honesty and fairness to the taxpayer, let alone that plane of integrity which is due from the state in its dealings with its citizens, demand that we appraise the transactions now before us as being either *inter vivos* gifts or as transfers in contemplation of, or to take effect upon, death. We cannot fairly classify such transactions as having two inconsistent characters. It would be sharp dealing, unworthy of a democracy, to look back upon a transaction preceding the Gift Tax Act, which transaction clearly amounted to a gift *inter vivos* and not to a transfer in contemplation of death or to take effect only upon death, and to classify it as subject to inheritance tax purely for the sake of garnering income to the state.

The Inheritance Tax Act has not been materially amended in its pertinent application to this case since the creation of the trusts in controversy. If those trusts, created in 1935, are properly subject to inheritance tax, then the same trusts, if created now, would be subject to such tax. Surely my brethren of the majority opinion would not go so far as to hold that the transfers of 1935 were "in contemplation of the death" of the grantor or to "take effect in possession or enjoyment at or after such death" within the meaning of the Inheritance Tax Act and at the same time classify them as transfers *inter vivos* so as to subject them to the gift tax. Manifestly if the property interests did not pass until death of the grantor then the transfers are subject to inheritance tax but equally manifest is it that if such property interests ***in their full value*** were transferred when the trust grants were executed then such transfers would be, if made after enactment of the Gift Tax Act, subject to the gift tax. The mere fact that they were made prior to the enactment of the Gift Tax Act of 1939 cannot operate to bring them within the otherwise inapplicable Inheritance Tax Act. Certainly, unless we are prepared to hold that the transfers now before us, if they were to take place *subsequent* to the enactment of the Gift Tax Act, would nevertheless be subject to the Inheritance Tax Act and not to the Gift Tax Act, we should not hold that they are subject to such Inheritance Tax Act merely because they originated prior to the enactment of the Gift Tax Act.

Lastly, it must be noted that the trial court found as a fact, upon conflicting inferences, in substance that the transfers in question were intended to, and did, take effect immediately upon the execution of the trust grants and that they were ***not*** "intended to take effect in possession or enjoyment [only] at or after such [the grantor's] death." The majority opinion lists a number of facts and circumstances in evidence which it argues support the inference that the transfers were intended to take effect in possession or enjoyment at or after the grantor's death. But the drawing of such inferences and the effect to be given them were matters properly for the determination of the trial court. The rule is that an "appellate court will accept or adhere to the interpretation [of a document] adopted by the trial court—and not substitute another of its own— * * * where parol evidence was introduced in aid of its interpretation, and such evidence * * * is such that conflicting inferences may be drawn therefrom." (4 Cal.Jur. 10-Yr.Supp. (1943) rev.) § 192, pp. 146-147; see also 2 Cal.Jur., § 549, pp. 934-935.)

Unless we are to depart from long established law, including the basic principle that the people are to be served before the state, the judgment should be affirmed.

SHENK, J., concurred.

26 Cal.2d 503

PEOPLE v. ONE 1941 FORD 8 STAKE TRUCK, ENGINE NO. 99T370053, LICENSE NO. P 8410 (CONSOLIDATED PRODUCE CO., Limited, Intervener).

L. A. 19220.

Supreme Court of California.

June 5, 1945.

1. Constitutional law ⚷303

Automobile taken from owner without his consent, and used by taker in violation of statute relating to forfeiture of vehicle used to transport narcotics, cannot be declared forfeited to state without violating due process of law clauses. St.1939, pp. 767, 768, §§ 11610, 11620, 11622, 11623 et seq., 11629.

2. Constitutional law ⚷48

Where statute is susceptible of two interpretations, one of which would satisfy constitutional guaranty, if possible, the court will uphold the legislation.

3. Forfeitures ⚷3

The Constitution does not prohibit forfeiture where owner intrusts his vehicle to another who uses it to transport narcotics in violation of statute even though the owner does not know of or acquiesce in such use. St.1939, pp. 767, 768, §§ 11610, 11620, 11622, 11623 et seq., 11629.

4. Forfeitures ⚷3

Where produce dealer directed employee to make certain deliveries and return truck to store and denied employee's permission to use truck for personal errand, but, contrary to instructions, employee, after delivering the produce, drove several miles from any reasonable route he might have traveled in carrying out his orders and secured some marijuana and truck was seized, no constitutional prohibition required that statute authorizing forfeiture of vehicle used to transport narcotics be construed to exempt innocent owner upon ground that vehicle was used without his consent. St.1939, pp. 767, 768, §§ 11610, 11620, 11622, 11623 et seq., 11629.

In Bank.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Proceeding by the People for the forfeiture of one 1941 Ford 8 Stake Truck, Engine No. 99T370053, License No. P 8410, on the ground that the truck had been used unlawfully to transport narcotics, wherein Consolidated Produce Company, Limited, intervened as the legal and registered owner. From an adverse judgment, intervener appeals.

Affirmed.

Prior opinion 151 P.2d 895.

Richard J. O. Culver and Felix H. McGinnis, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

EDMONDS, Justice.

The Consolidated Produce Company has appealed from an adverse judgment rendered in a proceeding authorized by the Health and Safety Code, St.1939, p. 482, for the purpose of forfeiting to the state a 1941 Ford truck upon the ground that it was used to unlawfully transport narcotics. The defense unsuccessfully urged in the trial court and now presented upon appeal is that a vehicle in the possession of an employee of the owner, but being used for the unlawful purpose in violation of specific restrictions as to the place of operation fixed by the owner, is not subject to forfeiture.

The appellant is engaged in the wholesale fruit and vegetable business. It directed an employee, Irving Schiller, to take one of its trucks and deliver some cucumbers to a point several miles from the company's place of business. At the time, Schiller asked for permission to use the truck for a personal errand and was refused. He was told to make the delivery and to then return the vehicle to the company's store.

Contrary to these instructions, Schiller, after taking the cucumbers to the customer, drove to a destination some four or five miles away from any reasonable route he might have traveled in carrying out his orders, and secured some marijuana. As he was returning to his employer's place of business, he was arrested and the truck seized. Subsequently the appellant for the first time learned of the illegal use of its truck. Upon this evidence, the trial court found that Schiller was in the possession of the truck with the consent of the produce company, its legal and registered owner; that Schiller violated his instructions in using the vehicle to go to the place where he obtained the marijuana, and that the owner had no knowledge of such use of its property by him. As its conclusions of law, the court decided that the truck should be forfeited to the state and judgment was entered accordingly.

The attorney general contends that the judgment must be affirmed upon the authority of People v. One 1933 Plymouth Sedan, 13 Cal.2d 565, 90 P.2d 799, 801, where this court said: "It has long been the settled law that the owner of a vehicle who has given consent to its operation by another, is not deprived of any constitutional right by the forfeiture of his property on account of the operator's violation of a statute such as [the confiscatory provisions of the Health and Safety Code] even though such owner is without knowledge of or has failed to acquiesce in its illegal use." To the contrary, the appellant urges that as an innocent owner may successfully defend against a forfeiture upon the ground that the vehicle was used without his consent (People v. One 1937 Plymouth 6, 37 Cal.App.2d 65, 98 P.2d 750; People v. One 1939 La Salle, 45 Cal.App.2d 709, 115 P.2d 39), it follows that the same rule should apply where, as in the present case, an employee to whom a vehicle is entrusted uses it for an unauthorized purpose and without the area specified for its use. Or, stated differently, the truck owner, relying upon Henrietta v. Evans, 10 Cal.2d 526, 75 P.2d 1051, asserts that where a vehicle is used for a purpose and in an area not authorized by the owner, such use must be deemed to be without the owner's consent and, under such circumstances, the automobile is not subject to forfeiture.

In the division of the Health and Safety Code relating to narcotics the provisions for enforcement are found in chapter 7, St. 1939, p. 767, which includes article I entitled, "Forfeiture of Vehicles." The first section of that article reads: "A vehicle used to transport any narcotic shall be forfeited to the State." (§ 11610.) The following sections state the procedure by which a judgment of forfeiture may be obtained. Among those provisions is one giving the claimant of any interest in a seized vehicle the right to prove his lien or sales contract to be bona fide and that his title "was created after a reasonable investigation of the moral responsibility, character, and reputation of the purchaser, and without any knowledge that the vehicle was being, or was to be, used for the purpose charged." (§ 11620.) "In the event of such proof," the vehicle must be returned to the lien claimant or vendor, if the value of the lien or the purchase price is equal to or in excess of the value of the vehicle, the intention being to forfeit only the "interest of the purchaser." (§ 11622.) If the amount due to the claimant is less than the value of the vehicle, it shall be sold and the proceeds of the sale, after the payment of the amount of the lien or the balance of the purchase price, paid to the state. (§ 11623 et seq.) "The provisions of this division relative to forfeiture of vehicles do not apply to a common carrier * * *." (§ 11629.)

[1, 2] The use made by Schiller of the truck of his employer is within the express terms of the legislation enacted for the purpose of curbing the traffic in narcotics and, applying the doctrine of expressio unius est exclusio alterius, is not one which exempts the owner from the drastic statutory penalty.

It is true that the Health and Safety Code does not expressly exempt from confiscation an automobile taken in the first instance without the owner's consent and used to transport narcotics but it has been construed as not authorizing forfeiture under such circumstances. The reasoning leading to this conclusion is that a contrary determination would amount to an unconstitutional deprivation of property without due process of law (People v. One 1937 Plymouth 6, supra), and where a statute is susceptible of two interpretations, one of which would satisfy constitutional guarantees, if possible the courts will uphold the legislation. Bodinson Mfg. Co. v. California Emp. Comm., 17 Cal.2d 321, 326-327, 109 P.2d 935.

[3] But there are no constitutional impediments to a forfeiture where the owner entrusts his vehicle to another who uses it illegally, even though the owner does not know of or acquiesce in such use. The distinction between such a situation and the plight of an automobile owner who failed to give possession of his car or consent to its operation is based upon the means by which the one found transporting the contraband obtained the vehicle. An owner who entrusts the possession of his vehicle to another thereby accepts the risk that it will be used contrary to law, but, in the operation of an automobile without the

owner's consent to do so in any manner or at all, there is no element of choice or volition and a complete lack of permission, express or implied, on the part of the owner.

In Van Oster v. Kansas, 272 U.S. 465, 47 S.Ct. 133, 134, 71 L.Ed. 354, 47 A.L.R. 1044, a forfeiture was upheld under legislation similar to that now under consideration. The owner entrusted his vehicle to another who, without the owner's knowledge or consent, used it to transport liquor, and the court said: "It is not unknown, or indeed uncommon, for the law to visit upon the owner of property the unpleasant consequences of the unauthorized action of one to whom he has intrusted it. Much of the jurisdiction in admiralty, so much of the statute and common law of liens as enables a mere bailee to subject the bailed property to a lien, the power of a vendor of chattels in possession to sell and convey good title to a stranger, are familiar examples. * * * They suggest that certain uses of property may be regarded so undesirable that the owner surrenders his control at his peril. The law thus builds a secondary defense against a forbidden use and precludes evasions by dispensing with the necessity of judicial inquiry as to collusion between the wrongdoer and the alleged innocent owner. So here the legislature, to effect a purpose clearly within its power, has adopted a device consonant with recognized principles and therefore within the limits of due process."

[4] Applying the same reasoning in the present case it follows that no constitutional prohibition requires that the Health and Safety Code be construed as contended for by the appellant. Clearly shown by the terms of section 11610 et seq. is a legislative policy that the vicious traffic in narcotics, with its disastrous effect upon the unfortunate members of society, is so great an evil as to justify the drastic penalty of confiscation of vehicles used to transport the contraband. The public interest to be protected against the drug and its victims outweighs the loss suffered by those whose confidence in others proves to be misplaced, and although, in some cases, hardship may result from the enforcement of the statute, no constitutional guarantees are invaded.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

CARTER, Justice.

I concur in the judgment of affirmance as the statute under which this proceeding was instituted seems to be perfectly plain and does not leave any room for construction which would justify a court in relieving an owner of an automobile of the penalty of forfeiture when it is used for the transportation of narcotics.

While section 11610 of the Health and Safety Code here involved is not an exact counterpart of section 402 of the Vehicle Code, St.1937, p. 2353, the same rules should be applicable to their interpretation. For this reason I desire to refer to my concurring opinion in the case of Burgess v. Cahill, Cal.Sup., 154 P.2d 395; Id., 158 P.2d 393, where I expressed my views with respect to the interpretation which should be placed upon section 402 of the Vehicle Code, which views are applicable to the provisions of the Health and Safety Code here involved, and for these reasons the judgment, in my opinion, should be affirmed.

26 Cal.2d 472

In re LUND'S ESTATE.

LUND v. LUND.

S. F. 17000.

Supreme Court of California.

May 31, 1945.

1. Descent and distribution 🔑4, 5

Whether a child shall succeed to the estate of his father is determined, in the case of land, by the law of the situs of the land, and in the case of movables, by the law of the domicile of the father at the time of his death, unless the law of the situs of the property provides that the law of the decedent's domicile shall not govern. Civ. Code, §§ 755, 946.

2. Bastards 🔑96

Where one was born out of wedlock in Norway and was publicly acknowledged and received into the family of his father in the United States with the consent of his wife, and father subsequently died while domiciled in California, the child's right to inherit from his father depended upon the law of California. Civ.Code, §§ 755, 946.

3. Bastards 🔑95

At common law an illegitimate child was held to be filius nullius or filius populi and was without right even to the name of its natural father and being without inheritable blood could acquire nothing except by its own efforts.

4. Bastards 🔑11

At common law the only method of legitimation was by special act of Parliament.

5. Bastards 🔑10

The public policy of California disavows the common-law tenets relating to bastards and favors legitimation. Civ.Code, §§ 84, 85, 193, 194, 196a, 205, 215, 230.

6. Bastards 🔑105

Under the statute providing for the legitimation of a child by acknowledgment, etc., by father, one who has attained status of legitimacy is entitled to the benefits of the general succession statutes. Civ.Code, § 230.

7. Bastards 🔑10
Descent and distribution 🔑1

The subject of legitimation as well as that of succession of property is a proper one for state legislation.

8. Bastards 🔑10, 11

The legislative power to legitimate or to provide for the legitimation of a bastard is recognized both in England and the United States, and such legitimation can be effected without the fact or fiction of a marriage by simple fiat.

9. Bastards 🔑10

Statutes providing for the legitimation of bastards are remedial and may be applied retrospectively.

10. Descent and distribution 🔑3

The status or condition of a person, the relation in which he stands to another person and by which he is qualified or made capable to take certain rights in that other's property, is fixed by the law of the domicile, and this status and capacity are to be recognized and upheld in every state so far as they are not inconsistent with its own laws and policy.

11. States 🔑4

Where a child was born out of wedlock in Norway and was publicly acknowledged as a son and received into the family of his father with consent of father's wife in Minnesota and father afterwards lived in New Mexico and died domiciled in California, the child's right to inherit from his father was one of comity, not controlled by the full faith and credit clause. Civ.Code, § 230; U.S.C.A.Const. art. 4, § 1.

12. Bastards 🔑10

Each state may formulate its own public policy in respect to legitimation and can enact laws to carry out such policy.

13. Bastards 🔑13

The provision of the Civil Code relating to the legitimation of a child by acknowledgment of its father with consent of wife, etc., is not to be strictly construed because in derogation of the common law, but must be liberally construed with a view to effect its objects and to promote justice. Civ.Code, §§ 4, 230.

14. Bastards 🔑13

The statute relating to legitimation of an illegitimate by acknowledgment of its father with consent of his wife applies to all illegitimates wherever located and wherever born. Civ.Code, § 230.

15. Bastards 🔑13

The object and effect of statute relating to legitimation of illegitimate child by public acknowledgment by father with consent of his wife and providing that such child shall be deemed for all purposes legitimate from the time of its birth was to change the status and capacity of an illegitimate child to the status and capacity of a child born in lawful wedlock. Civ.Code, § 230.

16. Bastards 🔑96

Where child was born out of wedlock in Norway and was publicly acknowledged as a son and received into the family of his father with consent of father's wife in Minnesota and father and family afterwards lived in New Mexico and father died domiciled in California, but the child, because he was of adult years, never attained California domicile, child's right to inherit from his father depended upon California law, and facts that child never attained a California domicile and was an adult were immaterial. Civ.Code, § 230; Code Civ. Proc. § 1866.

17. Bastards 🔑13

Statute relating to legitimation by public acknowledgment of father and providing that foregoing provisions of chapter entitled "Children by adoption" do not apply to adoption by legitimation meant to confer the broad benefits of such procedure without limitation express or implicit in ordinary adoption proceedings. Civ.Code, § 230.

18. Bastards ⚷105

Where child was born out of wedlock in Norway and was publicly acknowledged as a son and received into the family of his father with the consent of father's wife in Minnesota and father and family afterwards lived in New Mexico and father died domiciled in California, and child because he was then adult never acquired a California domicile, the child was entitled under the California statute to succeed in the status of a legitimate son to a share in the estate of his father. Civ.Code, § 230.

19. Bastards ⚷13

Silence of father once a child has been publicly acknowledged and received into father's family, even though in another state, is convincing evidence of continuation of the public acknowledgment and in itself exemplifies treating the child as legitimate. Civ.Code, § 230.

20. Bastards ⚷13

Where child was born out of wedlock in Norway and was publicly acknowledged as a son and received into the family of his father with consent of father's wife in Minnesota and the family subsequently lived in New Mexico and the father died domiciled in California, where the child never acquired a domicile because he was of adult years and did not follow the family to California, the presumption was that the publicly acknowledged and long established and recognized status of family relationship between father and son continued after father moved to California and that father did not wrong his son by disavowing his previous public acknowledgment. Civ.Code, § 230; Code Civ.Proc. § 1963, subds. 1, 32.

EDMONDS, SHENK, and TRAYNOR, JJ., dissenting.

In Bank.

Appeal from Superior Court, Santa Clara County; M. G. Del Mutolo, Judge.

Proceeding in the matter of the estate of Andrew Lund, deceased, by Bert A. Lund against Frank Lund individually and as guardian, etc., to determine heirship. From an order denying the petition, the petitioner appeals.

Order reversed, and cause remanded with directions.

Prior opinion, 148 P.2d 709.

Robert E. Hatch, of San Francisco, and Giannini, Callahan & Giannini, of San Jose, for appellant.

Simeon E. Sheffey, of San Francisco, for respondent.

SCHAUER, Justice.

Bert A. Lund, petitioner herein, appeals on a settled statement from an order denying his petition to determine heirship. Petitioner was born the illegitimate (it is assumed) son of Andrew Lund, now deceased, from whom he seeks to inherit. He was received into his father's family, with the consent of the father and his wife (not petitioner's mother), while they were domiciled in another state, and thenceforth was publicly acknowledged and in every respect treated by his father as a legitimate son. The father died a resident of California, leaving estate herein. The family status and relationship do not appear ever to have been disavowed. We have concluded that by virtue of the provisions of section 230 of the Civil Code, upon the facts shown, petitioner is entitled to share in the estate of decedent pursuant to the statutes of descent of California.

Petitioner was born in Norway in 1883. His father (decedent) and mother are not shown to have ever married, and for the purposes of this opinion we assume that the evidence establishes that they did not marry. Decedent came to Minnesota and married another. There were two children of the marriage, Lillian Blanche and Frank. In 1904 petitioner, at the request of decedent and his wife, came from Norway to Minnesota and was received into the family with the consent of the wife and publicly recognized and acknowledged by decedent as a son. In 1906 decedent moved to New Mexico; he took petitioner with him and the rest of the family soon joined them; petitioner continued to live as a member of the family and was publicly recognized and acknowledged by decedent as a son. It does not appear that this publicly established family status (whatever its legal effect) was ever broken up or disavowed prior to decedent's death. Petitioner was known by the name "Lund" in Norway. Although his mother's name was Anderson he came to this country under the name "Lund," and has continued to use it.

In 1941 Andrew Lund, the father, then a resident of California, died, leaving estate herein. It does not appear exactly when decedent became a resident of this state or, expressly, that petitioner did or did not join his father in becoming domiciled in California. Petitioner, it appears, was of adult age before the family moved to California—in fact, before they moved to New Mexico—but there is no showing that he ever married or established a separate domicile. It does appear that his half-brother and half-sister are residents of this state and he is now appearing in the courts of this state, invoking their jurisdiction.

Decedent left a will which devised all his estate to his son Frank Lund and his daughter Lillian Blanche Imel. Such will was admitted to probate. Petitioner, who was not mentioned or provided for in the will, claims that he, as pretermitted heir, is entitled to share in the distribution of the estate.

Statutes under which a child born illegitimate can, by virtue of subsequent conduct of his father (or of both parents), become capable of inheriting from the father, are usually classified as either statutes of legitimation (under which the child can, in some jurisdictions, attain the full status of legitimacy) or statutes of succession (under which the child, although remaining illegitimate in social status, can, at least to a limited extent, inherit as if he were legitimate, or, as is sometimes said, under which he is legitimated for the purpose of inheritance only). See, e. g., Pfeifer v. Wright, 10 Cir., 1930, 41 F.2d 464, 73 A.L.R. 932, certiorari denied 282 U.S. 896, 51 S.Ct. 181, 75 L.Ed. 789; 2 Beale, Conflict of Laws (1935) § 246.2, p. 967; Rest., Conflict of Laws, § 246, p. 329, and comments thereto.

[1] Whether a child shall succeed to the estate of his father is determined in the case of land by the law of the situs of the land (Civ.Code, § 755; Campbell-Kawannanakoa v. Campbell, 1907, 152 Cal. 201, 206, 92 P. 184; Estate of Loyd, 1917, 175 Cal. 699, 705, 167 P. 157; Estate of Hills, 1917, 176 Cal. 232, 234, 168 P. 20; Hall v. Gabbert, 1904, 213 Ill. 208, 72 N.E. 806) and in the case of movables by the law of the domicile of the father at the time of his death unless the law of the situs of the property provides that the law of the decedent's domicile shall not govern (Civ.Code, § 946; Estate of Apple, 1885, 66 Cal. 432, 434, 6 P. 7; Collins v. Maude, 1904, 144 Cal. 289, 294, 77 P. 945; Estate of Dwyer, 1911, 159 Cal. 680, 683, 115 P. 242; Estate of Lathrop, 1913, 165 Cal. 243, 247, 131 P. 752; Estate of Hodges, 1915, 170 Cal. 492, 495, 150 P. 344, L.R.A. 1916A, 837). As to what law governs (as precluding, permitting, or creating) the attainment of the full status of legitimacy, the reports of decisions and the texts of academic writers disclose a wide and heterogeneous conflict of authority and uncertainty of theory. As appears later herein it is upon the particular theory and policy adopted in California that the determination of this case depends.

At the time the family of Andrew Lund resided in Minnesota there was in that state no statute whereby petitioner could, by virtue of the father's receiving him into the family, etc., attain the status of legitimacy or otherwise become capable of inheriting from the father. And at the time the family moved to New Mexico the only statute there pertinent (N.M. Comp.Laws, 1897, § 2038) declared that illegitimate children shall, *when there are no legitimate children,* inherit from the father whenever they have been recognized by him as his children, provided that such recognition must have been general and notorious, or else in writing. The exception when the father left legitimate children was eliminated by amendment in 1915 (N.M. Laws, 1915, ch. 69, § 1). Whether at that date Andrew Lund and his family were still residing in New Mexico or had moved to California does not appear from the record before us. In any event the New Mexico statute probably is not applicable here and is not relied upon by us because although the Supreme Court of New Mexico, so far as our research discloses, has not had occasion to decide whether the statute above referred to (later N.M. Comp.Stats., 1929, § 38-114, now N.M. Comp.Stats. 1941, § 31-118) is a statute of succession as opposed to a statute regulating status, it has consistently referred to the section as a statute of descent (State v. Chavez, 1938, 42 N.M. 569, 82 P.2d 900; In re Gossett's Estate, 1942, 46 N.M. 344, 129 P.2d 56, 142 A.L.R. 1441) and we should probably feel constrained to regard such references as at least tending to show an interpretation of the statute placed on it by the courts of the state in which it is enacted, which interpretation we should therefore respect (Osborne v. Home Life Ins. Co., 1899, 123 Cal. 610, 612, 56 P. 616). As a statute of descent it would be immaterial to a determination of the legitimacy status of petitioner in California.

[2] We regard the record here as disclosing no facts which would bring the petitioner within any operative statute of succession otherwise than through legitimation. It thus becomes obvious, from the principles and facts above stated, that the right, if any, of petitioner to inherit from his father depends exclusively on the law of California and that such right, if existent, derives necessarily from our statute of legitimation. In other words, the ultimate question is: Under the laws of California is petitioner legitimated in relation to his father? The reasons which impel our affirmative answer to this question appear in the discussion which follows.

As previously stated there is a wide and heterogeneous conflict in authority and theory as to what law governs the attainment of the status of legitimacy. Support may be found for at least five different theories: (1) The law of the domicile of the father at the time of the birth of the child; (2) the law of the domicile of the father at the time of his legitimating acts; (3) the law of the place where the legitimating acts occurred; (4) the law of the domicile of the child (of its mother) at birth; (5) the law of the situs of property, succession to which depends on the status of legitimacy in that jurisdiction. See, e. g., authorities cited and discussed in 65 L.R.A. 177; 10 C.J.S., Bastards, § 22, p. 102; Story, Conflict of Laws (1883), §§ 93–93v, pp. 117–152; 1 Wharton, Conflict of Laws (1905), §§ 240–248, pp. 535–545; 2 Beale, Conflict of Laws (1935), §§ 139.1–140.1, pp. 706–712; Stumberg, Conflict of Laws (1937), 302–306; Goodrich, Conflict of Laws (1938), § 137, pp. 370–376, 73 A. L.R. 941; Wolf v. Gall, 1916, 32 Cal.App. 286, 288 [163 P. 346, 350; Blythe v. Ayres, 1892, 96 Cal. 532, 31 P. 915, 19 L.R.A. 40; Hall v. Gabbert, 1904, supra, 213 Ill. 208, 72 N.E. 806; Franklin v. Lee, 1901, 30 Ind. App. 31, 62 N.E. 78; Annotation, L.R.A. 1916E, p. 666.

It is contended here that California has no jurisdiction over the status of the relationship of Andrew Lund and the petitioner in that, it is asserted, neither father nor child was domiciled here at the time of the child's birth or at the time the cognizable legitimating acts took place, and that such acts were not performed in California. It is also contended that the legitimation of a child must be effected during his minority or not at all. Upon the record before us we are satisfied that neither of respondent's contentions should be sustained.

The divergence in authorities pointed out above reflects not only the personal attitudes of the justices of the various courts as being conservative or liberal in their interpretation and application of the statutes of the particular states they serve but also is grounded in the respective fundamental policies of those states on the subject of bastardy. On this subject the controversy is as old and deep-rooted as is the conflict between common law and civil law.

The common law was antagonistic to both adoption and legitimation of children and its effect appears in many jurisdictions. As stated in Re Riemann's Estate, 1927, 124 Kan. 539, 542, 262 P. 16, 17, "Not only may different statutes constrain different judicial conclusions on questions of law pertaining to the incidents and consequences attaching to the adoption of children, but the hostile attitude of the common law towards the whole subject of legitimation and adoption of children is not unlikely to be reflected in the decisions of great American courts which adhere to the common law tradition."

[3, 4] At common law an illegitimate child "was held to be filius nullius or filius populi, it was without right even to the name of its natural father, and being without inheritable blood it could acquire nothing except by its own efforts" (Pfeifer v. Wright, 10 Cir., 1930, 41 F.2d 464, 465, 73 A.L.R. 932, 935, supra), or, as succinctly phrased by Mr. Presiding Justice Peters (in Estate of Paterson, 1939, 34 Cal.App. 2d 305, 309, 93 P.2d 825, 828), "At common law illegitimates are the sons of nobody. They have no inheritable blood in them." The only method of legitimation under the common law in England was by special act of Parliament. Pfeifer v. Wright, supra. The Roman law, however, adopted a more tolerant and liberal view. It provided various modes for legitimation of bastards: "(1) By subsequent marriage of the father and mother; (2) per oblationem curiae, whereby the parent consecrated his child to the use of the state; (3) under the Emperor Anastasius, by adoption merely. This law was, however, abolished by Justin and Justinian. (4) By the last will of the father, confirmed by the emperor. (5) By a special dispensation from the emperor, granted upon the father's petition. (6) By recognition on the

part of the father." 7 C.J. § 17, p. 947, note 97c.

In jurisdictions espousing the strict common-law philosophy it is argued that it is meet to visit the sins of the fathers upon the children and that it tends to discourage bastardy if illegitimate children are denied any right of inheritance or support or recognition from the father. Few jurisdictions adhere absolutely to this rigorous rule. "From an early day the states [at least some of them] began to regard and deal with this unfortunate condition [illegitimacy] in a more humane and just way, as did the civil law (see Brightly's notes to Stevenson's Heirs v. Sullivant, 5 Wheat. 207, 5 L.Ed. 70), which provided several methods by which the child's status could be changed to that of a lawful child, thus effecting legitimation and placing the child in all respects upon the same footing as if begotten and born in wedlock. * * * Its civil and social status becomes that of a lawful child of the natural father, and the child and father thereafter stand in their relations to each other as though the birth had been during wedlock." Pfeifer v. Wright, 10 Cir., 1930, 41 F.2d 464, 465, 73 A.L.R. 932, 935, supra. The view of the common law has given way in large measure to the concept that the onus for the act of the parents cannot be visited justly upon the child and that placing responsibility for the support of the child upon the father equally with the mother, permitting it to become legitimated and to have a right to his name and to inheritance from him, will tend as well or better to deter the potential father than did the common-law doctrine of irresponsibility, and at the same time conform more closely to our present ideas of justice. Indeed, aside from considerations of justice, it may be suggested that the complete freedom from legal responsibility for illegitimate children, which the common law afforded the father, may have been a doctrine which to the male in licentious moments was more encouraging than deterrent, and were better abandoned.

Many states now have laws subjecting the father of an illegitimate child to liability for its support (see, e.g., Cal.Civ. Code, § 196a; Iowa Code, 1939, § 12667.-01); many have provisions by which the illegitimate may upon various conditions inherit from the father (see, e.g., Cal.Prob. Code, § 255; Colo.Ann.Stats., 1935, ch. 176, § 8; Ind.Ann.St., 1933, § 6-2309; Maine Rev.Stats., 1930, ch. 89, § 3); many have enacted statutes by which the illegitimate may attain the full status of legitimacy upon varying conditions (such as subsequent marriage of the parents, in some states dependent upon accompanying express acknowledgment of paternity [see, e. g., Ala.Code, 1940, tit. 27, § 10; Ind.Ann. Stats. 1933, § 6-2310] and in some jurisdictions regardless of such acknowledgment [see e.g., Cal.Civ.Code, § 215; Iowa Code, 1939, § 10444; Mont.Rev.Code, 1921, § 5852]; public acknowledgment by a father, without marriage of the mother, but accompanied by receipt of the child into his family and treatment as a legitimate child); some states by fiat decree the legitimacy of children born of a marriage void at law (see, e.g., Cal.Civ.Code, § 85; Kan. Gen.Stats., 1935, § 23-124); and some states have adopted substantially universal legitimation laws.[1]

[5] It cannot be seriously disputed that the public policy of California disavows the common-law tenets and favors legitimation.

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[1] See Ariz.Ann.Code, 1939, § 27-401, which provides that "Every child is the legitimate child of its natural parents and is entitled to support and education as if born in lawful wedlock, except the right to dwelling or a residence with the family of its father, if such father be married. It shall inherit from its natural parents and from their kindred heir, lineal and collateral, in the same manner as children born in lawful wedlock. This section shall apply to cases where the natural father of any such child is married to one other than the mother of said child, as well as where he is single." Section 27-402 provides "that the mother of said child shall not be a competent witness [to establish parentage] if the alleged natural father of said child is dead at the time of the trial."

See also Ore.Stats., ch. 269, Gen.Laws of 1925, which provides that "In case a man and a woman, not otherwise married heretofore, shall have cohabited in the state of Oregon as husband and wife, for over one year, and children shall be living as a result of said relation, said cohabitation, if children are living, is hereby declared to constitute a valid marriage and the children born after the beginning of said cohabitation are hereby declared to be the legitimate offspring of said marriage." This act is held to be retrospective in operation. (Wadsworth v. Brigham, 1928, 125 Or. 428, 459, 460, 259 P. 299, 266 P. 875, 877.)

A marriage annulled is held to be void ab initio; a decree of nullity is a determination that the marriage never existed as a valid marriage. Millar v. Millar, 1917, 175 Cal. 797, 805, 807, 167 P. 394, L.R.A.1918B, 415, Ann.Cas.1918E, 184; Withers v. Superior Court, 1928, 91 Cal.App. 735, 737, 267 P. 547. But "A judgment of nullity of marriage does not affect the legitimacy of children conceived or born before the judgment * * *" (Civ.Code, § 84) and "The issue of a marriage which is void or annulled * * * is legitimate" (Civ.Code, § 85). "All children born in wedlock are presumed to be legitimate" (Civ.Code, § 193); "All children of a woman who has been married, born within ten months after the dissolution of the marriage, are presumed to be legitimate children of that marriage" (Civ.Code, § 194); "The father as well as the mother, of an illegitimate child must give him support and education suitable to his circumstances" (Civ. Code, § 196a); "If a parent chargeable with the support of a child dies, leaving it chargeable to the county, and leaving an estate sufficient for its support, the supervisors of the county may claim provision for its support from the parent's estate by civil action" (Civ.Code, § 205); "A child born before wedlock becomes legitimate by the subsequent marriage of its parents" (Civ.Code, § 215); and "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed *for all purposes legitimate* from the time of its birth. The foregoing provisoins of this chapter [entitled "Children by adoption"] do not apply to such an adoption" (Civ.Code, § 230). (Italics added.)

[6] The last quoted statute is that upon which petitioner relies. It is, on its face, primarily a law governing legitimation or status, but if under it the petitioner has attained the status of legitimacy "for all purposes" in California then he is entitled to the benefit of the general succession statutes.

In some of the cases and texts there appears considerable confusion in the differentiation and respective applications of statutes of succession and statutes of legitimacy. It seems to be the concept of some authors that a statute of succession may be given application in situations where a statute of legitimacy would be wholly inoperative. Yet in truth the statute of legitimacy is the broader law. While a statute of succession is just a law of devolution of property, and no more, a statute of legitimacy is, in effect, all of that and more. The attainment of the full and unqualified status of legitimacy carries with it as an incident thereof the right to inherit. Certainly, then, a sovereign state should be no less zealous or unfettered in the application of its legitimation statutes than of its pure descent statutes.

In respondent's argument that the rights of petitioner as to status, and consequentially his right to inherit from his father, are not to be determined by California law, stress is laid on the proposition stated in 11 American Jurisprudence, Conflict of Laws, p. 319, § 21, that "The general rule is that the law of the father's domicil at the time of the legitimating act will be the proper law to determine the status of both parent and child. The father must, at the time of the acts of legitimation, be domiciled in a jurisdiction wherein those acts are recognized as legally sufficient. They will not, on his subsequently becoming domiciled in a jurisdiction in which they are sufficient, be permitted to operate nunc pro tunc as a legitimation in the latter jurisdiction."

The same assertedly general rule is stated in the Restatement, Conflict of Laws, p. 207, § 140, as follows: "An act done after the birth of an illegitimate child will legitimize the child as to a parent from the time of the act if the law of the state of domicil of that parent at that time so provides. * * * The law must be that of the state in which the parent is domiciled at the time of the act; it is not enough that he later becomes domiciled in a state whose law provides for the legitimizing upon the doing of the act." See, also, e.g., 5 R.C.L. § 14, p. 920; In re Presley's Estate, 1925, 113 Okl. 160, 240 P. 89; Pfeifer v. Wright 10 Cir., 1930, 41 F.2d 464, 73 A.L.R. 932, 941, supra; 10 C.J.S., Bastards, § 8, p. 51; cf. Hall v. Gabbert, 1904, supra, 213 Ill. 208, 72 N.E. 806; Franklin v. Lee, 1901, 30 Ind. App. 31, 62 N.E. 78, supra.

[7-9] That the above stated "general rules" are followed in some jurisdictions (see, e.g., Eddie v. Eddie, 1899, 8 N.D. 376, 79 N.W. 856, 73 Am.St.Rep. 765, 769) is fully recognized but it must also be recognized that the subject of legitimation, as

well as that of succession to property, is a proper one for state legislation. As stated in 10 C.J.S., Bastards, p. 54, § 10, "The legislative power to legitimate, or to provide for the legitimation of, a bastard has long been recognized both in England and in the United States. Such legitimation can be effected without the fact or fiction of a marriage by a simple fiat." And such statutes, being remedial, may even be applied retrospectively. Wadsworth v. Brigham, 1928, 125 Or. 428, 259 P. 299, 266 P. 875, supra.

[10] Chief Justice Gray in Ross v. Ross, 1880, 129 Mass. 243, 246, 37 Am.Rep. 321, well states the rule and recognizes the right of states to independently legislate upon the subject. He says: "It is a general principle, that the status or condition of a person, the relation in which he stands to another person, and by which he is qualified or made capable to take certain rights in that other's property, is fixed by the law of the domicil; and that this status and capacity are to be recognized and upheld in every other State, *so far as they are not inconsistent with its own laws and policy.*" (Italics added.)

In Hall v. Gabbert, 1904, 213 Ill. 208, 72 N.E. 806, supra, the Supreme Court of Illinois had before it a question as to the heirship of one Daisy Gabbert, who was born in Ohio, out of wedlock, the natural child of Alice Hannahs and the intestate, William C. Hall. After Daisy's birth her parents intermarried in Ohio. Her right to inherit in Illinois depended on her status as a legitimate child of her father. The court expressly disregarded the law of Ohio, which in construction and application was claimed to be dissimilar to the Illinois law. It declared (at pages 808, 809 of 72 N.E.):

"The statute under which appellee claims is section 3 of chapter 39 of the Revised Statutes (Hurd's Rev.St. 1903), and the act is entitled 'An act in regard to the descent of property.' The section reads: 'An illegitimate child, whose parents have intermarried, and whose father has acknowledged him or her as his child, shall be considered legitimate.' And under our law, when a child is legitimated he takes under our statute of descent, whether that legitimation arises from birth in wedlock or subsequent marriage and acknowledgment of a child born out of wedlock; in other words, without any distinction as to the rights of inheritance of legitimates. This section, placed as it is, cannot be construed as merely fixing the status of appellee, but is a rule of descent.

"A citizen of our state, possessed of real estate in it, has died intestate, and the question is, to whom, under our statute, does his property descend? The law says it shall descend to his children. It recognizes that he may have two classes of children—legitimate children and illegitimate children. It also recognizes that by the doing of certain acts the illegitimate child may become legitimate, and then he will have but one class, and between that class of legitimates there is no distinction of right of descent or inheritance. As we view the law, it is immaterial what the laws of Indiana or Ohio, or any other country, are or were. We look to our own law, and read it as it is written; then to the facts, and, if the facts bring the claimant within our law, then he is entitled to its benefits, whatever may be his status elsewhere."

Likewise the Appellate Court of Indiana in Franklin v. Lee, 1901, supra, 30 Ind.App. 31, 62 N.E. 78, had before it a claimant asserting a right to inherit as a legitimate son of Daniel Lee, deceased. The proof showed that the claimant was begotten and born in Kentucky, out of wedlock, the natural child of Daniel Lee and Mary Cobb; that subsequent to his birth his parents intermarried in Kentucky. The weight of the holding is diminished by the fact that apparently the laws of Kentucky and Indiana were not substantially different in their pertinent aspects, but the court asserted (at page 82 of 62 N.E.): "The Indiana statute is as follows: 'If a man shall marry the mother of an illegitimate child and acknowledges it as his own, such child shall be legitimate.' As to the right of appellee to inherit from Daniel Lee, the statutes in this state will govern, for it is a statute of descent."

[11] It is obvious that the question with which we are dealing is one of comity, and is not controlled by the constitutional provision as to "full faith and credit." Const. U.S. art. 4, § 1. Thus, in Olmsted v. Olmsted, 1910, 216 U.S. 386, 395, 30 S.Ct. 292, 54 L.Ed. 530, 25 L.R.A.,N.S., 1292, the United States Supreme Court held that (as well epitomized in the annotation at page 942 of 73 A.L.R.) "the courts of one state are not required by the full faith and credit clause of the federal Constitution to give effect to the statute of another state legitimizing children born prior to the marriage of their parents, so as to control the devo-

lution under a will of the title to lands in the state, particularly where to give effect to such statute would disturb interests already vested when the statute was enacted." Of course it is obvious that if a state is not bound to recognize a status of legitimacy created in another state it is not obligated to leave unchanged a status of illegitimacy existing in such other state.

[12] We deem it uncontestable that each state may formulate its own public policy in respect to legitimation and can enact laws to carry out its policy. There is no federal constitutional proscription against a state's adopting legislation which makes legitimate within the operation of its laws children who are illegitimate in other jurisdictions nor is there any constitutional requirement that such laws be limited in their applicability to children who were born in the state or whose parents (either or both) were domiciled in the state at the time of their birth or that such laws be dependent for operation on acts occurring within the state.

In the annotation at page 666 of L.R.A. 1916E, the conclusion is stated that "Whether acts of recognition in a different jurisdiction will be effective seems to depend upon the requirements of the particular statute of the jurisdiction where the suit involving the question of recognition occurs."

It will be noted that in none of the legitimation provisions of the California law hereinabove quoted is there any express or apparent requirement that the precedent marriage, void or otherwise, have been solemnized in California; or that the child of the marriage, void or otherwise, have been born in California; or that the parents, or either of them, or the child, at any time have been domiciled in California; or that the subsequent marriage of the parents of an illegitimate child be contracted in California; or that the legitimating acts specified in section 230 occur in California.

We come thus to the question as to what is the proper construction and application to be given section 230 of our Civil Code. That question is not an open one. In the case of Wolf v. Gall, 1916, 32 Cal. App. 286, 163 P. 346, 347, supra, the District Court of Appeal was dealing with the same problem which now confronts us. The material facts and the ruling of the court (hearing in this court denied) may be shown by quotation. "Arturo Wolf and Maria Julia Wolf, the respondents in this case, are the children born out of wedlock of Newman Wolf and Carmen Gonzales, and seek to have awarded to them a share in the property described in the complaint as heirs at law of Tobe Funkenstein, deceased, their grandmother, by right of representation of their deceased father, it being the claim of respondents that the subsequent marriage of their parents legitimated them by virtue of the provisions of section 215 of the Civil Code, and that their adoption by their father into his family in connection with such marriage also had for its effect their legitimation under section 230 of the same Code. The court * * * decreed that the respondents are heirs at law of said Tobe Funkenstein, and entitled to succeed to a part of her estate * * *." The evidence established that the father, Newman Wolf, through whom descent was claimed, had at all times concerned been an alien domiciled in Guatemala, and that it was in Guatemala that the legitimating acts occurred. After disposing of various other contentions of appellants therein, the court proceeded: "Nor do we think that the fact that Wolf was an alien and domiciled outside of California renders ineffectual the acts claimed to result in the legitimation of respondents. While it is generally true that the laws of one state or country have no extraterritorial effect, on the other hand, when the status of a person is under consideration before the courts of this state in questions of succession, they will apply our own statutes in determining the status of the claimant to the succession; and if the claimant shows that by applying our law he is entitled to take as a legitimate child, it is sufficient, and the fact that by the law of his own country he is not legitimate is immaterial." Pages 288, 289 of 32 Cal. App., page 347 of 163 P. It will be noted that in the above quoted case the children claimed by virtue of the provisions of both section 215 and section 230 of the Civil Code. The decision held both grounds to be good.

It has been suggested that a subsequent marriage (Civ.Code, § 215) may be differentiated from the legitimating acts contemplated by section 230 because such subsequent marriage changes the status of the parents. But this is patently a false differentiation because, unless the law of the place where such subsequent marriage occurs, or where the father is domiciled, ordains legitimation as a result thereof, such subsequent marriage in the other jurisdiction does not at all affect the legal status of the children in that jurisdiction. It affects only the status of the parents in their relationship *to each other,* not at all their status, in that jurisdiction, in relation to their illegitimate children. The decision in the Wolf case is based on the assumption that the children were still as illegitimate in the foreign state as though the marriage had not occurred. Such marriage was regarded simply as a fact—an act of the parents—which the law of California (Civ. Code, § 215) declares shall work in California the legitimation of the child. Section 230, likewise, and with no more limitation as to the place of occurrence declares that the acts of the father there specified shall accomplish the same result in respect to legitimating the child in its relationship to its father. It is apparent, therefore, that both grounds of the decision in the Wolf case support our conclusion here.

[13] Respondent impliedly seeks to have us overrule the Wolf case, although it is not cited in the briefs of either party, and necessarily asks us to apply a strict construction to section 230. It is suggested that section 230 is in derogation of the common law and should therefore be narrowly interpreted and applied. But such is not the proper rule of construction. The Civil Code itself declares the applicable rule (§ 4): "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice." We are satisfied that section 230 was properly construed and applied in the Wolf case. Such case is not the only instance in which that section has had liberal construction and application.

[14] In Blythe v. Ayres, 1892, 96 Cal. 532, 31 P. 915, 19 L.R.A. 40, we find an exhaustive and scholarly opinion[2] by Mr. Justice Garoutte in which, among other things, the objects and purposes of section 230 are admirably enunciated. He said (pages 559, 560 of 96 Cal., page 916 of 31 P., 19 L.R.A. 40): "The section is broad in its terms. It contains no limitations or conditions, and, to the extent of the power vested in the legislature of the state, applies to all illegitimates, wherever located, and wherever born. The legislature has not seen fit to make any exception to its operation, and, as was said by Chief Justice Taney, in Brewer's Lessee v. Blougher, 14 Pet. 178 [10 L.Ed. 408], when considering a quite similar provision of a statute: 'In the case before us the words are general, and include all persons who come within the description of illegitimate children; and when the legislature speaks in general terms of children of that description, without making any exceptions, we are bound to suppose they design to include the whole class.'

[15] "Bar, in his work on International Law (page 434), says: 'Legitimation of bastards, either by subsequent marriage or by an act of the government, (rescriptum principiis), is nothing but a legal equalization of certain children illegitimately begotten with legitimate children.' In other words, the object and effect of section 230 is to change the status and capacity of an illegitimate child to the status and capacity of a child born in lawful wedlock."

The learned Justice then concisely depicts the essential facts of the case and proceeds to a discussion of the extraterritorial aspects of operation of the law (pages 560, 561 of 96 Cal., page 916 of 31 P., 19 L.R.A. 40): "We have here a father at all times domiciled in the state of California, a mother at all times domiciled in England, and an illegitimate child born in England, and continuously there residing until the death of her father in California. * * * The contention of appellants that the status of a person residing in a foreign country, and a subject thereof, cannot be changed by acts performed in California under a provision of the law of our state legislature, cannot be supported as a rule without many exceptions, and to the extent of those exceptions, a state law must be held, by its own courts at least, to have extraterritorial operation * * *. The doctrine of extraterritorial operation of state laws is fully exemplified in the case of Hoyt v. Thompson, 5 N.Y.

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[2] Justices Paterson and Sharpstein fully concurred with Justice Garoutte in the main opinion. Two justices concurred in the judgment on one of the two theories stated in that opinion but dissented from application of the other theory solely on factual grounds which are not material under the facts of the case at bar.

[320], 340, where the court says: 'It is a conceded principle, that the laws of a state have no force proprio vigore beyond its territorial limits, but the laws of one state are frequently permitted by the courtesy of another to operate in the latter for the promotion of justice, where neither that state nor its citizens will suffer any inconvenience from the application of the foreign law. This courtesy or comity is established, not only from motives of respect for the laws and institutions of the foreign countries, but from considerations of mutual utility and advantage.'" Again, in Osborn v. Ozlin, 1940, 310 U.S. 53, 62, 60 S.Ct. 758, 761, 84 L.Ed. 1074, the Supreme Court stated that "The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids." (See also State Farm Mut. Automobile Ins. Co. v. Duel, 1945, 65 S.Ct. 573, 575.)

[16] Discussing section 215 of the Civil Code ("A child born before wedlock becomes legitimate by the subsequent marriage of its parents") Justice Garoutte says (pages 563–575 of 96 Cal., page 917 of 31 P., 19 L.R.A. 40):

"This section takes a wide range. Its operation is not confined within state lines. It is as general as language can make it. Oceans furnish no obstruction to the effect of its wise and beneficent provisions. It is manna to the bastards of the world. If Blythe [plaintiff's father], subsequent to the birth of plaintiff, had returned to England, and married Julia Perry [plaintiff's mother], such marriage, under the provision of law just quoted, ipso facto would have resulted in the legitimation of Florence Blythe. Then * * * we say that she was so domiciled that by the laws of California she could have been changed from bastardy to legitimacy. * * *

"[Page 567 of 96 Cal., page 919 of 31 P.] We have in Loring v. Thorndike, 5 Allen [Mass.], 257, a case involving additional elements, and therefore additional complications, even to those found in the Munro case [Munro v. Munro, 1 Rob. Scot.App. 492, discussed on pages 564–566 of 96 Cal., page 918 of 31 P., 19 L.R.A. 40]. The man was domiciled in Massachusetts. The woman was domiciled in Mayence. The illegitimate children were born in Frankfort on the Main, and the marriage occurred at that city. To accomplish legitimation, the Massachusetts law required not only a subsequent marriage, but a subsequent acknowledgment of the child. Upon this state of facts, and this provision of law, the child was held legitimate by the Massachusetts court, *even though the acts of acknowledgment occurred in a foreign country.* [Italics added.] * * * [Page 571 of 96 Cal., page 920 of 31 P.] We have quoted thus extensively from the authorities upon the subject of domicile as specially bearing upon the question of legitimatio per subsequens matrimonium for the reason that we are unable to perceive any difference in the general principles of law bearing upon that character of legitimation and in those principles bearing upon other forms of legitimation authorized by the same statute. * * * [Page 572 of 96 Cal., page 920 of 31 P.] Upon principle no distinction can be made between the rules of law applicable to these various forms of legitimation. * * * [Page 575 of 96 Cal., page 921 of 31 P.] Legitimation is the creature of legislation. Its existence is solely dependent upon the law and policy of each particular sovereignty. The law and policy of this state authorize and encourage it, and there is no principle upon which California law and policy, when invoked in California courts, shall be made to surrender to the antagonistic law and policy of Great Britain."

And likewise, we may paraphrase, there is no principle upon which our law and policy, now invoked, shall be made to surrender to the antagonistic (if they be such) law and policy of Minnesota or New Mexico or Norway.

It is thus apparent that the failure of the proof to expressly establish that petitioner himself became domiciled in California during his father's lifetime (assuming that because he was of adult years his domicile did not follow that established by his father) does not defeat his claim. We are also satisfied that the broad and sweeping language of section 230, considered in the light of the public policy evidenced thereby, does not contemplate that the operation of that section shall be limited by judicial construction to the legitimation of those children only whose respective fathers were domiciled in California at the time of their birth. No sound basis for any such classification among illegitimates appears and to indulge it would not only write into the statute a limitation not placed there by the Legislature but would defeat in many cases the policy which dictated the legislation.

We likewise are satisfied that it would be contrary to the purpose of the statute and the public policy of this state, and an unwarranted restriction upon the language used, to interpret it as applying only to *minor* children. Certainly an adult is as interested as is a minor in transmutation of status from illegitimacy to legitimacy and we perceive no compelling reason why the policy of the state favoring legitimation of children should be cut off upon their attaining majority. In Estate of Pico, 1877, 52 Cal. 84, this court in a per curiam opinion held that section 230 was applicable only to minor children. Its conclusion was based on the proposition that section 230 appears in the chapter headed "Children by Adoption" and that the first section in that chapter (§ 221) provides that "Any minor child may be adopted by any adult person, in the cases and subject to the rules prescribed in this chapter." Then follow several sections which unquestionably do apply exclusively to minor children. But section 230, after providing that "The father of an illegitimate child, by publicly acknowledging it as his own [etc.] thereby adopts it as such," concludes with the sentence, "The foregoing provisions of this chapter do not apply to such an adoption." We think it reasonable, therefore, and more consonant with our view of the state's policy, to construe the statute as it stands enacted, neither adding to nor subtracting from its words, and to hold that its benefits are available to all so-called illegitimate children (who in truth could be more accurately referred to as the natural children of illegitimate parents) whether they be minors or adults and whether the acts essential to effectuate their legitimation occur during their minority or later. "When a statute * * * is equally susceptible of two interpretations, one in favor of natural right, and the other against it, the former is to be adopted." Code Civ. Proc., § 1866.

It is also to be observed, as strengthening our conclusion in respect to differentiating the applicability of section 230 from that of other sections in chapter II of title II, part III, division I of the Civil Code, that there is a natural and basic difference between the adoption of blood strangers and the adoption by legitimation of a natural child. Concerning this difference, Justice Garoutte in Blythe v. Ayres, 1892, supra, 96 Cal. 532, 559, 31 P. 916, 19 L.R.A. 40, said: "Before passing to the merits of the discussion, we pause a moment to say that the verb 'adopts,' as used in section 230, is used in the sense of 'legitimates,' and that the acts of the father of an illegitimate child, if filling the measure required by that statute, would result, strictly speaking, in the legitimation of such child, rather than in its adoption. Adoption, properly considered, refers to persons who are strangers in blood; legitimation, to persons where the blood relation exists. See law dictionaries,—Bouvier, Black, Anderson, and Rapalje. This is the distinguishing feature between adoption and legitimation, as recognized by all the standard law writers of the day who have written upon the subject; and, for the reason that the text writers and decisions of courts to which we shall look for light and counsel treat the subject as a question of legitimation, we shall view the matter from that standpoint. Webster's New International Dictionary, second edition, says "legitimate" means "To put [a bastard] in the position or state of a legitimate child before the law, by legal means; —distinguished from adopt, which has no reference to blood relation." See, also, Estate of McNamara, 1919, 181 Cal. 82, 86, 183 P. 552, 7 A.L.R. 313.

[17] So considered, it becomes the more obvious that it is reasonable to conclude that the Legislature by declaring in section 230 that "The foregoing provisions of this chapter do not apply to such an adoption," i. e., to *legitimation,* meant to confer the broad benefits of that procedure without the limitations express or implicit in ordinary adoption proceedings. Estate of Pico, 1877, supra, 52 Cal. 84, to the contrary (and which is in effect and on reason inconsistent with Wolf v. Gall, 1916, supra, 32 Cal.App. 286, 295, 296, 163 P. 346), is overruled; dicta, based on Estate of Pico, appearing in Re Jessup, 1889, 81 Cal. 408, 421, 21 P. 976, 22 P. 742, 1028, 6 L.R.A. 594, and in Estate of Heaton, 1902, 135 Cal. 385, 387, 67 P. 321, are disapproved.

[18] Assuming, as we have held, that the provisions of section 230 are applicable to adult as well as minor children, it is not disputed that Andrew Lund, at least in the States of Minnesota and New Mexico, did everything necessary to have

legitimated petitioner in California if the legitimation statutes of this state ever became operative upon the status of petitioner in relation to his father. Andrew publicly acknowledged petitioner as his own child; he received petitioner as such, with the consent of his wife, into his family, and he otherwise treated petitioner as if he were a legitimate child. He died leaving estate in California. Under the holding in the Wolf case this showing entitles petitioner to succeed, in the status of a legitimate son, to a share in the estate of his father. But it is not alone upon the authority or theory of the Wolf case that petitioner has established his status and right of succession.

When Andrew Lund came to California and made his domicile here the status of the relationship between Andrew and petitioner clearly then, if not before, became subject to the jurisdiction of this state for all purposes connected with the administration of its laws. Excluding for the purposes of this discussion (in order that we may fully examine the legal issues upon this theory) the effect and theory of the ruling in Wolf v. Gall, 1916, 32 Cal. App. 286, 288, 163 P. 346, supra, the sole question not already disposed of is whether upon the facts shown the law of California ever became operative to work the transmutation of status.

Let us scrutinize carefully the requirements of our statute and measure them with the facts established. The first requisite is that the father shall *publicly* acknowledge the child as his own. This he did. The public acknowledgment shown here was and *still remains* unconditional. It was not subjected to any limitation of time or territory; it was a *public* acknowledgment for all time to the whole world —to the citizens of California as well as to those of Minnesota. Andrew Lund sent to Norway for *his son Bert Lund,* not for a person designated as the illegitimate child of Caroline Anderson. It was Bert Lund, *the acknowledged son of Andrew,* who traversed the long route from Norway, on the high seas of the world, across the Atlantic Ocean, through half of the United States, to the family home in Minnesota. There, in compliance with the second requirement of the California statute, and further evidencing compliance with the first, Bert was received into the family with the full consent of both Andrew and his wife Agnes. From then on, conforming to the third specification of the statute, Bert was treated as if he were a legitimate child; in the language of the stipulated testimony, he "was treated by Andrew and Agnes Lund the same as they treated Frank and Blanche Lund."

[19] Is it reasonable to hold that this public acknowledgment, this receipt into the father's family and treatment as a legitimate child, were all revoked and destroyed in their *factual* significance by a mere change of domicile? On the contrary, it seems more consonant with reason to hold that the unconditional public acknowledgment of a child as his own by a man who has full knowledge of all the facts, is, as previously suggested, not an act which is subject to limitations of time or territorial boundaries. Likewise it must be accepted as true that once a child has been received into the family of its father, *it attains the de facto status of a member of that family,* and unless disavowed, such status (in a broad sense) continues with it for the remainder of its days. The word "family" means not merely those who live in one house but, in equally wide usage, signifies all who are descended from a not too distant common progenitor. Webster's New Int. Dict. (2d Ed.). Here the petitioner was received into the intimate family circle, the household itself; he became as much a member of the family as was his half-brother Frank or his half-sister Blanche. That de facto status of family relationship is affirmatively shown to have continued during all the years of the family's residence in Minnesota and in New Mexico. It is not shown to have ever been disavowed or terminated. So firmly established, it became a continuing factual status, which was attached to and went with the family and each of its members. Its *legal* significance, or lack thereof, in Minnesota and New Mexico is not binding on California. It is its *factual* significance which is controlling. That factual significance was indelibly attached to Andrew Lund and came with him to California. Having so many years previously first publicly acknowledged petitioner as his son, and having thereafter consistently treated him in all respects as a legitimate child and member of his family, is it to be expected that Andrew, upon coming to California, should have told his new neighbors: "I have a son named Bert. He was born illegitimate in Norway but many years ago in Minnesota I publicly acknowledged

him as my child; I received him, with the consent of my wife, into my family; he has resided with us since; I have treated him as my legitimate child and as I treat my son Frank and my daughter Blanche; we moved to New Mexico; I publicly acknowledged him there and he continued to reside with us," etc.? On the contrary would it not be more consistent with treating petitioner in every respect as a legitimate child, and with continuing reaffirmation of all the acts of the father in Minnesota and New Mexico, for Andrew to remain silent on such intimate events of the past? Silence, it is said, when one is under a duty to speak, may be more eloquent than words; and silence by a father as to the legitimacy of a child, once that child has been publicly acknowledged and received into the father's family, is convincing evidence of continuation of the public acknowledgment, and in itself exemplifies treating the child as legitimate.

[20] It is presumed "That a thing once proved to exist continues as long as is usual with things of that nature" (Code Civ. Proc., § 1963(32)) and "That a person is innocent of * * * wrong" (Code Civ. Proc., § 1963(1). Hence it will be presumed that the publicly acknowledged and long established and recognized factual status of family relationship between father and son continued after Andrew moved to California and that he did not wrong his son by disavowing his theretofore long continued, consistent, and otherwise continuing public acknowledgment of the fact. Once the child had been unconditionally received into the family, he was received permanently and continuingly unless and until such reception was revoked (if in its nature it could be revoked), and a revocation of such reception would constitute an unnatural and wrong act. Such an act will not be presumed. Bert Lund, the petitioner, no more lost his continuing status as a de facto member of the Lund family by the coming of Andrew to California than did Frank or Blanche lose their de jure status in that family.

We are satisfied that the public, unconditional, and long continued acknowledgment of a child by his father, with full knowledge of the facts, accompanied by reception of the child into the family and treatment as a legitimate child, constitutes a continuing representation to the whole world of a permanent de facto family status which is the very essence of the requirements of section 230 of our Civil Code; that such representation is of a fact which by its nature is inherently permanent and continuing and goes with the father wherever he goes. The factual significance of the father's acts, proclaimed to the whole world, was the same in California as in Minnesota or New Mexico. The fact that the legal effect of those acts may have been inconsequential in Minnesota and New Mexico is immaterial in California. When Andrew Lund came here and established his domicile he did so in the light of the factual significance of his previous acts. His conduct in California in remaining silent in respect to the facts surrounding the birth of petitioner is consistent with his prior acts and amounts to a continuing representation of the facts and de facto status which he had publicly proclaimed. His acts were, it is repeated, inherently of a permanent and continuing character. The biological relationship of father and son, and the de facto family relationship which the father had established, are not transient or volatile things which may exist one moment and be nonexistent the next, or which depend for their continuance upon repetitions of the original words or acts. Once proclaimed and established they exist as facts for all time and in all places. And when the living proclaimer of those facts comes to California and establishes his domicile herein and leaves estate to be distributed according to our laws of succession, the courts of California need not ignore those facts and are not powerless to apply them. Their legal effect within this state will be admeasured by the laws of this state.

For the reasons hereinabove stated the order appealed from is reversed and the cause is remanded to the trial (probate) court with directions to enter its decree establishing the right of petitioner to share in the estate of his father as a legitimate son.

GIBSON, C. J., CARTER, J., and PETERS, Justice pro tem., concurred.

EDMONDS, Justice (dissenting).

I cannot concur in the conclusions upon which this case is decided and am of the opinion that the judgment of the probate court should be affirmed. The petitioner had the burden of proof (Prob. Code, § 1230); presumably he made out as favorable a case as the facts would permit and all inferences to be drawn from the evidence must be resolved in favor of the order of the probate court. But Justice SCHAUER has weighed the evidence and drawn inferences from it contrary to those of the trier of facts to support a theory which he principally justifies upon grounds of social policy.

Section 230 of the Civil Code provides that a child is legitimated for all purposes when the father publicly acknowledges his parentage, receives the child into his family with the consent of his wife, if married, and otherwise treats the child as if it were legitimate. This section, Justice SCHAUER states in effect, should be construed as providing that, for the purpose of status in California, any child born out of wedlock may be legitimated by the declaration of the father without regard to the domicile of the parent at the time he acknowledges the relationship. Yet the statute includes no language which, by the broadest construction allowable under fundamental legal principles, properly may be held to give it unlimited extraterritorial effect in contravention of the established rules concerning conflict of laws.

Certainly, the enactment expresses no intention that its operation shall violate the doctrine by which, in general, status is determinable according to domiciliary law. Beale, Conflict of Laws (1935), vol. 1, § 1.8, p. 7; § 9.3, p. 91; Goodrich, Conflict of Laws (2d ed. 1938), pp. 25, 26; Stumberg, Conflict of Laws (1937), p. 254. The narrow question for decision, therefore, is whether, for the purpose of fixing the petitioner's status, a statute of this state which allows status to be established by the acknowledgment of a father, governs a declaration made by one then a resident of a foreign jurisdiction.

"The rules of Conflict of Laws are part of the law of each common law state, and as such are as binding upon the courts as any other parts of the law of the state." Rest., Conflict of Laws, § 5, p. 9. And, it is stated in the comment to the foregoing section, "Conflict of Laws, as adopted, becomes no less definitely a part of the law than any other branch of the state's law; and in the application of its principles the courts have no more discretion than in any other part of the law. * * * It derives this law from the same sources used for determining all its law: from precedent, from analogy, from legal reason, and from the consideration of ethical and social need. * * * Upon careful analysis, the application of the principles of Conflict of Laws does not impair in the least the sovereignty of the state applying the rule of another state to a legal problem. * * * Principles of Conflict of Laws are 'law' in the true sense and involve no departure from the theory that territorial law is supreme." Goodrich, Conflict of Laws (2d Ed. 1938), pp. 9-11; and see, also, Beale, Conflict of Laws (1935), vol. 1, § 5.3, p. 52.

The evidence in the present case shows, without contradiction, that although the father acknowledged parentage and took his son into his home while domiciled in Minnesota and New Mexico, he made no legitimating declaration while domiciled in this state, nor did the boy live with him here. Under these circumstances, as I read the law, there is no "wide and heterogeneous conflict of authority" as Justice SCHAUER asserts. "Where some act other than the subsequent intermarriage of the parents is relied on to establish legitimacy—as, for instance, acknowledgment of paternity—," a late text declares, "the general rule is that the law of the father's domicil at the time of the legitimating act will be the proper law to determine the status of both parent and child. The father must, at the time of the acts of legitimation, be domiciled in a jurisdiction wherein those acts are recognized as legally sufficient. They will not, on his subsequently becoming domiciled in a jurisdiction in which they are sufficient, be permitted to operate nunc pro tunc as a legitimation in the latter jurisdiction." 11 Am.Jur. (Conflict of Laws, § 21) 319. The same rule is stated in the Restatement, Conflict of Laws, § 140, p. 207, as follows: "An act done after the birth of an illegitimate child will legitimize the child as to a parent from the time of the act if the law of the state of domicil of that parent at that time so provides. * * * The law must be that of the state in which the parent is domiciled at the time of the act; it is not enough that he later becomes domiciled in a state whose law provides for the legitimizing upon the doing of the act."

California has been uniformly included in the states which follow the general rule and Blythe v. Ayres, 96 Cal. 532, 31 P. 915, 19 L.R.A. 40, is widely cited by practically all leading authors and encyclopedias as well as by the courts of the sister states as a leading case in support of the doctrine. Blythe, while domiciled in this state, publicly acknowledged the plaintiff as his child and the court held that the declaration effected legitimation. But as the plaintiff resided in England until the time of Blythe's death, the statements of the court regarding the extraterritorial operation of the statute were in regard to that circumstance; they are not authority for holding that the declarations made by a father while domiciled outside of this state satisfy the provisions of section 230 of the Civil Code.

When facts similar to those shown in the present case were before the Supreme Court of Oklahoma, upon the authority of Blythe v. Ayres, supra, which was said to be in accord with the general rule that the domicile of the father is controlling, it was held that the child was not legitimated by a statute identical with section 230 of the Civil Code of this state. The court said: "We are of the opinion that the particular rule applicable to this case and the rule that seems to be sustained by the greater weight of authority is found in 5 R.C.L., § 14, p. 920, which is as follows: 'Where some act other than the subsequent intermarriage of the parents is relied on to establish legitimacy, as, for instance, acknowledgment of paternity, the general rule is that the law of the father's domicile at the time of the legitimating act will be the proper law to determine the status of both parent and child. * * *'" In re Presley's Estate, 113 Okl. 160, 240 P. 89, 92.

The case of Pfeifer v. Wright, 10 Cir., 41 F.2d 464, 73 A.L.R. 932, extensively quoted from by Justice SCHAUER, is to the same effect. There the minor was born in Kansas where her mother and father then resided, and was always there acknowledged as the child of the parties. The father died a resident of Oklahoma, leaving property in that state. The court recognized the rule that the domicile of the father at the time of his acts of acknowledgment governed the status of the child, but held that the Kansas statute was merely a statute conferring rights of inheritance, rather than a statute changing status. The American Law Reports annotation to this case (73 A.L.R. 941) is enlightening. In discussing the question as to what state shall furnish the personal law of the child to determine his legitimacy, it states: "As a general rule, where the ground for the acquisition of the status of legitimacy is an act other than the intermarriage of the parents, such as the act of the father in acknowledging the child as his own, the question whether such act will have the effect of legitimating the child will be determined by the law of the domicil of the father at the time of the performance of the act, to the exclusion of any other law. * * * Neither the law of the state of the mother's domicil, nor that of the state of the child's birth, nor that of the state of the actual residence of the child, will be applied in determining whether the acts relied upon as having a legitimating effect have that effect; but the applicable law is that of the domicil of the father at the time he acts. * * *" Pages 956-957.

Again in 10 Corpus Juris Secundum, Bastards, § 8, p. 51, it is stated: "In general, the domicile of the father of an illegitimate child determines as to subsequent legitimation, as, for example * * * by acknowledgment or recognition, or by public acknowledgment, together with other acts, by the father which are required by the applicable statute, and the laws of the domicile of the child and mother are not controlling with reference to alleged acts of legitimation by the father."

Notwithstanding this overwhelming authority, and the decision in the Blythe case, Justice SCHAUER states that the construction and application of section 230 of the Civil Code is not an "open" question in California. This declaration is based upon the decision in Wolf v. Gall, 32 Cal.App. 286, 163 P. 346, 350, 351. Although the District Court of Appeal erroneously interpreted the Blythe case as holding that a legitimation occurs when a child is acknowledged by his father at a time when the father was domiciled without this state (California Annotations, Rest., Conflict of Laws, p. 64), in denying a hearing this court stated that "we are not entirely in accord with all the reasoning" of the opinion. Also, it should be noted, the decision in the District Court of Appeal was placed upon the alternative grounds that the Wolf children were legitimated according to both sections 215 and 230 of the Civil Code, and in refusing to hear the case, this court held that the children were entitled to inherit as illegitimates under Civil Code, § 1387 (now Prob. Code, § 255). The opinion of this court strongly implies that it agreed with the conclusion of the District Court of Appeal only because the children were entitled to inherit according to the terms of the section governing the rights to succession of children born out of wedlock. Accordingly, regardless of the decision in Blythe v. Ayres, supra, the Wolf case is, at most, doubtful authority.

It is significant that the courts of other states have recognized and followed Blythe v. Ayres, supra, as stating the law of California, mentioning the Wolf case as being contrary to the earlier decision. "As to the case of Wolf v. Gall," said the Supreme Court of Nevada, "* * * we have never attached any weight to it, so far as the question in this case is concerned; for, no matter what significance might be given it under ordinary circumstances, the Supreme Court of California * * * held that it was not entirely in accord with its reasoning. In any event * * * so far as we are advised, the law as laid down in the Blythe case is still good in California. * * * [and the Blythe] opinion turned upon the proposition that the law of the domicile of the father controlled a rule which we know to be supported by practically all of the authorities in the United States, and as well, we believe, by sound reason." (In re Forney's Estate, 43 Nev. 227, 184 P. 206, 186 P. 678, 680, 24 A.L.R. 553.) Also, in the case of In re Presley's Estate, supra, wherein the Oklahoma Supreme Court held that an Oklahoma statute identical to section 230 did not govern status under circumstances the same as those in the present case, the court construed the holding in Blythe v. Ayres as in accord with the general rule that the law of the domicile of the father was controlling and disposed of Wolf v. Gall with the comment: "* * * Yet we do not think, under the state of facts of that case, so different to the one under consideration here, that it can be given very serious weight here, and certainly it cannot be controlling in this case."

To supply the obvious deficiency of legal authority to support his conclusions, Justice SCHAUER relies upon theories having no support in law. For example, as a final ground of decision, he attempts to ignore the fact that the father of Lund made no legitimating declaration while domiciled in this state by holding that the acts done in Minnesota and New Mexico, as a matter of law, were repeated wherever the father went and must be presumed to have continued at all times unless expressly revoked. The authorities clearly refute any such artificial and unwarranted presumption; they squarely hold that it is not sufficient that the father later acquires a domicile in a state recognizing the acts as conferring legitimacy.

As justifying the departure from established legal principles, Justice SCHAUER also mentions the present day change of attitude toward those born outside of the marriage relation, and concludes that any divergence of opinion, as evidenced by the present controversy, reflects "the personal attitudes of the justices of the various courts as being conservative or liberal in the interpretation and application" of legitimation statutes. But neither sentiment nor the desire to reach a particular result is a sound basis for evading or overturning long accepted rules of decision, and only by judicial legislation may it be said that the law of California affords any relief upon the facts shown by the record in the present case.

The question before the court is not whether the statute should be liberally construed for the purpose of determining whether the father performed the acts required by law; the issue is one of private international law. The necessity for and the purpose of rules of conflict of laws is at once apparent to anyone who contemplates upon the difficulties arising from the fact that this nation is comprised of forty-eight different states each having its own body of law. Otherwise, those whose affairs transcend a single state's boundaries would be without guidance as to the law governing their acts. See Beale, Conflict of Laws (1935), vol. 1, § 1.3, p. 4; Goodrich, Conflict of Laws (2d Ed. 1938), pp. 4-6. As stated in the Introduction to the Restatement of the Law, Conflict of Laws (pp. XIII and XIV): "The subject has presented very great special difficulties. Extraordinary as it may appear in view of the fact that we are a nation of forty-eight states, each with its own body of law, these special difficulties are in the main due to the fact that the legal profession has failed until recently to recognize the great practical importance of the subject. * * * Due to this pedagogical neglect the courts, confronted with questions of Conflict of Laws, have not, in many cases, brought to their solution an adequate background of knowledge."

For these reasons, in my opinion, the judgment should be affirmed.

SHENK and TRAYNOR, JJ., concur.

69 Cal.App.2d 663

SCOTT v. CROSTHWAITE.

Civ. 12885.

District Court of Appeal, First District, Division 2, California.

June 22, 1945.

1. Judgment ⚿153(2)

When a default is entered after personal service, delinquent party must move for relief within six months of date of entry, and motion to set aside a subsequent judgment, though made within six months of its entry, does not affect default and does not permit delinquent party to file any pleadings or to take any other steps in defense of action. Code Civ.Proc. § 473.

2. Judgment ⚿159

Where motion to set aside a default and subsequent judgment was made more than six months after default, and motion was supported by affidavit of counsel for defendant only and set forth facts in relation to a defense to the action which were based entirely upon hearsay and showed affirmatively that there was want of diligence in permitting time to run, motion was required to be denied. Code Civ.Proc. § 473.

◆

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by James A. Scott against Oliver Crosthwaite for damages and for personal services rendered to defendant. From an order which set aside a default of defendant and judgment taken after default, and permitting defendant to file a cross-complaint and bring in a new party, plaintiff appeals.

Reversed.

Simeon E. Sheffey, of San Francisco, for appellant.

Hugh F. Mullin, Jr. and Kirkbride & Wilson, all of San Mateo, for respondent.

NOURSE, Presiding Justice.

The plaintiff appeals from an order which set aside the default of defendant and a judgment taken after the default, and which permitted the defendant to file a cross-complaint and bring in a new party. After appellant's brief was filed the respondent suffered default in this court by failing to file his brief. Notice of default was duly given in accord with Rule 17b, Rules on Appeal, and the cause was thereafter submitted upon appellant's opening brief.

On April 7, 1944, plaintiff filed a complaint for damages and made personal service upon the defendant. On May 24th the default of defendant was entered. Judgment on the default was rendered on June 7th and filed on June 10th. On November 27th the defendant gave notice of motion to set aside the default and the judgment, and for leave to file an answer and cross-complaint and to bring in a new party. This motion was granted on December 4, 1944.

[1] The motion to set aside the default and judgment came too late. Section 473 of the Code of Civil Procedure authorizes the court to relieve a party "from a judgment, order, or other proceeding taken against him" through his mistake or excusable neglect. A default entered by the clerk is a proceeding taken against the delinquent party. Burns v. Superior Court, 140 Cal. 1, 5, 73 P. 597; Title Ins., etc., Co. v. King, etc., Co., 162 Cal. 44, 46, 120 P. 1066. The latter case clearly defines the effect of the procedure under the Code section to be that when a default is entered after personal service the delinquent party must move for relief within six months of the date of entry, and a motion to set aside a subsequent judgment, though made within six months of its entry, does not affect the default and does not permit the delinquent party to file any pleadings or to take any other steps in defense of the action.

[2] The rule of this case was followed in Macbeth v. Macbeth, 219 Cal. 47, 25 P.2d 11, and McLain v. Llewellyn Iron Works, 56 Cal.App. 58, 204 P. 869, and we have found no case to the contrary. Though it has been said to be a harsh rule of procedure, that cannot be said here because the showing made by respondent was insufficient and the application should have been denied on the ground. It was supported by the affidavit of counsel for respondent only and this affidavit set forth facts in relation to a defense to the action which were based entirely upon hearsay and also showed affirmatively that there was a want of diligence in permitting the time to run.

The order is reversed.

GOODELL, J., and DOOLING, Justice pro tem., concur.

69 Cal.App.2d 536

ROFF v. CRENSHAW.

Civ. 14785.

District Court of Appeal, Second District, Division 3, California.

June 8, 1945.

As Modified on Denial of Rehearing
July 6, 1945.

Venue ⚷7

A "check" is a contract within venue statute, and county in which the contract is entered into is the proper county for trial of action on the check where drawer stopped payment thereof, notwithstanding check is payable in another county. Code Civ.Proc. § 395; Civ.Code, §§ 3082 et seq., 3265a.

See Words and Phrases, Permanent Edition, for all other definitions of "Check".

◆

Appeal from Superior Court, San Luis Obispo County; Ray B. Lyon, Judge.

Action upon a check by Marie Roff against Joseph T. Chrenshaw, also known as Jos. T. Crenshaw. Defendant filed a motion for a change of venue, and, from an order denying the motion, defendant appeals.

Affirmed.

Phil F. Garvey, of San Francisco, for appellant.

Lawton D. Champion, of Paso Robles, for respondent.

DESMOND, Presiding Justice.

This is an appeal from an order denying defendant's motion for a change of venue. Suit was filed in the county of San Luis Obispo upon a check reading as follows:

"90–1379 Millbrae Branch 90–1379
"Bank of America No. 209
"National Trust & Savings Association
"Milbrae, Calif. Aug. 16 1944

"Pay to the order of Marie Roff $500 00/
Five Hundred and No/xx dollars
"Jos. T. Crenshaw"

It was alleged in the complaint that the defendant made, executed and delivered the check in the county of San Luis Obispo; that on the day following its date it was presented for payment to the Millbrae branch of the Bank of America and was refused payment upon a written order executed by the defendant stopping the payment thereof. To this suit the defendant filed a demurrer at the same time that he moved that the action be transferred to the county of San Mateo, in which county Millbrae is located. In a supporting affidavit the defendant alleged that he had been a bona fide resident of the county of San Mateo for more than five years last past and that "the alleged check mentioned and described in plaintiff's complaint on file herein, was in fact payable and to be performed in the City of Millbrae, County of San Mateo, State of California." The motion for change of venue was based upon these allegations and shortly after the hearing thereon the motion was denied and the demurrer sustained, fifteen days allowed for amendment.

Appellant predicates his appeal upon the statement "that there is no allegation by the plaintiff in the complaint or by way of affidavit that the *contract was in fact entered into* in San Luis Obispo County, and in view of the contract in writing which was to be paid and performed in San Mateo County it cannot be *deemed* that the contract was to be performed in San Luis Obispo County." (Italics by appellant.)

To this the respondent replies that the allegation of the complaint that the check was made, executed and delivered in San Luis Obispo County is equivalent to saying that the contract was in fact entered into in that county, and then relies upon section 395, Code of Civil Procedure, to support the order refusing to transfer the case to San Mateo County. Referring to that section we find that when "a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, *or in which the contract in fact was entered into,* or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary." The words which we have italicized in this excerpt were added to section 395 in the year 1939 and, in our opinion, form a sufficient basis for the decision of the court.

Although the appellant in his opening brief states that "In the instant case there is a special contract in writing (the check sued upon), that the contract is to be paid and performed at Millbrae, California (San Mateo County)," and elsewhere, as we have shown, by direct quotation refers to the instrument in question as a contract in writing, he makes the statement in his closing brief that "A check is not a contract and the laws governing contracts can have no application to checks since the enactment of the Negotiable Instruments Law," and also argues that "The check in question here is not a contract but is a negotiable instrument expressly distinguished from contracts by the Negotiable Instruments Law, and since Section 395, Subsection 1, of the Code of Civil Procedure relates specifically to *contracts,* it does not govern the instant case and has no application here." (Italics by appellant.) But according to the Restatement of the Law of Contracts, at page 8, "Contracts are classified as formal or informal; as unilateral or bilateral" and "Formal contracts are (a) Contracts under seal, (b) Recognizances, (c) Negotiable instruments." While it is true that Title XV of Div. 3, Pt. 4 of the Civil Code of California (adopted in the year 1917) embodies the so-called Uniform Negotiable Instruments Law, there is nothing under that title to indicate that a bill of exchange or a check, such as was given in this case, is not a contract. Section 3265a of the Civil Code, under Title XV, defines a check as a "bill of exchange drawn on a bank payable on demand," and continues, "Except as herein otherwise provided, the provisions of this title applicable to a bill of exchange payable on demand apply to a check." In the treatise on Bills and Notes, 7 Am.Jur. 788 (published in 1937 long after Title XV was adopted by our legislature), we find the statement that "A bill, draft, check, or note is a contract, and the fundamental rules governing contract law are applicable to the determination of the legal questions which arise over such instruments," and at page 790 the statement is made that "Bills of exchange, drafts and checks are all substantially in the same form. They are, in substance, orders drawn by one person upon another directing the latter to pay a certain sum of money to a third person or order, or to a third person or bearer."

The court, in Deal v. Atlantic Coast Line R. Co., 1932, 225 Ala. 533, 144 So. 81, at page 82, 86 A.L.R. 455, at page 457, says that "a check is a contract within itself, and imports an obligation or engagement on the part of the drawer to pay the same, if, on due presentation to the bank, payment is refused." See, also, section 3141, Civil Code, under the title "Negotiable Instruments. No case to which we have been cited is governed by any different principle and the same article to which we have already referred has this to say at 8 Am.Jur. 237: "The drawer of a check impliedly represents that he has funds or credits available for its payment in the bank upon which it is drawn. In the absence of an express stipulation negativing or limiting liability, the drawer of a check admits the existence of the payee and his then capacity to indorse and engages that on due presentment the check will be paid according to its tenor and that if it should be dishonored and the necessary proceedings on dishonor are duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it. The drawer is not liable to pay the check until the holder has demanded and failed to obtain payment from the drawee bank, unless there are circumstances which dispense with the necessity of presentment. * * * There seems to be no doubt as to the right of the payee of a check, upon its nonpayment, to sue the drawer either upon the check itself or on the original consideration [citing Camas Prairie State Bank v. Newman, 15 Idaho 719, 99 P. 833, 21 L.R.A.,N.S., 703, 128 Am. St.Rep. 81." In the annotation attached to the report of this cited case in 21 L.R.A., N.S., at page 704, we find that in Henshaw v. Root, 60 Ind. 220, it was expressly held that "the payee of a bank check, upon payment being refused, and notice being given the maker, may maintain an action thereon against the latter, it not being necessary to resort to an action on the original consideration; as the natural inference from the giving of the check is that it is in payment of a debt due from the maker to the payee, and, when demand has been refused and notice of its nonpayment given, the maker is as much liable upon it as he would be upon a dishonored bill of exchange." The case, Byrd Printing Co. v. Whitaker Paper Co., 1911, 135 Ga. 865, 70 S.E. 798, at page 800, Ann.Cas.1912A, 182, mentioned in foot-note to Section 1748, Daniel on Negotiable Instruments, 7th Ed., p. 1791, involved an action based upon a check which plaintiff had received from defendant. The suit was held immune to attack under a general demurrer and the court, upon appeal, stated: "A check is a contract, and not a 'mere request upon a third party to pay money.' (Citing case.) Like a promissory note, it imports a consideration, and none need be alleged in the petition in an action to collect the amount due thereon. Inasmuch as the check was made payable to the Whitaker Company, and the petition alleged that the check had been presented for payment and the same refused, no further showing of its right to sue thereon was necessary."

Under the authorities cited, it is clear that the instrument sued upon in the instant case is a contract and, since it was entered into in the county of San Luis Obispo, that is a proper county for the trial of the action. The court rightly denied the motion for the change of venue and its order to that effect is hereby affirmed.

SHINN and PARKER WOOD, JJ., concur.

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69 Cal.App.2d 593

OTT HARDWARE CO., Inc., v. YOST et al.

MARTINSEN v. SAME.

GANAHL LUMBER & MILL CO., Inc., v. SAME.

STUART v. SAME.

Civ. 3277.

District Court of Appeal, Fourth District, California.

June 15, 1945.

Hearing Denied Aug. 13, 1945.

1. Mechanics' liens 🔑78

A participating owner, even though acting through his agent in the improvement of property, cannot relieve his property from mechanic's liens by filing a nonresponsibility notice. Code Civ.Proc. § 1192; Const. art. 20, § 15.

2. Mechanics' liens 🔑288(2)

Generally, under conflicting evidence, question whether a lessee is owner's agent in improving property so as to subject owner's property to mechanic's liens is one of fact. Code Civ.Proc. § 1192; Const. art. 20, § 15.

3. Mechanics' liens 🔑288(2)

Where construction of lease, addenda, and other undisputed writings determined whether lessee was owner's agent for improving property so as to subject owner's property to mechanic's liens, question was one of law. Code Civ.Proc. §§ 1192, 2102; Const. art. 20, § 15.

4. Mechanics' liens 🔑281(3)

In action against theater owners and others for foreclosure of mechanic's liens, evidence that under lease lessees were obligated to make alterations and improvements warranted finding that lessees were owners' agents and entitled to subject owners' property to mechanic's liens. Code Civ.Proc. § 1192; Const. art. 20, § 15.

5. Mechanics' liens 🔑72

Where lessees of theater were obligated to make alterations and improvements, a breach of which covenant returned the property to owners greatly enhanced in value, and owners promised to repay lessees estimated cost of major part of improvements out of future rents, lessees were owners' agents in making the improvements, owners' notice of nonresponsibility was ineffective, and mechanic's liens should have been made liens against the entire property rather than against the building only. Code Civ.Proc. § 1192; Const. art. 20, § 15.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Actions by the Ott Hardware Company, Inc., by Perry J. Martinsen, doing business under the fictitious trade name of California Electric Company, by Ganahl Lumber & Mill Co., Inc., and by Darrell T. Stuart, against E. D. Yost and others for foreclosure of mechanic's liens, consolidated for trial. From a judgment for plaintiffs, defendants appeal.

Judgment affirmed.

Drumm & Drumm and Forgy, Reinhaus & Forgy, all of Santa Ana, for appellants.

Reynolds & Painter and Montgomery & Montgomery, all of Los Angeles, for respondents.

GRIFFIN, Justice.

These actions for foreclosure of mechanic's liens were consolidated for the purpose of trial and also on appeal.

Defendants and appellants E. D. Yost and his wife, Stella M. Yost, in 1913 owned property on which was erected a theatre building. Between 1928 and 1940 the building was closed. It became obsolete or antiquated in many respects for presenting entertainment to the public. That was the only purpose for which it was adapted. The necessity for substantial repairs, modernization and improvements was known to all defendants. About September, 1940, defendants L. Kaplan, S. Lelin and Jack Zamsky entered into some oral agreement, as partners, under the firm name and style of "New Yost Theater", for the purpose and object of procuring from defendants and appellants Yost, a lease on the theatre building and its contents, with the object of remodeling the building as a motion picture show house. A lease was prepared, dated October 1, 1940, and was signed by the Yosts and Mr. and Mrs. Kaplan. It contained the usual recitals. In addition, it sets forth that the term of the lease shall be for ten years at $350 per month; that the parties agree that certain alterations are to be made; that plans and specifications therefor shall be presented to and approved by lessors; that lessees shall furnish a bond for faithful performance and cost of labor and materials used therein; lessors agree to pay lessees $100 per month from rentals for actual cost of alterations up to $10,000; that lessees agree to furnish lessors a statement of material and labor supplied as the work progresses; lessees agree that the cost of labor and material shall be fully paid by them at least five days prior to the time for filing any lien therefor; that lessees shall not have the right to remove any improvements made by them at the expiration of or termination of the lease; that the lease shall remain in escrow until the improvements are completed and paid for.

An addenda to this lease, dated October 26, 1940, recites that $1,000 shall be paid by lessees to lessors and in consideration thereof lessors waive the provisions of the lease requiring lessees to furnish a bond for faithful performance and payment of labor and material. The addenda also provides for the return of the $1,000 to lessees upon the expiration of the time for filing liens if lessees' agreement set forth in the lease is carried out, otherwise that amount is to be forfeited to lessors as liquidated damages. On October 31, 1940, two signed copies of the lease and addenda thereto were deposited in escrow. The escrow instructions provided that the documents were to be there held until the escrow agent was notified by Yost that there had been a compliance with the terms of the lease. On November 1, 1940, defendant E. D. Yost executed a notice of nonresponsibility under section 1192 of the Code of Civil Procedure, and on November 2, 1940, posted and recorded it. The notice recited that the property was subject to a lease between the above-named parties.

November 1, 1940, the partnership "New Yost Theatre" took possession of the real property, proceeded with the improvements of the building and completed it on or about January 8, 1941. Plaintiff and respondent Ott Hardware Co., Inc., furnished the heating and ventilating system and other fixtures for a contract price of $4,250. Plaintiff and respondent Perry J. Martinsen rebuilt the projection room and installed a new electrical system throughout the theatre for $5,058. Plaintiff and respondent Ganahl Lumber & Mill Co., Inc., furnished sash, doors and lumber to the extent of $843. Plaintiff and respondent Darrell T. Stuart redecorated the interior for $1,579. Other repairs were made and other labor and materials were furnished. Over $12,000 was expended in work and materials in rehabilitating the building. The copartners failed to pay the claims when due. Liens against the property were duly recorded. On January 28, 1941, Yosts, the lessors, demanded of the escrow agent the return of the lease and addenda for the failure of lessee to comply with the terms thereof. The escrow agent complied with the request. On February 5, 1941, Yosts served on the Kaplans a notice of default based on the grounds (1) that they failed to pay rent due February 1, 1941; (2) that they failed to pay cost of alterations and repairs within the time required by the lease; (3) that they failed to give statement re work progress; and (4) by reason of lessees' insolvency. Thirty days thereafter Yosts took possession of the property. On April 4, 1941, they sold the theatre to defendant Alfred Gazler (who is not an appellant herein and as to whom the judgment has become final) for the sum of $45,000.

After trial the court found generally in accordance with the facts above related and in addition thereto found that at the date of the execution of the lease and addenda thereto, the Yosts knew that the partnership was contemplating substantial improvements and repairs to the theatre building; that no repairs of any character had been placed in the building for many years preceding the execution of the lease; that in many instances the building did not comply with the fire laws and regulations of the City of Santa Ana; that *the Yosts would not have entered* into the lease unless the lessees named therein *had promised to substantially* modernize the building; that the Yosts had knowledge of the fact that the plaintiffs in the above-entitled action had furnished material for use in and about the building situated on their real property described and that substantial amounts of money were due, owing and unpaid to plaintiffs; that the building occupies the whole of the described real property; that without the furnishing of the labor and materials aforesaid the "buildings had no use whatsoever". The court then gave judgment for plaintiffs and provided if the liens be not paid within 90 days after judgment becomes final the "buildings, down to the surface of the ground, be sold according to law", and that out of the proceeds there be paid the amounts found to be due the claimants; that plaintiffs are not entitled to a lien upon or against the land or any portion thereof.

Article XX, section 15 of the Constitution of California, provides that "Mechanics, materialmen, artisans, and laborers of every class, shall have a lien upon the property upon which they bestowed labor or furnished material, for the value of such labor done and material furnished; and the Legislature shall provide, by law, for the speedy and efficient enforcement of such liens."

After the adoption of section 15, the Legislature enacted section 1192 of the Code of Civil Procedure, which provides in part that "every building * * * constructed, altered or repaired upon any land with the knowledge of the owner * * * shall be held to have been constructed, performed or furnished at the instance of such owner * * * and such interest owned * * * shall be subject to any lien * * * unless such owner * * * shall, within ten days after he shall have obtained knowledge of such construction, alteration or repair, * * * give notice that he will not be responsible for the same by posting a notice in writing to that effect * * *."

The effect and purpose of these provisions of the law have been stated in English v. Olympic Auditorium, Inc., 217 Cal. 631, 20 P.2d 946, 87 A.L.R. 1281. It would serve no good purpose to again discuss them here. Suffice it to say the trial court apparently believed the holding in that case was applicable to the facts in the instant case and gave judgment accordingly. It is defendants' contention that the filing of a notice of nonresponsibility by the owner of the land, which land is improved by a building at the time of the contemplated repairs, exempts the entire property from any mechanics or materialmen's liens. This is a question which, from our search, does not seem to have been decided by the Supreme Court of this state. From our examination of the record before us we do not feel that it is necessary to determine that question in this proceeding.

There is a rule of law stated in 36 American Jurisprudence, p. 73, sec. 94, under the subject of Mechanics' Liens, reading as follows:

"A lessee is not generally considered the agent of the lessor within the contemplation of the mechanic's lien statutes merely by virtue of the relation of landlord and tenant. Nor is an agency relationship created merely by the consent of the lessor to the making of alterations and improvements upon the leased premises. Knowledge of, and acquiescence in, the making of improvements by the tenant is insufficient to establish agency.

"With a few exceptions, it is generally held that such relationship may result from contractual provisions of a lease which relate to alterations and improvements to be made by the lessee during the term of the lease. Where the lease contains a provision *requiring* the lessee to make improvements, it is generally held that the lessee is thus constituted the agent of the lessor for that purpose, within the contemplation of mechanic's lien laws, and this is generally so, irrespective of whether the cost of the improvements is to be borne by the lessor or by the lessee, if it clearly appears that the lessee is *obligated* to make the improvements. However, where it does not otherwise clearly appear that the lessee is *obligated* to make improvements, the question of responsibility for the cost becomes important in determining the intention of the parties. Regard is had also to the character of the improvements and the benefits to be derived therefrom, in determining whether the parties intended to create an agency for the making of improvements. A lease merely authorizing the lessee to make improvements does not render the lessee the agent of the lessor for that purpose. It has been held in several cases that where a lease *requires* the lessee to make improvements, a stipulation to the effect that nothing therein contained shall be deemed to constitute the lessee the agent of the lessor, or to impose any liability on the lessor for mechanics' liens, is ineffectual. However, the contrary has been held in practically an equal number of cases." (Italics ours.) (Citing cases.) See, also, Comley Lumber Co. v. Mid-Co. Petroleum Co., 116 Kan. 78, 225 P. 744.

Our attention has not been called to any direct authority in this state as to which rule has been or may hereafter be followed by the appellate courts of this state where the facts are similar to the facts in the instant case. We find an expression in English v. Olympic Auditorium, Inc., supra, which bears on the subject. It is there said, 217 Cal. at page 643, 20 P.2d at page 951, 87 A.L.R. 1281: "In many jurisdictions mechanics' liens have been held to attach, not only to the building but also the estate or property of the lessor for improvements made by the lessee, which improvements, by the terms of the lease, are to belong or revert to the lessor, or are permanent in nature, becoming part of the realty and of benefit to the lessor. (Citing cases.) These cases are based on the theory that since the lease contemplates the construction of a building which will enhance the value of the fee to the benefit of the lessor, the lessee must be deemed the statutory agent of the lessor for the purpose of the construction. In view of the nonresponsibility statute in this state, we do not feel justified in going that far and holding that the lien attaches to the land as well as to the building. We are of the opinion that, *at least where the building of the improvement is optional* with the lessee, the posting and filing of the notice of nonresponsibility by the lessor relieved the land from the lien." (Italics ours.)

Under the facts before us we lean toward the rule above quoted, especially where the instrument creating the relationship is such that the transaction establishes, in effect, that the lessee is but an agent of the owner in causing the improvements to be made to the owner's property, where the making of the improvements is *not optional* with the lessee, and the lessee is *obligated*, as a condition or covenant of the lease, to make the improvements, and where a breach of the condition or covenant returns the property to the owner greatly enhanced in value and the owner promises to repay to the lessee the estimated cost of the major portion of the improvements out of future rents. We will therefore consider the entire transaction in the light of this rule.

For some period of time the Yosts had been making some endeavor to have the theatre repaired or improved. They had secured figures on cost of remodeling. To them some of these figures appeared to be excessive. They contacted Mr. Kaplan, who later endeavored to secure some finances to make the necessary improvements. Some of the parties believed that the cost would not exceed $7,500, and all believed it would not be in excess of $10,000. The lease was entered into with the provision that the lessee was *obligated*, as a condition of the lease, to make the improvements and pay for them; that out of the $350 per month rental money paid by the lessee, the lessor was to pay the lessee for the improvements to be made to his property, not to exceed $10,000. (This amount did not include the cost of the marquee). It may be said that, in fact, the owner was simply borrowing the money (up to $10,000) from the lessee to make the improvements designated, agreeing to pay the lessee therefor at the rate of $100 per month, which amount was to be deducted from the rents. Under the lease, lessee was compelled to and did show the owner plants and specifications for his approval. He was obligated to furnish a statement of materials and labor supplied. The owner was on the property at frequent intervals discussing with lessee the advisability of the several improvements made and to be made. At some stage of the proceedings the owner suggested that one L. R. Wilson, a construction engineer (known to the owner and who had been employed by him in reconstruction work on a previous theatre) be employed by lessee, at lessee's expense, as superintendent of the construction. A supplemental agreement was then signed and as one of the covenants of the agreement lessee was obligated to employ Wilson as such and he was to give "lessor such information regarding costs and progress of said alterations, repairs and improvements, as lessor may from time to time request or require."

Each agreement contained a provision that nothing therein contained should be construed so as to impose any responsibility or liability on lessor for labor or material furnished in making the alterations. The facts in this case further show that lessee was unable to secure a satisfactory bond, running to the owner, to secure the payment of labor and material furnished. Against the advice of his counsel, the owner agreed to and did accept $1,000 in cash in lieu of such bond and signed a written agreement to the effect that if the repairs were made as agreed upon and the lessee paid all bills incurred, the $1,000 would be returned to the lessee after the time for filing improvements had expired. Otherwise, lessor would retain the $1,000 as liquidated damages.

The evidence further shows that the owner, on written agreement, allowed lessee, with the approval of the owner, to trade in all old seats and other equipment in the theatre toward other new seats and new equipment purchased by lessee. It was agreed, however, that at a later date, lessee was to pay owner the trade-in value at the rate of $50 per month. Lessee was obligated to execute a chattel mortgage on all new fixtures in favor of the owner, for the purpose of securing the monies due under the lease and the conditions and covenants therein contained.

The agreement then provided that if default be made by the lessee in the performance of any of the covenants or agreements to be performed by him, lessor might declare the term ended and lessee agreed to surrender the premises to lessor immediately.

It was further agreed that in the event the lease be canceled or terminated by the lessor or for any cause, before payments to be made by lessor to lessee from rentals to amortize the cost of alterations, etc., the lessee forfeited all rights to further payment from the lessor.

[1] During the course of the trial, the question was raised whether the lessee was, under the written agreements, an agent of the defendant Yost. The trial judge orally commented: "I don't think that I could find that the lessee was the agent of the owner * * * that under the lease to make the owner a contracting owner it would have to be through some trace of agency. Those were the facts in the Olympic case and the court refused to give a lien upon the land and building, but only upon the building." It should be here noted, from a statement of the facts in the English case, 217 Cal. at page 634, 20 P.2d 946, 87 A.L.R. 1281,—the lessee was *authorized* to construct an auditorium building (Italics ours), not *obligated* to construct it. Here, the trial court made no written finding directly holding that the lessee was or was not the agent of the owner. The findings merely set forth a copy of the lease, the addenda, and recited the facts above mentioned. It is only by inference that the trial court found that the lessee was not the agent of the owner because, under the findings, the owner, had the lessee been his agent, would not have been entitled to have the *land* exempted from the mechanics' and materialmen's lien. The whole property would have been subject thereto. A participating owner, even though acting through his agent, is not entitled to relieve his property from such liens by filing a nonresponsibility notice. Western Lumber & Mill Co. v. Merchants' Amusement Co., 13 Cal. App. 4, 108 P. 891; Hines v. Miller, 122 Cal. 517, 55 P. 401.

[2-4] Ordinarily, where there is conflicting evidence on the question whether a lessee is agent of the owner, the question becomes one of fact and not of law. In the instant case, it was the construction of the written lease, addenda, and other undisputed writings, which the court was called upon to construe as to their legal effect. The question presented was therefore one of law whether the terms of the instruments construed constituted the lessee the owner's agent for the purposes therein set forth. Cain v. Whiston, 58 Cal. App.2d 738, 137 P.2d 479; Sec. 2102, Code Civ.Proc.; Estate of Thomson, 165 Cal. 290, 131 P. 1045; Shelley v. Byers, 73 Cal. App. 44, 238 P. 177; People v. Marsicano, 57 Cal.App.2d 591, 135 P.2d 16; Gardner v. San Gabriel Valley Bank, 7 Cal.App. 106, 93 P. 900. We are convinced that, by their terms, the lessee was obligated to make the alterations and improvements as a condition to the effectiveness of the lease. The lessee's right to cause the improvements to be made was not optional

with the lessee. The contemplated project for the improvement and repair of the theatre was more in the form of a joint venture between the owner and the lessee.

[5] Defendant Yost cannot, on this appeal, claim prejudice because the trial court ordered the lien to operate against the building only when it should have been held to have been a lien against the entire property.

In Ah Louis v. Harwood, 140 Cal. 500, 74 P. 41, it was said that an agreement with the lessee or conditional purchaser that improvements must be at his cost and that the lessor or seller will not be liable for labor and materials, will not alone satisfy the statute or protect the land from the lien. To the same effect is Pacific Sash & Door Co. v. Bumiller, 162 Cal. 664, 124 P. 230, 41 L.R.A.,N.S., 296, where it is held that such contracts are good as between the owner and the lessee and serve to fix the liability as between them, but do not affect the rights of lien claimants. Under the cases cited and the rule herein adopted, the nonresponsibility notice of the owner was ineffectual.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

COLBERT v. COLBERT. *

Civ. 14791.

District Court of Appeal, Second District, Division 3, California.

June 5, 1945.

Rehearing Granted July 3, 1945.

1. Husband and wife 🔑295

Order in separate maintenance action directing husband to pay alimony pendente lite, attorney's fees and court costs is presumed valid. Civ.Code, § 137.

2. Husband and wife 🔑295

Record disclosing that at time of entry of order directing defendant in separate maintenance action to pay to plaintiff pendente lite alimony, counsel fees and costs, the only pleading before court was complaint which alleged the marriage of the parties and continued relationship of husband and wife, was sufficient to authorize entry of order directing defendant to make such payment. Civ.Code, § 137.

3. Appeal and error 🔑714(4)

Appellant's recital of matters which were not contained in record on appeal could not be considered.

4. Husband and wife 🔑295

Power to order payment of alimony, counsel fees and costs in a domestic relations case may be exercised only in favor of a husband or wife. Civ.Code, § 137.

5. Husband and wife 🔑295

Where it was established by undisputed evidence that relationship of husband and wife did not exist when order was made directing defendant in separate maintenance action to pay to plaintiff alimony pendente lite, attorney's fees and court costs, court was without jurisdiction to make the order, notwithstanding that it had jurisdiction of the parties. Civ.Code, § 137.

6. Husband and wife 🔑295

Trial court has power to vacate an order pendente lite for alimony, counsel fees and costs on the ground of lack of jurisdiction, notwithstanding that such order is appealable. Civ.Code, § 137.

7. Husband and wife 🔑295

Where action for separate maintenance was based specifically upon a statutory marriage which had been dissolved by a court of competent jurisdiction and, under allegations of complaint, a common-law marriage would not be a proper basis for an order pendente lite for alimony, counsel fees and costs, such an order was not justifiable on the basis of a common-law marriage. Civ.Code, § 137.

8. Husband and wife 🔑295

Where it was established on motion to vacate order directing defendant in separate maintenance action to pay alimony pendente lite, counsel fees and costs, that the relationship of husband and wife between the parties had previously been dissolved by a court of competent jurisdiction so that court had no jurisdiction to enter the order, court erred in not vacating such order, notwithstanding that court was justified in entering order on the basis of record before the court at time order was made. Civ.Code, § 137.

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* Subsequent opinion 162 P.2d 839.

9. Appeal and error ⟹790(3)

Where District Court of Appeal reversed order denying a motion in trial court to vacate a prior order, which action had the effect of vacating prior order, appeal from prior order was dismissed as moot.

◆

Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Action by Ruth Colbert against Joseph W. Colbert for separate maintenance. From an order directing that defendant pay alimony pendente lite, attorney's fees and costs, and from a second order denying defendant's motion to vacate the first order, defendant appeals.

Second order reversed, and appeal from first order dismissed.

Clarence Hansen, of Los Angeles, for appellant.

Michael Rudolph and Daly B. Robnett, both of Los Angeles, for respondent.

PARKER WOOD, Justice.

Defendant appeals from an order of August 14, 1944, that he pay alimony pendente lite, attorney's fees and costs. He also appeals from an order of September 1, 1944, denying his motion to vacate the order of August 14, 1944.

Plaintiff filed a complaint for separate maintenance on July 21, 1944, and the complaint and summons were duly served on the defendant. An order directing defendant to show cause on August 14, 1944, why he should not pay alimony pendente lite, attorney's fees and costs was also duly served on defendant. Upon the hearing of the order to show cause on August 14, 1944, the court ordered that defendant pay to plaintiff the sum of $22.50 per week as alimony pending the trial but not to exceed three months, and to pay $125 as attorney's fees and $25 as costs.

Defendant contends that the court did not have jurisdiction to award alimony or attorney's fees or costs for the reason that plaintiff was not the wife of defendant.

[1-3] The record on appeal, as to the documents before the court at the hearing on the order to show cause, includes only the complaint. The record as to that hearing also includes the order of the court made as a result of the hearing, but it does not include any affidavits of the parties, or a reporter's transcript, or a settled statement or record of the proceedings had at that hearing. The complaint alleged that the plaintiff and defendant intermarried at Benton, Texas, on May 3, 1940, and "ever since have been and are now husband and wife." The defendant had not answered the complaint at the time of the hearing on August 14. (His default was entered the next day but the default was set aside on September 15, 1944.) There is a presumption in favor of the validity of the order of the court made on August 14. The record as to the matters before the court at the time of the hearing on August 14th is sufficient to support the order of the court. In his opening brief defendant asserts that he told the court at the hearing of the order to show cause that plaintiff had obtained a divorce from defendant in Texas on June 27, 1941, and that he exhibited to the court a postal card from the clerk of the Texas court stating that plaintiff and defendant had been divorced. Since the record on appeal as to that hearing does not include those asserted matters, this court cannot consider defendant's recital of them.

On August 22, 1944, defendant filed a motion to set aside the order, which had been made on August 14th "upon the ground" that the court had no jurisdiction to make said order, and "upon the further ground" that plaintiff and defendant were not husband and wife when the order was made or when the action was commenced. Said motion stated further that it would be "made upon" the files and records of the action, the affidavit of defendant filed concurrently therewith, and a certified copy of the final judgment of divorce entered in the Texas court. The affidavit of defendant, referred to in said motion, was also filed on August 22, 1944, and it stated, among other things, that at the hearing of the order to show cause on August 14th, the plaintiff and her counsel were present and defendant appeared without counsel; that at said hearing "the court was advised that plaintiff and defendant were not husband and wife and subsequent thereto were divorced in Texas, however the above entitled court, nevertheless proceeded with the hearing of the order to Show Cause"; that he and the plaintiff were divorced in the State of Texas and that a final decree of divorce was entered in cause number 32312-A, entitled Ruth Colbert vs. J. W. Colbert, as the same appears in volume C-23, page 149, minutes of the District Court at Fort

Worth, Texas; and that on August 14th, when the order to show cause was heard, and on July 21, 1944, when the present action was filed, he and plaintiff were not married to each other.

On September 1, 1944, the affidavit of plaintiff in opposition to said motion of defendant was filed and it stated, among other things, that the alleged decree of divorce was for convenience only, being obtained with the understanding they would continue as husband and wife and that "the divorce would be a mere formality to comply with the employment laws of the United States"; that "it was secured by reason of the fact that the government regulations did not permit two employees belonging to the same family in the same establishment"; that it was agreed that plaintiff would secure a decree of divorce from defendant but their marital relations would not be disturbed; that they were married 2 months prior to the divorce and had not been separated since the marriage on May 3, 1940, until their separation in Los Angeles on July 8, 1944; that after the divorce they lived together about 2 years as husband and wife in the State of Texas; and that prior to the hearing on August 14th, her attorney in her presence offered to continue the hearing if defendant wanted to get an attorney but defendant declined the offer stating that he did not need an attorney and he would pay nothing.

At the hearing of the motion to vacate, on September 1, 1944, the defendant testified that he and plaintiff were married on May 3, 1940, at Benton, Texas; that they were divorced and he did not remarry plaintiff. An exemplified copy of a decree of divorce entitled, "In the 96th Judicial District Court of Tarrant County, Texas. Ruth Colbert (Plaintiff) v. J. W. Colbert (Defendant) No. 32312–A," showing that the decree of divorce was granted on June 27, 1941, was offered in evidence by defendant and it was received. It appears that it was conceded the parties mentioned in that decree were the same parties who are plaintiff and defendant herein. The defendant testified further that after the marriage and before the divorce he lived with her about 6 months; that after the divorce they lived together about half the time, and held themselves out to the public as Mr. and Mrs. Colbert, and they "split the bills" for the place where they were living; and that there was a separation at the time of the divorce.

At the hearing of that motion the plaintiff testified that the divorce "was at one month" after they were married; that plaintiff and defendant were doing government work and it was against the rules for a husband and wife to have such employment; that the divorce was secured in order to keep their employment. In answer to the question, "Was there any separation at the time [of the divorce]?" she replied, "No. We only separated for about 3 weeks and he was looking for a job, we lived together all the time." She testified further that they were together constantly in the State of Texas from the time of the divorce until April 8, 1942, when she came to live in Los Angeles; that "I lived—we lived here in—he has been paying the rent, but signed my name."

Thereupon the court denied the motion to vacate the order of August 14th.

[4] Upon the hearing of the motion to vacate on September 1st, it was established by the exemplified decree of divorce and the admissions of plaintiff that on June 27, 1941, the plaintiff herein obtained a decree of divorce from defendant herein dissolving the contract of marriage made between them at Benton, Texas, on May 3, 1940. The action herein for separate maintenance was based specifically upon the contract of marriage which was dissolved by that decree. The court's power to order payment of alimony, counsel fees and costs may be exercised only in favor of a husband or wife. Civ.Code, sec. 137. In Carbone v. Superior Court, 18 Cal.2d 768, at page 771, 117 P.2d 872, 874, 136 A.L.R. 1260, it was said: "* * * the existence of the marriage is a jurisdictional prerequisite for the right of the court to order support, costs, and counsel fees pendente lite in an action for divorce." In the case of Talbot v. Talbot, 218 Cal. 1, 21 P.2d 110, a separate maintenance action, wherein an order for alimony and counsel fees pendente lite was made, defendant filed as an exhibit a certified copy of a final decree of divorce in a certain action entitled Joseph Jay Pausner v. Esther Roof Pausner. The defendant Talbot contended that said decree showed that Esther Talbot, the plaintiff in the Talbot case, was a married woman at the time of her alleged marriage to the defendant Talbot, and therefore that the essential basis for the action of Talbot v. Talbot, namely, the marriage relation, could not exist. The court said at page 3 of 218 Cal., at page 110 of 21 P.2d: "The

point would be well grounded if there were any showing that the plaintiff [Esther Talbot] in the present action and the defendant [Esther Roof Pausner] in the former action were one and the same person." In the matter of Ex parte Cook, 42 Cal.App.2d 1, 108 P.2d 46, the petitioner sought his release in habeas corpus from a commitment for contempt for failure to comply with an order for payment of alimony and suit money pendente lite in a divorce action. It appeared therein that the marriage, which had been the basis for the order for alimony and suit money, was void for the reason that petitioner was married to a person other than the plaintiff in the divorce case when he and the plaintiff were married, and that plaintiff had knowledge of such other marriage when she married the petitioner. The court therein said, 42 Cal.App.2d at page 3, 108 P.2d at page 47: "The undisputed record before us discloses that the petitioner is not now and never has been the husband of Hilda [the plaintiff in the divorce action] * * * that the superior court was * * * without jurisdiction to order petitioner imprisoned for failure to comply with the illegal award of alimony and suit money." The case of Parmann v. Parmann, 56 Cal.App.2d 67, 132 P.2d 851, 852, was an action, in the alternative, for an annullment or divorce. The appeal therein was from an order that, pending the trial, defendant pay attorney's fees and court costs. The allegations of the complaint therein and the testimony of the parties showed indisputably that the marriage was void. It was held therein that "the court is without jurisdiction to order such payments."

[5] It having been established by undisputed evidence that the relationship of husband and wife, as a result of the alleged marriage of May 3, 1940, did not exist when the order of August 14th was made, the court was without jurisdiction to make the order of August 14th.

[6] Even though an order pendente lite for alimony, counsel fees and costs is appealable the court had power to vacate such order on the ground of lack of jurisdiction. In the case of Sharon v. Sharon, 67 Cal. 185, at page 195, 7 P. 456, at page 462, 635, 8 P. 709, a divorce case, wherein an order for alimony and counsel fees pendente lite had been made, it was held that such an order "possesses all the essential elements of a final judgment" and 67 Cal. at page 199, 7 P. 456 at page 465: "is an appealable order." It was said further therein, 67 Cal. at page 195, 196, 7 P. 456, at page 462, that, "If the court had afterwards found that the marriage relation never existed between the parties, that would not have affected the order for the payment of temporary alimony. It would have afforded good ground for vacating it." It is true as respondent asserts that, the defendant having been duly served with summons, the complaint and the order to show cause, and having appeared generally at the hearing on the order to show cause, the court had jurisdiction of the parties; however, the question of jurisdiction under Section 137 of the Civil Code to order the payment of alimony, counsel fees and costs did not depend solely upon jurisdiction of the parties but depended upon the relationship of husband and wife existing between the parties. The question here presented is one of jurisdiction under Section 137, and not the erroneous exercise of jurisdiction.

[7] It might be that the theory upon which the trial court permitted its order to stand, after the fact of a divorce between the parties had been established, was that it considered, in accordance with the suggestions of counsel for plaintiff made at the close of the hearing, there was a common-law marriage between the parties after the divorce. The action for separate maintenance, however, was not based upon a common-law marriage but was based specifically upon the statutory marriage of May 3, 1940, which had been dissolved by a court of competent jurisdiction. Under the allegations of the complaint herein, a common-law marriage would not be a proper basis for an order that defendant make such payments to plaintiff.

[8] The court should have granted the motion to vacate the order of August 14th. The order of September 1, 1944, denying defendant's motion to vacate the order of August 14, 1944, is reversed, and it is hereby ordered that the order of August 14, 1944, be and the same is hereby vacated.

[9] As above stated, the record as to the matters before the court at the time of the hearing on August 14th is sufficient to support the order of the court made on that day; however, since that order has been vacated by this court the question on the appeal from the order of August 14, 1944, is moot, and therefore the

appeal from the order of August 14th is dismissed.

DESMOND, P. J., and SHINN, J., concur.

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69 Cal.App.2d 589

ATEN v. ATEN.

Civ. 3366.

District Court of Appeal, Fourth District, California.

June 13, 1945.

1. Dismissal and nonsuit 🔑19(3)

Litigants should not be permitted to inject themselves into a controversy, raise issues therein, and then change position and seek to avoid contest, as by voluntarily dismissing action brought by them, especially where plaintiff has attacked validity of agreement respecting property rights, which has long been relied on by defendant, who has met issue thus raised and sought determination thereof by answer and cross-complaint.

2. Dismissal and nonsuit 🔑19(3)

In wife's action against husband to cancel property settlement agreement and recover interest in community property, defendant's cross-complaint, seeking judgment declaring that agreement was valid and binding and that plaintiff had no right or title to or interest in property involved other than as provided in such agreement, constituted sufficient request for affirmative relief to render voluntary dismissal of action discretionary with court. Code Civ. Proc. § 581, subd. 1.

◆

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by Mabel Aten against Ira D. Aten to cancel and set aside a property settlement agreement and recover plaintiff's interest in community property, in which defendant filed a cross-complaint to have the agreement declared valid and binding and plaintiff without right or title to or interest in defendant's property except as set forth in such agreement. Judgment for defendant, and plaintiff appeals.

Affirmed.

Paul G. Henderson and Walter H. Sprague, both of Los Angeles, for appellant.

Harry W. Horton, of El Centro, for respondent.

BARNARD, Presiding Justice.

On May 16, 1935, the parties hereto, who were husband and wife, entered into a written property settlement agreement by the terms of which each was given certain property and the defendant agreed to pay to the plaintiff $100 a month during her lifetime, or until her remarriage.

On August 1, 1942, the plaintiff wife brought this action to cancel and set aside this agreement on the ground that her signature thereto had been obtained through fraudulent representations made by the defendant, and seeking a restoration of her interest in certain described community property. Second and third counts of the complaint added failure of consideration and declaratory relief as causes of action. The defendant filed an answer and cross-complaint pleading a denial, the statute of limitations and estoppel and alleging, among other things, that he had fully performed the terms of the agreement and for eight years had conducted his business in reliance thereon, that the plaintiff had for years accepted the monthly payments and had ratified the contract, and that he was the sole owner of the property involved. The prayer was that the plaintiff take nothing by her complaint; that it be decreed that the property settlement agreement is valid and binding between the parties; that it be decreed that the plaintiff had no right, title or interest in or to any of the properties of the defendant, real or personal, and no property rights as to him other than as set forth in that contract; and for general relief. The plaintiff answered this cross-complaint.

The trial of the action was set for September 13, 1943, and was continued to January 10, 1944. At that time counsel for the plaintiff moved for a further continuance. When this motion was denied counsel attempted to dismiss the action and objected to the court's proceeding with it, but asked for findings in the event judgment was to be entered. The court overruled this objection. Subsequently, findings were made and a judgment entered, and this appeal followed.

The appellant's sole contention is that no affirmative relief, within the meaning of paragraph 1 of section 581 of the Code of Civil Procedure, was sought in the answer or cross-complaint and that it was, therefore, the duty of the trial court to dismiss the action in response to her request. She relies upon a number of cases involving the sufficiency of counterclaims and other early cases in which it was held that a cross-complaint was unnecessary in a quiet title action since a judgment entered upon issues raised by the answer, if in favor of the defendant, would operate as an estoppel and protect him as well as a decree in his favor upon a cross-complaint. It is argued that the respondent could not have maintained an action against the appellant, that there was no controversy between them until the appellant raised the issue of the validity of the agreement by bringing this action, that the respondent asked for nothing either in his answer or cross-complaint which he would not have received upon a denial of relief to the appellant, and that it follows that no affirmative relief was here asked for by the respondent, within the meaning of the statute.

In Islais, etc., Water Co. v. Allen, 132 Cal. 432, 64 P. 713, 715, most of the cases relied upon by the appellant are discussed and cogent reasons are given why the assertion of property rights, even when made in an answer, may constitute the seeking of affirmative relief within the meaning of the Code section. In that case, the court said: "The Code plainly provides that the plaintiff cannot dismiss his action if the defendant, by his answer, has sought affirmative relief. Whether he did so is therefore the question to be decided. Conceding that upon the denials in defendant's answer his title would have been quieted by a judgment in his favor, if the plaintiff had prosecuted its action, it does not follow that he may not seek and be entitled to affirmative relief. The commencement of the action, and the allegations of plaintiff's complaint, where an attack upon defendant's title to his property, which, however unfounded, impaired the market value thereof, and obstructed its alienation; and, if the plaintiff should be permitted to dismiss the action, the defendant, in most cases, would feel compelled to bring an action to remove the stain upon his title. It is therefore important to him to prevent a dismissal, and compel a trial of the action; and this he may do by setting up his own title and right of possession, and praying that it be quieted as against the plaintiff who has asserted an adverse right. It thus appears that the action to quiet title, in some of its features, is peculiar. The defendant's title may never have been questioned, and therefore no cause of action existed in his favor against any one; but the plaintiff, by bringing the action, created a cause of action in the defendant against the plaintiff, for it was the assertion of an adverse claim or interest in the same property."

[1] The rule thus suggested is now well established in quiet title actions. In Collins v. Bridge Investment Co., 20 Cal.2d 52, 123 P.2d 436, 437, the court said: "Where the defendant seeks affirmative relief in a quiet title action, the plaintiff is not entitled to dismiss the action as of right." In Hough v. Wright, 127 Cal.App. 689, 16 P.2d 301, an action to set aside a deed and to quiet the plaintiff's title to a portion of certain property, it was held that an answer alleging that the defendant was the owner of the property and praying for a decree in her favor brought the case within the provisions of subdivision 1 of section 581, Code Civ.Proc., "and thus prevents a dismissal of the action by the plaintiff." There are many cases involving other kinds of actions where a similar rule has been applied, of which only a few need be cited. Swanson v. Siem, 7 Cal.2d 267, 60 P.2d 281; Calhoma Oil Corporation v. Conniff, 207 Cal. 648, 279 P. 771; Simmons v. Simmons, 45 Cal.App.2d 697, 114 P.2d 660; Rodgers v. Parker, 136 Cal. 313, 68 P. 975. In Bayle-Lacoste & Co. v. Superior Court, 46 Cal. App.2d 636, 116 P.2d 458, 464, it is said: "Litigants should not be permitted to inject themselves into a controversy, raise issues therein and then change position and seek to avoid the contest." This is peculiarly true where the plaintiff has attacked the validity of an agreement affecting property rights, upon which the defendant has long relied, and when he has, by answer and cross-complaint, met the issue thus raised and sought a determination thereof.

[2] Similar principles are applicable here. The complaint herein was one to cancel and set aside an agreement which had been in force for several years, for declaratory relief and, in effect, to establish appellant's title to a community interest in certain property. The answer and cross-

complaint sought a judgment that the appellant take nothing, that it be decreed that the agreement was valid and binding and that the appellant had no right, title or interest in this property, other than as provided for in the contract. In effect, the respondent asked for declaratory relief, and that the validity of the contract and his title to the property be confirmed. Not only could the respondent have maintained an action for declaratory relief, had this action never been brought, but under well-established principles there was a sufficient request for affirmative relief, within the meaning of the Code section, to make the matter of a dismissal of the action one within the discretion of the court, and not one which was mandatory or to which the appellant was entitled as a matter of right.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

69 Cal.App.2d 583

CURCI v. PALO VERDE IRR. DIST.

Civ. 3284.

District Court of Appeal, Fourth District, California.

June 13, 1945.

Hearing Denied Aug. 9, 1945.

1. Pleading 🔑34(4)

Presumptions are against the pleader, and all doubts are to be resolved against him.

2. Waters and water courses 🔑260

Although irrigation district owed one leasing land adjacent to district's canal the duty not to injure the land through any act of faulty planning or neglect, district was not an insurer against damage.

3. Waters and water courses 🔑263

Complaint alleging that while defendant irrigation district was maintaining and operating its irrigation system for the public uses and purposes specified, water flowing through canal and ditch adjacent to plaintiff's land for public supply flooded the land and that plaintiff's crop was thereby flooded with water and damaged, did not state cause of action. St.1923, p. 1067.

◆

Appeal from Superior Court, Riverside County; Elmer W. Heald, Judge.

Action by Kelly C. Curci against Palo Verde Irrigation District to recover damages resulting from water escaping from defendant's ditch and flooding land leased by plaintiff. From a judgment for defendant, plaintiff appeals.

Affirmed.

G. V. Weikert, of Los Angeles, for appellant.

Stewart, Shaw & Murphey, of Los Angeles, for respondent.

MARKS, Justice.

This is an appeal from a judgment entered after sustaining a general demurrer to a second amended complaint with leave to amend. Plaintiff failed to amend his pleading and has prosecuted this appeal.

The action is for damages resulting from water escaping from defendant's ditch and flooding forty acres of land planted to lettuce.

Defendant is a public corporation organized for the purpose, among others, of distributing water for public use through canals and ditches. Stats.1923, P. 1067. Plaintiff was the lessee of the land in question and the owner of the lettuce crop.

Paragraph one of the second amended complaint alleges the corporate existence of defendant. Paragraph two alleges the tenancy of plaintiff and his ownership of the lettuce crop which was "ready for harvesting and marketing". Paragraph three alleges that defendant maintained and operated for public use a canal or ditch adjacent to plaintiff's leasehold. Paragraph four alleges as follows: "That on or about the 28th day of February, 1943, while defendant was controlling, operating, maintaining and using its said irrigation system and the said property and works comprising the same and connected therewith for the public uses and purposes aforesaid, water flowing in and through said canal or ditch adjacent to plaintiff's said land for public supply, distribution and use escaped therefrom and flooded said land; and that plaintiff's said crop of lettuce on said land was thereby flooded with water and was thereby injured and damaged, and the greater part thereof was thereby destroyed and rendered unfit for harvest, marketing or consumption, all to plaintiff's damage in the sum of $36,616.20, no part of which has been paid to plaintiff."

Paragraph five alleges the presentation and filing of a verified claim for damages and is followed by the prayer for judgment.

It is clear that the pleading contains no allegation even hinting that the damages were caused by faulty design, careless construction, or improper operation of defendant's ditches. It even fails to suggest any act, omission or dereliction of duty on the part of defendant which resulted in the invasion of any right of plaintiff and caused damage to him.

While it is not alleged in so many words that the damage was caused by a sudden flood, the language chosen by the pleader is certainly appropriate to convey that idea. The water "escaped" from the ditch on one day and "flooded said land", forty acres, on the same day. Certainly this negatives the idea of slow percolation and indicates the breaking out of a considerable volume of water.

[1] As was said in Feldesman v. McGovern, 44 Cal.App.2d 566, 112 P.2d 645, 648: "It is well settled that the presumptions are always against the pleader, and all doubts are to be resolved against him, for it is to be presumed that he stated his case as favorably as possible to himself (Joseph v. Holt, 37 Cal. 250; Silvers v. Grossman, 193 Cal. 696, 192 P. 534; Burrowes v. Bosworth, 68 Cal.App. 117, 228 P. 667; Higgins v. Security Trust and Savings Bank, 203 Cal. 398, 264 P. 744; Smith v. Buttner, 90 Cal. 95, 27 P. 29); if a fact necessary to the pleader's cause of action is not alleged it must be taken as having no existence. Hildreth v. Montecito Creek Water Co., 139 Cal. 22, 72 P. 395; Callahan v. Loughran, 102 Cal. 476, 36 P. 835." (See, also, Risco v. Reuss, 45 Cal. App.2d 243, 113 P.2d 914; Vilardo v. County of Sacramento, 54 Cal.App.2d 413, 129 P.2d 165; 21 Cal.Juris. 51, Sec. 29, and cases cited, and Ten Year Supplement.)

Defendant urges with much logic that if we hold the complaint in this action good, and stating facts sufficient to constitute a cause of action, we must do so on the theory that an irrigation district is an insurer against injury and is liable for all damage caused by water escaping from its system regardless of any blame attaching to it for the flooding. This doctrine was expressly rejected in the case of Sutliff v. Sweetwater Co., 182 Cal. 34, 186 P. 766, 768, where it was said:

"Hoffman v. Tuolumne Water Co., 10 Cal. 413, is a good illustration of these cases. There the court, in laying down the rule governing the case, said: 'The general rule is that every man may do as he chooses with his own property, provided he does not injure another's. But there is another rule as well established, which is that a man must so use his own property as not to injure his neighbor's. This last rule, however, does not make a man responsible for every injury which may arise to another from the use which the first may make of his property. It would be an intolerable hardship to hold a man responsible for unavoidable accidents which may occur to his property by fires or casualties, or acts beyond his control, though others are likewise injured.'

"The court then reversed a judgment against the defendant because of an instruction by the trial court which imposed too high a degree of care upon the defendant. Such reversal was, of course, wholly inconsistent with the contention of the plaintiff here that the defendant is liable no matter what care it used. To the same effect are Tenney v. Miners' Ditch Co., 7 Cal. 335; Wolf v. St. Louis, etc., Co., 10 Cal. 541; Todd v. Cochell, 17 Cal. 97; Everett v. Hydraulic, etc., Co., 23 Cal. 225; Campbell v. Bear River, etc., Co., 35 Cal. 679; Weiderkind v. Tuolumne C. W. Co., 65 Cal. 431, 4 P. 415; Moore v. San Vicente Lumber Co., 175 Cal. 212, 165 P. 687; Bacon v. Kearney Vineyard Syndicate, 1 Cal.App. 275, 82 P. 84."

Plaintiff argues that it was unnecessary to allege improper plan of the ditch, its improper construction, or negligence, or lack of care in its operation because it has been frequently said that in an action brought for taking or damaging property under Article I, Section 14 of the Constitution, as is this action, it is not necessary to prove negligence of the defendant in order to support a recovery by plaintiff.

This statement appears in the opinion of the Supreme Court denying a hearing in the case of Tormey v. Anderson-Cottonwood Irrigation Dist., 53 Cal.App. 559, 200 P. 814. From the statement of facts in the opinion of the District Court of Appeal it appears that the defendant had constructed its ditch through loose sandy soil incapable of holding water; that water had seeped from the canal onto plaintiff's land damaging it. A judgment in his favor was affirmed. This statement by the Supreme Court seems to be a reaffirmance of the doctrine announced in Reardon v. City & County of San Francisco, 66 Cal. 492, 6 P. 317, 325, 56 Am.Rep. 109, to the effect that where private property is damaged by the public works of a municipality, a recovery may be had whether the work was "done with care and skill or not."

The same rule has been announced in a number of cases relied upon by plaintiff among which we cite the following: Kaufman v. Tomich, 208 Cal. 19, 280 P. 130; Powers Farms, Inc. v. Consolidated Irrigation Dist., 19 Cal.2d 123, 119 P.2d 717; House v. Los Angeles County Flood Control Dist., 25 Cal.2d 384, 153 P.2d 950; Ketcham v. Modesto Irrigation Dist., 135 Cal.App. 180, 26 P.2d 876; Massetti v. Madera Canal & Irrigation Co., 20 Cal.App.2d 708, 68 P.2d 260; Hume v. Fresno Irrigation Dist., 21 Cal.App.2d 348, 69 P.2d 376.

An examination of the foregoing cases, and others on the same subject, show that in the majority of them the landowner sought recovery for damages caused by seepage from canals constructed through porous soil that did not confine and hold water but permitted it to percolate through the soil and water log adjoining property. Although the canal was constructed carefully and according to specifications this has been referred to as improper designing or improper planning which would make the irrigation district liable for damages. In some cases it is pointed out that this seepage of water may be prevented easily by puddling the canal with clay, by the use of oil on the banks and bottom, or by other simple means. It is recognized that the irrigation district owes the adjoining property owner the duty of not needlessly damaging his land by reason of improperly planned, constructed or operated works and if such damage occurs through any of those causes the district must respond in damages. In speaking on this subject in House v. Los Angeles County Flood Control Dist., supra [25 Cal.2d 391, 153 P.2d 953], it was said:

"According to plaintiff's pleading, the defendant district, with time to exercise a deliberate choice of action in the manner of its installation of the river improvements, followed a plan 'inherently wrong' and thereby caused needless damage to her property.

"While mere errors of judgment in planning and constructing a public work may be consistent with reasonable care, procedure so grossly incompetent and contrary to 'good engineering practices' as to constitute negligence might well give the injured property owner just cause for complaint upon the ground that the governmental agency responsible for the project has transgressed the limits of the police power. Kaufman v. Tomich, 208 Cal. 19, 280 P. 130. Such conclusion does not make the public agency, in undertaking its flood control program, an insurer against all possible damage which thereby might be inflicted on private property (cf. United States v. Sponenbarger, 308 U.S. 256, 60 S.Ct. 225, 84 L.Ed. 230, but it merely requires that the damage to the individual, on whom the sovereign power justifiably makes demands in the public interest, not exceed the necessities of the particular case due to a failure to use reasonable care and diligence."

Plaintiff stresses the case of Massetti v. Madera Canal and Irrigation Co., supra, as exactly identical with the instant case. In the Massetti case it appears that the defendant had constructed a canal with a capacity of 100 second feet; that it was obstructed with weeds and brush which retarded the flow of water; that there were gopher holes in the bank opposite plaintiff's property; that a pipe line constructed to carry away seepage and surplus water was plugged so that no water could flow through it; that defendant, probably wilfully, had overloaded the ditch with 113 second feet of water so that its banks were broken and Massetti's property was damaged.

[2, 3] Had plaintiff here alleged any such defective or careless construction, maintenance, or operation of defendant's canal, we would have had no trouble in concluding that he had stated facts sufficient to constitute a cause of action. He did not do so but satisfied himself with the bare allegation that the water "escaped" from defendant's canal and "flooded" his land. While defendant owed plaintiff the duty of not injuring his land through any act of faulty planning or neglect on its part, it is not an insurer against damage and the complaint should have contained some allegation from which it might be reasonably inferred that defendant was legally liable for the damage caused by

the water escaping from its canal and flooding plaintiff's land. Lacking such allegations the demurrer was properly sustained and plaintiff should have taken advantage of the leave given him to amend.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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69 Cal.App.2d 634

In re RIEMER'S ESTATE.

Civ. 12858.

District Court of Appeal, First District, Division 2, California.

June 21, 1945.

Rehearing Denied July 21, 1945.

Hearing Denied Aug. 16, 1945.

1. Wills 🔑630(3)

Devise of realty to nine year old grandson of testatrix "when he becomes 21 years of age, in the meanwhile his mother * * * to be his guardian", gave devisee a vested, and not merely a contingent, interest as against claim that rents and profits should be distributed under residuary clause of will, in view of fact that will made no "gift over" in event of devisee's death. Probate Code, §§ 28, 101.

2. Wills 🔑629

Where will makes no "gift over" in event of death of devisee or legatee, estate will be presumed to have vested at time of testator's death. Probate Code, § 28.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding in the matter of estate of Selma Riemer, deceased. From an order holding that a devise to Herbert Julius Riemer, grandson of testatrix, was vested and not contingent, Irma Gallian, executrix of the last will and testament of deceased, appeals, opposed by Alys Riemer, guardian of the estate of the minor devisee.

Affirmed.

Henry B. Lister, of San Francisco, for appellant.

George F. Barry, Jr., of San Francisco, for respondent.

NOURSE, Presiding Justice.

This appeal involves the interpretation of the will of Selma Riemer, deceased, the debatable question being whether the estate devised to her nine year old grandson is vested or contingent. This question is presented by the third and fifth paragraphs of the will which read:

"Third: I hereby give, devise and bequeath to my grandson, Herbert Julius Riemer, my three houses at the Southeast corner of Baker and Union Streets, San Francisco, California when he becomes 21 years of age, in the meanwhile his mother Alys Riemer to be his guardian.

"Fifth: I hereby give, devise and bequeath the rest and residue of my estate, wherever situated, share and share alike to my daughter Irma Gallian, and to my grandson Herbert Julius Riemer."

The court held that the interest of the grandchild was vested under the third paragraph and the appellant argues that possession and enjoyment of the subject of the devise should be postponed until the devisee reaches his majority, and that, in the meantime, the rents and profits of the realty should be distributed one-half to her and one-half to the minor under the residuary clause of the will. We are satisfied that the trial court's interpretation of the will was sound and that the decree of distribution in accord therewith should be affirmed.

[1] It is an accepted rule in the construction of a will that it must be construed according to the intention of the testator. Section 101, Probate Code. In aid of such construction the Probate Code declares that: "Testamentary dispositions, including devises and bequests to a person on attaining majority, are presumed to vest at the testator's death." Section 28. With this presumption as the outstanding piece of evidence of the intention of the testator the trial court properly concluded that the third clause of the will was intended to give to the grandchild a vested interest in the realty and all that went with it, and that the boy's mother was named as guardian for the collection of the rents and the management of the property during his minority.

In this conclusion the decree of the trial court finds support in Williams v. Williams, 73 Cal. 99, 14 P. 394; In re Estate of Yates, 170 Cal. 254, 149 P. 555; In re Estate of

Blake, 157 Cal. 448, 108 P. 287; Jones v. Pueblo Savings & Trust Co., 103 Colo. 455, 87 P.2d 2; and many other cases which need not be cited here. In the Williams case the court rested the decision on the presumption of the code section stating [73 Cal. 99, 14 P. 396]: "The law favors the vesting of interests, and every interest will be presumed to be vested *unless a contrary intention is clearly manifest.*" (Emphasis ours.) In Re Estate of Yates bequests were made to named legatees "to be paid" when they reached a certain age. The Supreme Court said, 170 Cal. 256, 149 P. 556: "The legacies were vested. Notwithstanding the unimportant differences in their phraseology, each and all manifest a clear intent upon the part of the testator to give the sums named to the beneficiaries. The time of payment only was postponed, and trusts for accumulations created to cover the time of the deferred payment. There was no bequest over in the event of death. Under all of the authorities the legacies vested in the legatees an absolute, indefeasible and disposable interest." In Re Estate of Blake a question arose as to the interests of children of a beneficiary who died before the termination of a trust for her benefit. The court invoked the presumption of the code section in holding that the interest vested upon the death of the testator, saying, 157 Cal. at page 459, 108 P. 292: "The general rule is that, where the legacy or devise is given to a person to be paid at a future time, it vests immediately. When, however, it is not given until a future time, it is contingent and does not vest until that time occurs. As said in the note to Goebel v. Wolf, 113 N.Y. 405, 21 N.E. 388, 10 Am.St.Rep. 470, quoted approvingly by this court in In re Rogers, 94 Cal. 526, 530, 29 P. 962: 'The leading inquiry upon which the question of vesting or not vesting turns is whether the gift is immediate, and the time of payment or of enjoyment only postponed, or is future and contingent, depending upon the beneficiary arriving of age, or surviving some other person, or the like. * * * According to the prevailing doctrine, a postponement of the time of payment will not of itself make a legacy contingent unless it be annexed to the substance of the gift; or, as it is sometimes put, unless it be upon an event of such a nature that it is to be presumed that the testator meant to make no gift unless that event happened.'"

The opinion discusses at length the effect of the habendum clause in the devise but the judgment as a whole rests upon the code presumption as read with the language of the will whereby the beneficiary was given the positive right "to demand and receive" the corpus when she reached the specified age. From this language the court concluded that the testator did not intend to give the devisee a mere contingent interest, but that he did intend to postpone possession alone because "the presumption must be indulged in that the testator intended by his will to dispose of his entire estate and, if possible, its provisions must be construed to prevent intestacy." In the Jones case the will bequeathed to a daughter one-half of the estate "to be delivered to her at the age of twenty-one." [103 Colo. 455, 87 P.2d 3.] The will named a guardian and trustee for the limited period. The court there emphasized that the bequest was to the heir directly and not to the trustee. Also that the guardian was named for the period of minority. From this it was held that, 87 P.2d at page 4, "The use of the term 'guardian' in this connection would seem to imply a vested interest in the daughter and a stewardship by the trust company until she reached the ages specified, inconsistent with the intent to create a purely contingent estate."

Here the will left no doubt as to the testator's intention to make a present gift. The language used, "I hereby give, devise and bequeath to my grandson," makes that intention clear. It was said in Re De Vries' Estate, 17 Cal.App. 184, 194, 119 P. 109, 113, in reference to similar language and quoting from a New York case: "'Words of present gift are here clearly used. The testator says: "I do hereby give and bequeath." The use of such language, or language of the same import, or effect, is expressly or impliedly recognized by the authorities as effective, in the absence of other controlling circumstances, to create a vested interest or estate in the beneficiary.'" See In re Estate of Reith, 144 Cal. 314, 77 P. 942; and In re Estate of Klein, 23 Cal. App.2d 708, 74 P.2d 79.

[2] Another rule of interpretation which is equally well settled is that when there is no "gift over" in the event of the death of the minor the estate will be presumed to have vested at the time of the testator's death. Estate of Yates, supra, 170 Cal. 256, 149 P. 555; Estate of Klein, supra; Williams v. Williams, supra. The presence of such language in the will was one of the main grounds of the decision in

Estate of Blake, supra, upon which appellant herein relies. But, in placing her reliance upon that case, the appellant chooses only the dicta which reads, 157 Cal. at page 460, 108 P. 292: "Thus, where the legacy is given, payable or to be paid when the legatee attains the age of 21 years, the legacy vests immediately upon the death of the testator. It is a present gift, the time of payment only being postponed; but where the time is annexed, not to the payment only, but to the gift itself—as when the legacy is given to the legatee at 21, or 'if' or 'when' he attains the age of 21—the legacy does not vest until the legatee attains that age. His attaining the age specified is a condition precedent; and, if the condition be not fulfilled, the legacy never vests." The quoted language is but a statement of *one* element to be considered in a case of this type. But the court did not rely upon it since it held that the "devise over" rule was the strongest evidence of the testator's intention to have the portion of the estate go to the issue of the beneficiary in the event that the latter should decease before she reached the age fixed in the will when she could "demand and receive."

The application of these rules to the present case is clear. The testatrix made a direct gift to her grandson in the third paragraph of the will just as she made a direct gift of all the residue in equal shares to her daughter and to her grandson in the fifth paragraph. There is no "gift over" in the event of the boy's death before he reaches majority. This is true as to both clauses of the will. The realty disposed of under the third clause was appraised at $23,500. The boy's share of the residue is estimated to be $14,000 all in cash. There is no sound reason for assuming that the testator intended to give him the cash as a present gift, and to make the gift of the realty contingent upon his reaching majority. To so hold would require an interpretation of the will that the rents and profits from the realty mentioned in paragraph 3 were undisposed of except by means of the residuary clause. But in this paragraph it is not disputed that a direct and present gift was made without any contingency. It would be wholly unreasonable to say that the testator had the deliberate intention to cause confusion in relation to the income from the realty by the mere insertion of the word "when" in the third paragraph. It is more reasonable to say that she intended her will should be interpreted in accordance with the presumption declared in section 28 of the Probate Code, and that the proper reading of the clause is that the estate should be delivered to him when he reached the age of twenty-one.

The order is affirmed.

GOODELL, J., and DOOLING, J., pro tem., concur.

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69 Cal.App.2d 611

PASADENA PLAYHOUSE ASS'N v. LOS ANGELES COUNTY.

FIRST TRUST & SAVINGS BANK OF PASADENA et al. v. SAME.

Civ. 14751.

District Court of Appeal, Second District, Division 2, California.

June 19, 1945.

Hearing Denied Aug. 16, 1945.

1. Taxation ⇨191

The Legislature is without authority to limit or extend the constitutional exemption of educational institutions from taxation. St.1939, p. 1280, § 203; Const. art. 13, § 1a.

2. Taxation ⇨242(1)

Under constitutional provision exempting educational institutions of collegiate grade from taxation, a statute defining institutions of collegiate grade by the use of the phrase "professional studies, such as law, theology, education, medicine, dentistry", etc., did not intend to make the professions specifically mentioned exclusive or to exclude acting which is universally recognized as a profession. St.1939, p. 1280, § 203; Const. art. 13, § 1a.

3. Taxation ⇨543(7)

In action to recover taxes wrongfully collected, evidence sustained finding that plaintiff association devoted to developing histrionic talents of students was an educational institution of collegiate grade not conducted for profit so as to be exempt from taxation. St.1939, p. 1280, § 203; Civ. Code, § 649 et seq.; Const. art. 13, § 1a.

4. Taxation ⇨242(1)

In order to be exempt from taxation as an educational institution of collegiate

grade not conducted for profit it is not necessary that the majority of students pursue their studies until degrees are obtained. St. 1939, p. 1280, § 203; Const. art. 13, § 1a.

5. Taxation ⚬=543(1)

That educational institution not for profit filed a petition with the board of equalization for a reduction in the assessed value based upon its properties did not bar action to recover taxes collected on ground that property was exempt. St.1939, p. 1280, § 203; Civ.Code, § 649 et seq.; Const. art. 13, § 1a.

6. Taxation ⚬=543(2)

Claim of educational institution for taxes wrongfully collected on ground that property was exempt was not barred by failure of bank as trustee to file a claim of exemption with assessor since claim of exemption could only be filed by the educational institution which was beneficiary of the trust. St.1939, p. 1280, § 203; Civ.Code, § 649 et seq.; Const. art. 13, § 1a.

◆

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Separate actions by Pasadena Playhouse Association and by First Trust & Savings Bank of Pasadena and another against County of Los Angeles to recover taxes wrongfully collected, which were consolidated for trial. From a judgment for plaintiffs, the defendant appeals.

Affirmed.

J. H. O'Connor, Co. Counsel, and Gordon Boller, Deputy, both of Los Angeles, for appellant.

C. C. Hamill and Roland Maxwell, both of Pasadena, and O'Melveny & Myers and L. M. Wright, all of Los Angeles, for respondents.

W. J. WOOD, Justice.

The plaintiff Pasadena Playhouse Association, which is an educational institution organized under Division 1, Part 4, Title 17 of the Civil Code, in which provision is made for the incorporation of colleges and seminaries of learning, commenced this action to obtain a refund of taxes paid for the tax year 1941–42. Plaintiff bank as trustee commenced a similar action and the two actions were consolidated for trial. A single judgment was rendered in favor of the two plaintiffs. The trial court found that plaintiff Association is an educational institution of collegiate grade, not conducted for profit, whose profits were being used exclusively for the purposes of education. On this appeal from the judgment in favor of plaintiffs defendant contends that these findings are not supported by the evidence.

Plaintiff Association is the record owner of approximately one-half of the property involved, consisting of the Fannie E. Morrison building, a structure seven stories in height used primarily for class work and instruction. It is the beneficial owner of the balance of the taxed property, the legal title being held by respondent bank as trustee, consisting of the playhouse building, containing administration offices of the school, a recital hall, library and an auditorium used primarily as a laboratory in developing the histrionic talents of the students.

As the basis for its claim of exemption from the payment of taxes plaintiffs rely upon Article XIII, section 1a, of the Constitution of California, which provides: "Any educational institution of collegiate grade, within the State of California, not conducted for profit, shall hold exempt from taxation its buildings and equipment, its grounds within which its buildings are located, not exceeding one hundred acres in area, its securities and income used exclusively for the purposes of education."

The legislature in 1939 enacted section 203 of the Revenue and Taxation Code, St. 1939, p. 1280, which is as follows: "An educational institution of collegiate grade is an institution incorporated as a college or seminary of learning under the laws of this State, which requires for regular admission the completion of a four-year high school course or its equivalent, and confers upon its graduates at least one academic or professional degree, based on a course of at least four years in liberal arts and sciences, or on a course of at least three years in professional studies, such as law, theology, education, medicine, dentistry, engineering, veterinary medicine, pharmacy, architecture, fine arts, commerce, or journalism. An educational institution of collegiate grade is not conducted for profit when it is conducted exclusively for scientific or educational purposes and no part of its net income inures to the benefit of any private person."

[1, 2] Although the legislature is without authority to limit or extend the exemp-

tion granted by the Constitution (Pasadena University v. Los Angeles County, 190 Cal. 786, 788, 214 P. 868), we find nothing in the legislative definition which supports the contention of defendant that plaintiff is not an educational institution of collegiate grade. It is to be noted that in this definition an institution to be accorded collegiate grade must have a course of study of at least four years in liberal arts and sciences *or* it must have a course of study of at least three years in professional studies, listing such subjects as architecture, fine arts and journalism. Although the profession of acting is not specifically mentioned in the code definition, it is clear that the legislature did not intend to make the professions specifically mentioned exclusive, for the code includes "professional studies, *such as* law, theology * * * journalism." It cannot be questioned that the occupation of acting is universally recognized as a profession.

[3, 4] The evidence is ample to justify the findings of the trial court that plaintiff Association is such an institution as comes within the exemption allowed by the Constitution. Plaintiff Association offers three different courses of study in drama and theatre arts, all based upon the entering student having successfully completed four years of high school work or its equivalent, furnished three satisfactory letters of recommendation and satisfied the faculty committee of his ability and earnestness. The first course contemplates two years study of subjects as set forth in its catalog. For a successful completion of this course a diploma is granted. The second course is a three-year course which leads to a bachelor of theatre arts degree, and the third course of four years work leads to a master of theatre arts degree. Plaintiff's requirements for the admission of students and for the course of study to be pursued are the equivalent of or superior to comparable courses in colleges and universities in California and in other state institutions which are recognized as of collegiate grade. All of the profits of the school and the income from the property involved are used to conduct the school of the drama. The fact, emphasized by defendant, that the larger portion of plaintiff's students complete only the two years course and do not receive a degree does not render ineffective the court's finding that plaintiff is an institution of collegiate grade. We find nothing in the Constitution or legislative enactments which requires that the majority of students must pursue their studies until degrees are obtained. Nor are the findings of the trial court weakened by the fact that theatrical performances are presented to the public to which admission is charged. Clearly the school of the drama must have a means for the development of the abilities of the students, and argument is not necessary to convince that performances before a paying and critical audience furnish an excellent method for improvement on the part of the students. A stage in the auditorium might well be compared to the laboratory of a student of chemistry or physics. The fact that less than half of the actors taking part in the performances for which an admission is charged are students is of slight importance, for, the performances being upon a competitive basis, actors older than the students must be procured to take the parts calling for older persons. It is noteworthy that plaintiff Association received a smaller income from its paid performances than it received from its paid tuitions.

Defendant cites Pasadena University v. Los Angeles County, supra, but we find nothing therein which bears out its contention. In that case the trial court found that plaintiff was not an educational institution of collegiate grade, and the reviewing court held that its findings were supported when it was shown that the total number of enrolled students was 304, of which number only 37 had completed a four-year high school course before admission to the institution. Eighty-nine of those enrolled had only grammar grade preparation and only a small fractional part of the student body was engaged in work of a collegiate grade.

[5] We find no merit in defendant's contention that plaintiff Association is barred from seeking a refund of the taxes because of the fact that it filed a petition with the board of equalization for a reduction in the assessed value placed upon its properties. Plaintiff filed its claim for a refund before it appeared before the board to obtain a reduction in the assessment. At that time the assessor had not granted the exemption. Plaintiff was not compelled to forego its right to demand a just valuation of its property because of the delay of the authorities in determining whether its property was exempt from taxes. It was merely following a course dictated by good business judgment and was not conceding that it should be taxed in any sum whatever.

[6] Nor is there merit in defendant's contention that the claim should be barred, at least in part, because of the failure of the bank as trustee to file a claim of exemption with the assessor. The bank, not being an educational institution of collegiate grade, could not properly file the claim, which was filed by the proper party, the beneficial owner. Third & Broadway Bldg. Co. v. Los Angeles County, 220 Cal. 660, 665, 32 P.2d 377.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

69 Cal.App.2d 574

BENWAY v. BENWAY.

Civ. 7101.

District Court of Appeal, Third District, California.

June 13, 1945.

1. Divorce 🔑243

Where husband having instituted divorce suit in Washington appeared in answer to wife's cross-complaint but did not deny allegations therein that parties had entered into agreement as to property, alimony, and custody of minor children, Washington court 14 years after entry of interlocutory and final decrees of divorce had jurisdiction to correct such decrees nunc pro tunc without notice to husband by incorporating therein original finding of fact approving and making a part of such finding, the agreement as to property rights and custody of children, which finding was approved as to form by husband's attorney. Rem.Rev.Stat.Wash. § 367.

2. Judgment 🔑326

A court may at any time and with or without notice or on its own motion correct a judgment by nunc pro tunc order so as to make judgment as entered conform to decision actually made.

3. Judgment 🔑191

Findings of fact and conclusions of law made and filed pursuant to statute constitute the decision of the court and entry of judgment thereon is a ministerial act to which signature of the judge gives no additional validity. Code Civ.Proc. § 632, Rem.Rev.Stat.Wash. § 367.

4. Judgment 🔑305, 306, 316, 323

While court may not correct a judicial error by ex parte order nunc pro tunc, errors due to failure of record to speak the truth or conform to decision rendered and clerical misprisions generally, of which the record affords the evidence, may be corrected at any time by court upon its own motion or upon motion of an interested party, with or without notice.

5. Judgment 🔑326

An error made by court or judge as well as one made by a clerk may be such a clerical error as is subject to correction by order nunc pro tunc.

6. Motions 🔑61

Every intendment is in favor of the regularity and validity of a nunc pro tunc order once it is made.

7. Judgment 🔑649

A record corrected by nunc pro tunc order and the order making the correction are conclusive upon any other court in which the record is offered in evidence.

8. Divorce 🔑243

Proceeding in Washington court which rendered decision granting divorce and approving agreement as to alimony to determine amount due thereunder was merely auxiliary to divorce action and a proper exercise of continuing jurisdiction of divorce court, and not an independent proceeding of which party bound to pay alimony was entitled to notice.

9. Divorce 🔑243

Service of process upon attorney who represented husband in divorce suit in Washington was sufficient notice to divorced husband of proceedings by former wife to have divorce decree corrected nunc pro tunc so as to incorporate therein finding approving agreement as to property, alimony and custody of children, and to have amount due thereunder determined.

◆

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action by Virgia Benway against Roy W. Benway to recover upon a judgment for past-due alimony entered in a superior court of the state of Washington. Judgment for defendant, and plaintiff appeals.

Judgment reversed, with direction to enter judgment for plaintiff.

H. K. Landram, of Merced, for appellant.

L. M. Linneman, of Dos Palos, for respondent.

ADAMS, Presiding Justice.

Plaintiff, Virgia Benway, brought this action in Merced County, setting up in her complaint that she had, on April 8, 1942, obtained a judgment against defendant in the State of Washington, in the sum of $3,991.66, no part of which had been paid. Defendant filed an answer denying the allegations of the complaint and setting up as a separate defense that the Washington court did not have jurisdiction over the person of defendant or any property belonging to him, and that the judgment entered by said court was without jurisdiction.

The cause coming on for trial, plaintiff's counsel introduced in evidence a copy of the judgment roll in the Washington action. That record shows that on October 24, 1927, Roy W. Benway filed in the Superior Court of Spokane County, Washington, a complaint in an action for divorce against Virgia Benway, it being alleged therein that there was no community property belonging to the parties by reason of the fact that prior to the commencement of the action plaintiff had turned over all property to defendant. It was further alleged that there were five minor children of the marriage, the youngest, a girl, being three years of age. Defendant filed an answer and cross-complaint, in which plaintiff's allegations of cruelty were denied, and cruelty on the part of cross-defendant toward cross-plaintiff was alleged. It was further alleged that the parties had entered into an oral agreement which would be reduced to writing later, which provided for division of property and for alimony and the custody of the children of the marriage. It was prayed that a divorce be granted to cross-complainant, that the agreement be approved by the court and that cross-defendant be compelled to pay the sums therein agreed upon as alimony and the property be awarded as therein provided. Cross-defendant in a reply admitted the making of the agreement but denied the other allegations of the cross-complaint. Upon trial of the action the written agreement of the parties was filed with the court, the presently pertinent portions thereof being an agreement on the part of Roy W. Benway that he should pay to Virgia Benway the sum of $25 per month until the further order of the court, and that to secure the first ten payments he should deposit the sum of $250 with the clerk of the court. It was further agreed that Mrs. Benway should have the custody of four of the minor children then in her custody, but that should she become unable to support them the three minor boys might be turned over to Benway, at his expense, but that, in such event, the rights of Mrs. Benway to the $25 per month should not be prejudiced. On the same day Benway deposited $250 with the clerk of the court, together with written instructions to the clerk that pursuant to an agreement between the parties plaintiff should pay $25 per month into the registry of the court, and instructing the clerk that upon failure of Benway to make such monthly payment, the clerk should pay to Mrs. Benway, out of the amount deposited, the sum of $25 per month in lieu thereof.

At the conclusion of the trial the court made and filed its findings of fact and conclusions of law which recited that plaintiff (cross-defendant) had been guilty of cruel treatment toward defendant (cross-complainant) and that defendant was entitled to a divorce from plaintiff; also "That there is no community property belonging to plaintiff and defendant; that all property rights were settled between them prior to the commencement of this action; that the custody of the children belonging to the aforesaid parties has likewise been adjusted between the parties themselves; that the agreement settling the property rights and custody of the children of the parties is approved and made a part hereof." These findings were "approved as to form" by plaintiff's attorneys. On the same day, February 17, 1928, the court filed its "Interlocutory Order", which decreed that defendant was entitled to an interlocutory decree of divorce but made no mention of the custody of children or the payment of alimony. Upon the expiration of six months a final decree was made and entered granting an absolute divorce to Mrs. Benway, but making no mention of custody, alimony or support money.

On January 14, 1942, Mrs. Benway executed, and on April 2, 1942, filed in the Washington court a "Petition for Modification of Judgment Nunc Pro Tunc," in which she recited the facts hereinbefore set forth, and further recited that she had surrendered to plaintiff the care of the three minor sons of the parties, but had maintained and supported the minor daughter; and she prayed that the decree of divorce be corrected by an order nunc pro tunc as of the date thereof to provide for and set forth the intents and wishes of the parties to the property settlement as set forth in the findings of fact. She also filed a petition to determine the amount of alimony due from Benway. On April 6, 1942, the court made and entered a "Nunc Pro Tunc Order Correcting Interlocutory Decree," which recited that Benway had been given notice by service upon his former attorney and that it appeared from an inspection of the records that the order given and made on February 17, 1928, "was entered in such a way as not to set forth correctly the order of this court as then made in the premises, and that the judgment of this court should incorporate the additional finding of the court as hereinafter set forth so as to conform to the facts and speak the truth." It was then ordered that the finding of the court "That the agreement settling the property rights and custody of the children of the parties is approved and made a part hereof," be incorporated in the decree and made a part thereof. On April 8, 1942, the court made and entered a "Judgment for Alimony Due," which recited that the total sum due to date, after deducting $250 paid by Benway, was $3,991.66.

After introducing the foregoing record in the case before us plaintiff rested.

Defendant then took the stand and testified that he had not been in the state of Washington since 1928, that no "due process" had been served upon him in that proceeding, that he had no attorney in the divorce proceeding who had authority to represent him after the final decree was entered in Washington, that three of the children had been with him and only one with the mother. No other evidence was offered. The trial court filed a memorandum opinion in which it stated that the nunc pro tunc order and the judgment which followed it were null and void because Benway was not served personally in the state of Washington, that the entry of the "personal" judgment in 1942 was not a proper exercise of the "continuing jurisdiction" of the Washington court, and that "the process of changing the judgment in rem, which was entered in 1928, into a judgment in personam in 1942, is void notwithstanding the fact that the same was entered nunc pro tunc for the purpose of making a legitimate correction in the judgment as originally entered." Findings were then filed reciting that Benway was not served in Washington, and that the Washington court had no jurisdiction over his person or property, and, as a conclusion of law therefrom, that plaintiff take nothing. Judgment was entered for defendant, a motion for a new trial was denied, and this appeal followed.

Appellant states that the question involved is whether the order of the Washington court correcting the interlocutory and final decrees of divorce nunc pro tunc was valid. Respondent argues that it was invalid because of lack of personal service of notice upon him to appear and defend against the petition for correction of the judgment nunc pro tunc. He also argues that the original judgment was, by the nunc pro tunc correction, changed from a judgment in rem to a judgment in personam, and that this could not be done without serving him personally in the state of Washington; and that the judgment for the unpaid alimony was a new and personal judgment which was not based on personal service.

[1, 2] We are of the opinion that the order of the Washington court, made in 1942, correcting the decrees entered in 1928 nunc pro tunc as of their original dates was valid. The great weight of authority is to the effect that a court may, at any time, and with or without notice, or on its own motion, correct a judgment by a nunc pro tunc order so as to make the judgment as entered conform to the judicial decision actually made. See Takekawa v. Hole, 170 Cal. 323, 149 P. 593; Dutton Dredge Co. v. Goss, 77 Cal.App. 727, 732, 247 P. 594; Goatman v. Fuller, 191 Cal. 245, 248, 216 P. 35; Kaufman v. Shain, 111 Cal. 16, 23, 43 P. 393, 52 Am.St.Rep. 139; Carter v. J. W. Silver Trucking Co., 4 Cal.2d 198, 204, 205, 47 P.2d 733; Carpenter v. Pacific Mutual Life Insurance Co., 14 Cal. 2d 704, 96 P.2d 796; Scamman v. Bonslett, 118 Cal. 93, 97, 50 P. 272, 62 Am.St.Rep. 226; E. Clemens Horst Co. v. Federal, etc., Co., 22 Cal.App.2d 548, 71 P.2d 599; Crim v. Kessing, 89 Cal. 478, 486, 26 P. 1074, 23 Am.St.Rep. 491; In re Estate of Soboslay, 4 Cal.2d 177, 179, 47 P.2d 714; McKannay v. McKannay, 68 Cal.App. 709, 712, 230 P.

218; 14 Cal.Jur. 931, sec. 40; Pappas v. Taylor, 138 Wash. 31, 244 P. 393, 394; O'Bryan v. American Inv. & Imp. Co., 50 Wash. 371, 97 P. 241, 242. Also see notes in 10 A.L.R. 526, 67 A.L.R. 828, and 126 A.L.R. 956.

As above stated, the Washington court recited in its findings of fact and conclusions of law that the parties had entered into an agreement settling their property rights and custody of their children, and that such agreement was approved and made a part thereof. This constituted the decision of the court. Section 367, Remington's Rev.Stats. of Washington, which is comparable to section 632 of the California Code of Civil Procedure, provides: "Upon the trial of an issue of fact by the court, its decisions shall be given in writing and filed with the clerk. In giving the decision, the facts found and the conclusions of law shall be separately stated. Judgment upon the decision shall be entered accordingly."

[3] Findings and conclusions made and filed pursuant to such a statute constitute the decision of the court, and the entry of judgment thereon is a ministerial act to which the signature of the judge gives no additional validity. See Crim v. Kessing, supra, 89 Cal. at page 488, 26 P. 1074, 23 Am.St.Rep. 491; Takekawa v. Hole, supra, 170 Cal. at page 324, 149 P. 593; In re Cook's Estate, 77 Cal. 220, 227, 17 P. 923, 19 P. 431, 1 L.R.A. 567, 11 Am.St.Rep. 267; 14 Cal.Jur. 994, sec. 71.

[4] While a court may not correct a judicial error by an order so entered, errors due to the failure of a record to speak the truth or to conform to the decision rendered, and clerical misprisions generally, of which the record affords the evidence, may be corrected at any time by the court upon its own motion or upon motion of an interested party, with or without notice. 14 Cal.Jur. 1007.

[5] Also a clerical error is not necessarily one made by a clerk, but such error may be that of the court or judge. In Re Estate of Goldberg, 10 Cal.2d 709, 76 P.2d 508, the court had for consideration the validity of an order correcting a decree of distribution nunc pro tunc as of the date of the original decree entered 35 years previously. It first stated the general rule that when on the face of a record it appears that a clerical error has been committed and carried into the judgment or decree the court has the power to correct such error; and as to what constitutes a clerical error within such rule it stated, 10 Cal. 2d at page 715, 76 P.2d 508, that while in its original and literal significance, a clerical error is one made by a clerk or some subordinate agent, latterly the meaning has been broadened and extended so that now it may include an error that may have been made by the judge or court. It also said, 10 Cal.2d at page 717, 76 P.2d 508, that as to such clerical errors, when same are apparent upon the face of the record, no time limit exists as far as the right to make the correction is concerned, and that the trial court has full power to determine whether the error was clerical or judicial in character, citing Harman v. Cabaniss, 207 Cal. 60, 276 P. 569. Carpenter v. Pacific Mutual Life Insurance Company, supra, is to the same effect.

Also in Kohlstedt v. Hauseur, 24 Cal App.2d 60, 74 P.2d 314, where the power of the court to amend a judgment nunc pro tunc on an ex parte application was in question, the court said that the superior court has inherent power to correct its records so as to make them speak the truth, regardless of the lapse of time, even though the misprision was that of the court; and that such correction may be made ex parte and of the court's own motion. It also said that it is for the judge who made the original decision to decide whether the judgment as written expresses his decision, and that in so acting he is exercising one of the functions of his judicial office, citing Kaufman v. Shain, supra, and Kowalsky v. Nicholson, 23 Cal.App. 160, 137 P. 607. It also quoted from Livesay v. Deibert, 3 Cal.App. 2d 140, 147, 39 P.2d 466, where the court said that it was for the trial judge to determine whether the order was all that he intended it to be; that if the mistake was clerical it could be corrected; that it must be presumed that he found it to be his own clerical error; that the facts were within his knowledge and that he had a right to rely upon his own memory; and that the court retained jurisdiction to amend the original order to correct clerical errors therein.

[6, 7] In Haynes v. Los Angeles R. R Corporation, 80 Cal.App. 776, at page 781, 252 P. 1072, the court said that the court having made the nunc pro tunc order, every intendment is in favor of its regularity and validity. And in Crim v. Kessing, supra,

it was said, 89 Cal. at page 486, 26 P. 1074, 23 Am.St.Rep. 491, that, when made, a record so corrected, and the order making the correction, are conclusive upon any other court in which the record is offered in evidence. Also see 14 Cal.Jur. 994 and cases cited in 10 A.L.R. 624, 625.

There is no merit in respondent's argument that the nunc pro tunc order made by the Washington court had the effect of changing a judgment in rem to one in personam, without personal service upon respondent in the state of Washington. Respondent himself instituted the divorce proceeding, appeared in answer to appellant's cross-complaint and made no denial of the allegation therein that the parties had entered into an agreement as to property, alimony and the custody of the children. He was well aware of the findings of the court made and filed, same having been approved as to form by his counsel. His awareness of his obligation to pay to Mrs. Benway the $25 provided by the agreement is evidenced by his deposit of $250 with the clerk of the court in part payment of this obligation. The decision of the trial court was made when the findings were filed, and, as we have held, the nunc pro tunc order did not create any new obligation on his part but merely corrected the clerical error of the court in failing to carry same into the decrees. De la Montanya v. De la Montanya, 112 Cal. 101, 44 P. 345, 22 L.R.A. 82, 53 Am.St.Rep. 165, and similar cases cited by respondent have no application.

[8] Nor did the hearing at which the Washington court determined the amount due appellant under the decision and agreement constitute a new or independent proceeding. It was merely auxiliary to the divorce action, and a proper exercise of the continuing jurisdiction of the divorce court. It is not contended by respondent that he ever paid more on account of his obligation than the $250 paid into the registry of the court, and the determination of the amount remaining unpaid was a mere matter of computation.

[9] Even if service of notice of these proceedings was necessary, service upon respondent's attorney of record was sufficient. Reynolds v. Reynolds, 21 Cal.2d 580, 583–585, 134 P.2d 251; Shibley v. Superior Court, 202 Cal. 738, 262 P. 332; Russ v. Russ, 68 Cal.App.2d 400, 156 P.2d 767; Olcott v. Superior Court, 68 Cal.App.2d 603, 157 P.2d 36; State v. Superior Court, 164 Wash. 618, 3 P.2d 1098, 1099, 78 A.L.R. 366; In re Force, 113 Wash. 151, 193 P. 698.

The judgment is reversed and the trial court is directed to enter judgment for plaintiff as prayed.

THOMPSON and PEEK, JJ., concur.

69 Cal.App.2d 602

PEOPLE v. BROWN.

Cr. 566.

District Court of Appeal, Fourth District, California.

June 15, 1945.

1. Criminal law ⚷97(4)

Generally, to deprive state courts of criminal jurisdiction over federal government property within a state, state must surrender, and United States must accept, jurisdiction. St.1943, pp. 898, 900, §§ 110, 113, 114, 120; 34 U.S.C.A. § 520; U.S.C.A. Const. art. 1, § 8.

2. Criminal law ⚷104

In prosecution in state court for offenses allegedly committed at a Naval Ordnance Training Station in state, in absence of evidence of the United States' exclusive jurisdiction, that the United States had not accepted jurisdiction over the property, and that the state courts had jurisdiction, was conclusively presumed Pen.Code, § 286; St.1943, pp. 898, 900, §§ 110, 113, 114, 120; 34 U.S.C.A. § 520; U.S.C.A. Const. art. 1, § 8.

3. Criminal law ⚷104

In absence of evidence that a superior county court lacked jurisdiction in a criminal prosecution of an offense allegedly committed in county, a presumption of jurisdiction existed.

4. Criminal law ⚷97(4)

In prosecution in state court for offenses allegedly committed at a Naval Ordnance Training Station in state, evidence that the United States maintained a police force known as the "security police" was insufficient to establish acceptance of criminal jurisdiction over the property by the United States so as to deprive state courts of jurisdiction. Pen.Code, § 286; St.1943, pp. 898, 900, §§ 110, 113, 114, 120; 34 U.S.C.A. § 520; U.S.C.A. Const. art. 1, § 8.

5. Robbery ⚿30

Where the jury returned a general verdict finding defendant guilty of robbery without fixing the degree, the trial court erroneously fixed the degree as robbery in the first degree and sentenced defendant accordingly, and defendant was entitled to a new trial. Pen.Code § 1157.

◆

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Joe Brown, also known as Shorty Brown, was convicted of robbery and the crime under Section 286 of the Penal Code, and he appeals.

Affirmed in part and reversed in part.

Harold D. Leddy, of Bakersfield, for appellant.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Tom Scott, Dist. Atty., and Dorsett M. Phillips, Deputy Dist. Atty., both of Bakersfield, for respondent.

MARKS, Justice.

This is an appeal from a judgment and order denying defendant's motion for new trial after his conviction of robbery and the crime denounced by section 286 of the Penal Code.

The amended information contained two counts. The first charged defendant with the crime of robbery alleged to have been committed on December 2, 1944, in Kern County, by taking $50 from the person and possession of Joseph Nettles by means of putting him in fear. The second count charged the commission of the other crime on the same day. Two prior convictions of felonies were charged and were admitted.

The crimes were committed at Inyokern at the Naval Ordnance Training Station in Kern County. Defendant maintains that the state courts have no jurisdiction of the case because the crimes were committed on a government military reservation. Art. I, Sec. 8, U. S. Constitution.

[1] It is well established that the federal government may acquire property within the boundaries of a state for governmental use but, as a general rule, in order to deprive the state courts of jurisdiction over it there must be a surrender of jurisdiction by the State and an acceptance of jurisdiction by the United States. Fort Leavenworth R. Co. v. Lowe, 114 U. S. 525, 29 L.Ed. 264, 5 S.Ct. 995, 29 L.Ed. 264; United States v. Watkins, D.C., 22 F.2d 437; People v. Mouse, 203 Cal. 782, 265 P. 944. Prior to 1940 it had been held that acceptance and consent by the Government will be presumed in the absence of the showing of a contrary intent. United States v. Jones, 109 U.S. 513, 3 S. Ct. 346, 27 L.Ed. 1015.

In 1940 the Congress amended section 520, Title 34 U.S.C.A. The final paragraph of the amended section provides in part as follows:

"Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head * * * of any department * * * may, * * * accept or secure from the State in which any lands or interests * * * are situated, consent to or cession of such jurisdiction, exclusive or partial, * * * over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction * * * by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted."

In 1943, Sections 110, 113, 114 and 120 of the Government Code of California, St. 1943, pp. 898, 900, were enacted. The effect of the first three sections is to cede to the United States jurisdiction over all land held, occupied or reserved by it on March 2, 1897, and to tender jurisdiction over all other such land thereafter acquired, subject to acceptance by the government and subject to certain reservations not important here. Section 120 provides as follows:

"Upon receipt of notification of the acceptance by the United States of exclusive jurisdiction over lands situated within the State of California, the Governor shall cause to be filed a true and correct copy of said notification in the office of the recorder of the county in which said lands are located and in the office of the clerk of the board of supervisors of the county in which said lands are located."

There is nothing in the record indicating under what tenure the United States was holding or using the land in question here. What little there is indicates that the federal government had not accepted exclusive jurisdiction over it.

[2] At the opening of the trial defendant moved to dismiss because of lack of jurisdiction in the state courts. During the course of the argument the deputy district attorney stated that in March, 1944, the War Department had filed with the Governor a list of military installations over which the Government had accepted jurisdiction; that he had a photostatic copy of this record which did not include the Naval Ordnance Training Station at Inyokern. If the deputy district attorney was mistaken in this statement, the record was in court and defendant could have availed himself of it. Instead he did nothing and did not produce anything at all to support his contention of exclusive jurisdiction in the United States. Under this state of the record we must follow the provisions of section 520 of Title 34 U.S.C.A., as amended, and conclusively presume that the United States has not accepted jurisdiction over the property involved and that the state courts have jurisdiction in this case. Johnson v. Morrill, 20 Cal.2d 446, 126 P.2d 873; Kiker v. City of Philadelphia, 346 Pa. 624, 31 A.2d 289.

[3] As the record contains nothing indicating that the superior court lacked jurisdiction, there is also a presumption of jurisdiction of the state court that comes to the support of the judgment. Ex parte Hasse, 5 Cal.App. 541, 90 P. 946.

[4] Defendant argues that the evidence shows that at the Naval Ordnance Training Station the United States maintains a police force known as the "security Police" which is a recognized civilian organization under the command of a Naval Officer which is sufficient to establish acceptance of jurisdiction by the Government. We are not impressed with this argument. Military Police and Ships' Police are familiar figures along the streets and in the public places in some of our cities. No one has suggested that their presence is evidence that the federal government has assumed jurisdiction in those cities and has suspended the jurisdiction of the state courts there.

[5] The jury returned a general verdict finding the defendant guilty of robbery without fixing the degree. The trial judge fixed the degree as robbery in the first degree and sentenced defendant accordingly. The attorney general concedes this to be error requiring reversal of that part of the judgment. See, Sec. 1157, Penal Code; People v. Tognola, 83 Cal.App. 34, 256 P. 455; People v. Machen, 3 Cal.App.2d 499, 501, 39 P.2d 893; In re Colford, 68 Cal.App. 308, 229 P. 63. No other questions are presented by defendant for our consideration.

The portion of the judgment pronounced on defendant under the first count of the information charging him with robbery, and the order denying his motion for new trial as to that offense, is reversed and that phase of the case is remanded to the superior court for retrial.

The portion of the judgment pronounced under the second count of the information charging defendant with violation of section 286 of the Penal Code, and the portion of the order denying his motion for new trial as to that offense are affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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69 Cal.App.2d 478

LUCACHEVITCH v. LUCACHEVITCH.

Civ. 14711.

District Court of Appeal, Second District, Division 3, California.

June 6, 1945.

1. Divorce 🔑298(1)

In determining right to custody of minor child after divorce of parents, court is concerned only with the interests of the child.

2. Divorce 🔑303(3)

Where court, in decree granting divorce to husband, incorporated an agreement respecting joint custody of minor child whereby he would go from home of one parent to that of the other, and husband subsequently applied for modification of decree to give him exclusive custody and wife filed counter motion, court did not abuse discretion under the evidence in modifying decree so as to give wife exclusive custody with right to select nurses, giving husband the right to part-time custody on week-ends and during vacation.

3. Divorce ⚷303(1)

Under statute giving court granting divorce continuing jurisdiction with power to modify orders for custody of children during time of minority, court cannot, in divorce decree, limit power to modify to a shorter period. Civ.Code, § 138.

4. Divorce ⚷303(1), 309

In every divorce decree having provisions respecting custody and support of children, law becomes part thereof and decree is subject to further order of court whether or not it is so stated. Civ.Code, § 138.

5. Divorce ⚷255, 303(1), 309

Although doctrine of res judicata applies generally to judgments of divorce which settle property rights, it does not apply to provisions for custody and support of children. Civ.Code, § 138.

6. Divorce ⚷297

Rights of children of parties to a divorce suit as respects custody cannot be contracted away by the parents. Civ.Code, § 138.

7. Divorce ⚷312½

Divorce decree incorporating property settlement agreement between the parties and a provision respecting attorney's fees in future proceedings, in so far as it purported to release defendant husband from obligation to pay plaintiff wife's attorney's fees in a proceeding to modify decree respecting custody of a minor child, was of no effect. Civ.Code, § 138.

◆

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Divorce suit by Zita Lucachevitch against Joseph Lucachevitch, in which defendant filed a cross-complaint and was awarded a decree of divorce. Defendant applied for modification of the decree so as to give him exclusive custody of a minor child of the parties, and plaintiff made a counter motion for exclusive custody. From the judgment modifying the decree, defendant appeals.

Affirmed.

Joseph Scott and J. Howard Ziemann, both of Los Angeles, for appellant.

Charles J. Katz and Pacht, Pelton, Warne, Ross & Bernhard, all of Los Angeles, for respondent.

SHINN, Justice.

On January 27, 1943, defendant was awarded a decree of divorce by default upon his cross-complaint, which charged cruelty. The parties have a boy who at the time of the divorce was 27 months of age. After defendant filed his answer and before his cross-complaint was filed, the parties made an agreement settling their property rights, under which plaintiff was to receive $3,750 within the period of a year. The agreement made elaborate provision for the custody and support of the child; the parties were to have joint custody and the child was to be passed back and forth from the home of one parent to that of the other. The agreement was approved by the court and the provisions with reference to custody were incorporated in the decree. In November, 1943, defendant made application for modification of the decree so as to give him the exclusive custody of the child and plaintiff made a counter motion for exclusive custody. The court modified the decree as hereinafter stated and also awarded plaintiff attorney's fees in the amount of $1,700 and $150 as costs. Defendant has appealed.

Under the terms of the interlocutory decree the parents had joint custody, the child was to be in a nursery school during the morning on school days; he was to be with plaintiff from noon of each Monday until Friday noon, when he was to be taken from school to the home of defendant, who was to return him to school the following Monday morning; he was to be with his father two-thirds of summer vacation periods and with his mother one-third. Part of each school holiday was to be spent with each parent. Nurses were to be selected by a designated physician, who were to be with the boy whether he was in the home of one parent or the other, and defendant was to pay this expense. The provisions of the decree respecting custody cover some nine pages of the clerk's transcript. We shall refer to those only which were modified; the others were continued in effect. The provision for joint custody was changed and exclusive custody was awarded to plaintiff, and she was given the right to select the nurses. Defendant, instead of having the infant with him from Friday noon until Monday morning of each week, is to have him from Friday noon to Sunday night on alternate week-ends and on Sundays from 9 a. m. until 8 p. m. other week-ends; each parent is to have the company of the child for one-half of his summer vacation period, and the decree provides that neither parent shall say anything in the presence of the child or of his nurses which would reflect upon the other parent. The court found that these changes were required for the best interest, health and welfare of the child, and this was the ultimate fact to be determined. The ground of the attack upon the custody provision is that there was no evidence whatever to support the general finding and certain evidentiary findings incidental thereto. The record contains the affidavits of the parties and more than 500 pages of transcript of the proceedings had in the taking of oral evidence. The only question of law involved upon this branch of the appeal is whether the court abused its discretion in so modifying the decree. We think it is quite clear from the record that there was no abuse of discretion. We would prefer to say nothing further upon this branch of the case but the earnest argument of appellant of insufficiency of the evidence requires us to proceed with an unpleasant duty.

In the beginning of their contest, neither party saw fit to submit to the court the question whether the other was fit to have the personal custody of the child for a part or all of the time. By their agreement they acknowledged, and the court specifically found, that each of the parties was so qualified. Ten months later defendant made his application for exclusive custody, based upon his affidavit. He stated upon information and belief that the child had been allowed in the home and in the presence of a Mr. Ingster, plaintiff's present husband, whom she married as soon as the decree of divorce became final, and he stated in his affidavit that plaintiff's present husband had been responsible for the breaking up of the home, and it was further stated on information and belief that Mr. Ingster was suffering from tuberculosis. It was alleged that the child was continually taken to restaurants and was thereby frequently upset and that on many occasions plaintiff created scenes in the presence of the minor child, and had used filthy language and made false accusations against defendant in the presence of the child. These were charges which, if sustained, would have called for a drastic modification of the decree, but the court found, upon sufficient evidence, that they were not sustained. Aside from his own testimony as to words passing between himself and plaintiff, defendant presented no evidence in support of his charges except alleged statements made to him by the infant. His accusations were denied in toto by plaintiff in her testimony; she testified that the child had never been in the home of Mr. Ingster; that the latter had never visited her home, and that he had seen the child only momentarily, during the year following the granting of the decree. It was further shown without contradiction that while Mr. Ingster had had a tuberculosis infection, it had been arrested, was not infectious, and that it was not likely to recur. Plaintiff by her counter motion and affidavit charged defendant with interfering with the supervision of the child by the nurses, with imposing his will upon them in matters affecting the rearing of the child, with being unable to get along with the nurses, with attempting to influence and prejudice them and the child against her, and with constantly allowing the presence in his home and in the presence of the child, to assist in the rearing of the child, of a nurse whom he was forbidden by the decree to employ for the child. The court found these charges to be true. The evidence disclosed that some seven or eight different nurses had been employed and that they went with the child from one home to the other. There only of these nurses testified at the trial, one for defendant and two for plaintiff. The nurse who testified for defendant was the one whom he had been forbidden to employ. She testified that her frequent services were rendered without compensation, but her association with the child was obviously contrary to the spirit of the decree. Both of the nurses who testified for plaintiff had been trained and were experienced in the rearing of children, and had been selected by the physician as specified in the decree. They testified that defendant overruled them in their decisions as to the training of the child, that he allowed the child to have his own way to such an extent that he became spoiled and difficult to care for; that the child was excited and nervous in the home of defendant and that the living conditions there were not as satisfactory as they were in the mother's home, where the child was more calm and contented and where he had numerous playmates. Their testimony along these lines was specific and pictured the father as overindulgent to a degree that affected the child's training. Although respected friends of defendant testified to his love for the child and to his solicitude for its welfare, these witnesses did not have the opportunities for observation that the nurses had, and the court was not unjustified in according much weight to the testimony of the latter.

The court found that defendant had attempted to influence the nurses and the child against plaintiff, and this finding is claimed to be without support in the evidence. Both nurses testified that defendant had told them, at or about the time they were first employed, that plaintiff was an immoral woman; that she and her mother had both been prostitutes, and defendant, in a deposition taken shortly before the trial, not only admitted having made these statements but also gratuitously added that the statement he had made about the mother was true. One of the nurses testified that defendant told her that plaintiff had been a streetwalker in Paris and that he had lived with her there. He also called their attention to the fact that the child was born some months before his marriage to plaintiff. While there was no evidence that defendant had spoken in derogatory terms of the mother directly to the child, the court could scarcely have doubted that his statements to the nurses were inspired by a desire to prejudice them against plaintiff, since he impressed upon them that they must take complete charge of the child when he was in the mother's home and keep the mother and child apart as much as possible. If he had succeeded in influencing the nurses the result would have been to disturb or destroy the normal relationship between the boy and his mother. His efforts, it is true, were unsuccessful; the nurses evidently did not subscribe to the exotic view of the defendant that the events related by him, if true, were more to the discredit of his wife than they were to him. The nurses had lived in both homes and were of the opinion, for reasons which they stated, that the child was better off in the home of the mother; they, as well as other witnesses, testified that plaintiff gave the child intelligent and affectionate care and training. Considering the obvious motives of defendant, it would not have been difficult for the court to believe that he was willing to indulge in gross exaggeration in order to destroy the good name of his wife. All of the findings of which appellant complains were well sustained by the evidence. The record would have furnished no justification for a modification of the decree which would have awarded defendant sole custody of this 3½-year-old child. The original decree was not the expression of the court's judgment, which only followed the agreement of the parties, and this agreement, with all of its elaborate provisions, seems to have been shaped more to meet the demands of the father than to promote the welfare of the child. The threatened detriment to the child through being shuttled back and forth between the parents appears to have been overlooked. If there was any good reason for it at the time of the trial, plaintiff's remarriage and the fact that she was providing the child with a good home were important facts to be considered upon the application for modification. The decree as modified is somewhat better than the original decree and the changes that were made were justified by the conditions which had developed under the original decree.

[1, 2] The court is concerned only with the interests of the child and cannot allow the desires of the parents to interfere therewith. No doubt the trial judge felt assured that the father would in the future desist from the course of conduct which led to a modification of the decree and would so deport himself that further modification would not be required for the welfare of the child. Defendant has no just cause to complain of the modifications that were made. In view of the evidence, the decree is indulgent so far as the claims of the father are concerned.

[3-5] Defendant's second point is that the order for the payment of attorney's fees and costs was erroneous, for the sole reason that it had been determined by the interlocutory decree that he should not be required to pay plaintiff's attorney's fees or costs in any other proceedings in the case and that this constituted a conclusive adjudication for all time to come. The decree, which followed the language of the agreement, provided that plaintiff should pay all attorney's fees incurred by her in the action or which might be incurred in any actions, motions or other proceedings

to enforce the terms of the agreement "or to enforce any or all of the terms of this judgment or to enforce any rights which either of the parties may have in law or in equity against the other in respect to said child," and that the attorney's fees and costs incurred in any such matter should be paid by the party incurring the same. The decree in terms was sufficiently broad to bar plaintiff's right to receive additional attorney's fees and costs. Defendant's plea of res judicata should be sustained if the court could, by the decree, deprive itself of the power to order the payment of attorney's fees in the future in a proceeding for modification with respect to the custody of the child. Section 138 of the Civil Code provides that the court may either before or after a decree of divorce and "during the minority of any of the children of the marriage, make such order for the custody, care, education, maintenance and support of such minor children as may seem necessary or proper, and may at any time modify or vacate the same." This continuing jurisdiction is vested in the court, and is to be exercised, in the interests of children. It is their right to have the court hear and determine all matters which concern their welfare and they cannot be deprived of this right by any agreement of their parents. The welfare of children is of interest to the state. The legislature has fixed the period within which such powers may be exercised by the courts as that of the minority of the children, and it is not within the power of the court to fix a shorter period. In every decree of divorce which has provisions respecting the custody and support of children the law becomes a part thereof and the decree is subject to the further order of the court, whether or not it be so stated. Although the doctrine of res judicata applies generally to judgments of divorce which settle property rights (Leupe v. Leupe, 1942, 21 Cal.2d 145, 130 P.2d 697), it can have no application to the provisions for the custody and support of children. Under the express terms of the statute the decree may be modified or vacated at any time during the minority of the child. A decree of the court cannot supersede or nullify this statutory provision. A judgment is conclusive only to the extent that it is made so by law, and the court has no power to give conclusive effect to a judgment which is declared by statute to be subject to modification, especially where it involves the interests of children and the state, which are superior to the rights of the parties litigant.

[6, 7] Defendant relies upon the rule stated in Kohl v. Kohl, 1944, 66 Cal.App.2d 535, 152 P.2d 494, and in the cases therein cited, that a decree of divorce which is based upon and gives effect to a property settlement agreement cannot be modified by the court without the consent of the parties. The rule is founded upon the right of the husband and wife to contract with each other with respect to their property and marital rights. It cannot be extended to as to interfere with the rights of children, which cannot be contracted away by the parents. Black v. Black, 1906, 149 Cal. 224, 86 P. 505. See also Puckett v. Puckett, 1943, 21 Cal.2d 833, and cases cited at pages 839, 840, 136 P.2d 1, at pages 4, 5. In Ott v. Ott, 1932, 127 Cal.App. 325, 15 P.2d 897, it was held that a property settlement agreement sanctioned and approved by the trial court in a divorce action did not have the effect of releasing the wife's claim for counsel fees and costs in a proceeding to modify the judgment with respect to the custody of the children, in which the welfare of the children was alone involved. While the terms of the agreement were not stated in the opinion, the case was decided not upon the ground that the agreement did not purport to release the husband from the obligation to pay attorney's fees but upon the ground that the wife had no power to free him from that obligation in a proceeding involving the welfare of children. The cases are unanimous in holding that in deciding questions involving the custody of children, the court is called upon to determine only what is best for the general welfare of the children. Controversies over custody are oftentimes long drawn out and bitter and they frequently present difficult questions for decision, requiring long and thorough preparation by competent counsel. There is a necessity for the services of attorneys in order that the court may be informed as fully as possible as to the competency and fitness of the respective parents, the conditions and influences that would surround the children in the home of one parent or that of the other and, where change of custody is sought, the court must make the most complete investigation as to whether the best interests of the children require that a change be made. The court is therefore vested with a broad discretion to order payment of attorney's fees whenever it ap-

pears necessary for a proper presentation of the case. This power is not limited by statute except as the general power of the court is limited to proceedings during the minority of the children, and it would be contrary to the policy of the law for the court to make any decree or order by which it might be hampered in future proceedings. A decree which declared that no order could be made in the future for the payment of attorney's fees in matters affecting the custody or support of children would be to that extent void. The decree here, insofar as it purports to release defendant from the obligation to pay attorney's fees in the instant proceeding, is of no effect. It is not contended that the amounts allowed as attorney's fees and costs are excessive.

The judgment is affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.

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69 Cal.App.2d 799

LUCACHEVITCH v. LUCACHEVITCH.

Civ. 14897.

District Court of Appeal, Second District, Division 3, California.

June 6, 1945.

Divorce 🔑312½

Incorporation into an interlocutory divorce decree of a property settlement agreement whereby parties agreed that all attorney's fees and costs incurred in any proceeding respecting enforcement of agreement or decree or rights of custody of minor child should be paid by party incurring costs was ineffective to deprive court of discretionary power to order payment of attorney's fees by defendant in subsequent proceeding seeking a modification of decree in respect to custody of minor child.

◆

Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Divorce action by Zita Lucachevitch against Joseph Lucachevitch in which a divorce decree was granted to defendant on his cross-complaint. The defendant applied for a modification of the decree in respect to custody of a minor child, and the plaintiff filed a counter motion. After an appeal was taken from an order modifying the decree, plaintiff applied for an order requiring defendant to pay attorney's fees and court costs on appeal and such an order was made, and defendant appeals.

Affirmed.

Joseph Scott, of Los Angeles, for appellant.

Isaac Pacht, of Los Angeles, for respondent.

SHINN, Justice.

This is a companion appeal to Civil No. 14711, 159 P.2d 688. Defendant took an appeal from an order modifying a decree of divorce with respect to the custody of a minor child and requiring him to pay attorney's fees and costs to the wife in the proceeding in the trial court. After that appeal was taken, upon application of plaintiff, which was opposed by defendant, the court ordered defendant to pay the sum of $750 as attorney's fees and the sum of $100 court costs on the appeal. Defendant has appealed from this order.

The sole point made for reversal is the one urged upon the appeal from the order of modification, namely, that by the interlocutory decree, in which was incorporated a property settlement agreement of the parties, and in accordance with the agreement, it was provided that all attorney's fees and costs incurred in any proceeding in the case respecting the enforcement of the agreement or decree or rights of custody of the minor child should be paid by the party incurring the same. For reasons which we stated in our opinion upon the other appeal, the provision of the decree relied upon by defendant must be held ineffective to deprive the court of the discretionary power to order the payment of attorney's fees by defendant. It is not contended that the amounts allowed were excessive.

The order is affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.

EPHRAIM et al. v. METROPOLITAN TRUST CO. OF CALIFORNIA et al.*

Civ. 7109.

District Court of Appeal, Third District, California.

June 12, 1945.

Hearing Granted Aug. 9, 1945.

1. Quieting title 🔑34(5)

In a suit to remove a cloud on title, complaint must state facts and not mere conclusions, showing apparent validity of instrument designated, and point out the reason for asserting that it is actually invalid. Civ.Code, §§ 3412, 3413.

2. Mortgages 🔑32(1)

Declaration of trust executed by owners of land as trustors, which appeared to be valid voluntary trust conforming to statute for purposes of subdividing, selling and accounting for proceeds of sales of real property, was not a mere mortgage or deed of trust to secure grantors' interest in the property in payment of specified debt, even though declaration provided for liens to secure indebtedness and for sale of lands to satisfy indebtedness in case of default. Civ.Code, § 2221.

3. Property 🔑9

Where record in a prohibition proceeding, determined in November, 1936, showed court's determination that grantors in deed under which plaintiffs claimed title to land had no beneficial interest in the land and had been declared bankrupt in 1934, court must assume that when grantors executed the deed in July 1939 they then had no title to convey.

4. Evidence 🔑43(3)

Court could take judicial notice of determination in a previous prohibition proceeding that parties who thereafter executed a deed under which plaintiffs claimed title had no beneficial interest in the land.

5. Pleading 🔑312

Where declaration of trust provided specifically for manner of publishing notice of sale in case of default in payment of indebtedness secured and provided that recitals in assignment of default and the publication of notice of sale should be conclusive proof of failure to pay and of due publication of notice, and assignment of beneficial interest, which was attached to plaintiffs' complaint, recited that due notice of sale of lots was made in manner required by declaration of trust, court must assume that due notice was given and contrary allegation of complaint for removal of cloud and other relief were without effect. Code Civ.Proc. §§ 738, 1060; Civ.Code, §§ 3412, 3413.

6. Trusts 🔑194

Statute relating to notice of sale under power in mortgage and providing that it applies to every transfer of an interest in property other than any transfer in trust did not apply where real property was transferred in trust for specified purposes under declaration of trust. Civ.Code, § 2924.

7. Pleading 🔑35

Where written contract, which is foundation of action, is attached to complaint and made a part thereof, allegations of mere conclusions with respect to legal construction of instrument and averments in conflict with its clear provisions should be disregarded as surplusage.

8. Quieting title 🔑34(5)

Complaint for removal of cloud from title and other relief did not state cause of action on theory that declaration of trust, which was attached to complaint, and which had been executed by parties who, after sale thereunder, executed a deed under which plaintiffs claimed title, was a mere mortgage which could be canceled as a cloud upon plaintiffs' title or that notice of sale thereunder was defective. Civ.Code, §§ 3412, 3413.

9. Pleading 🔑8(9)

Paragraph of complaint merely asserting that plaintiffs brought the action under certain statutes relating to declaratory relief stated a mere conclusion where no facts of ownership of land involved, of an actual controversy between the parties, or otherwise, were stated to confer jurisdiction in a suit for declaratory relief. Code Civ.Proc. §§ 738, 1060.

10. Action 🔑6

To state a cause of action for declaratory relief, plaintiff must state facts from which court may assume a valid present controversy exists. Code Civ.Proc. §§ 738, 1060.

11. Action 🔑6

Where complaint alleged that deed which was challenged was recorded July 9, 1937, and complaint in action for declaratory relief was not filed until after lapse of more than 5 years, action was barred under statute authorizing court to deny relief where declaration is not proper at the time under all the circumstances. Code Civ.Proc. § 1061.

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* Subsequent opinion 172 P.2d 501.

◆

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Action by Walter K. Ephraim and another against Metropolitan Trust Company of California and others to quiet title to real property, to remove a cloud from title, or for declaratory relief. From a judgment for defendant, plaintiffs appeal.

Affirmed.

John J. Redhead, of San Francisco, for appellants.

Wm. H. B. Haymond and F. W. Audrain, both of Los Angeles, and Thomas Maul, of Placerville, for respondent.

Herbert E. White, of Sacramento, amici curiae for Metropolitan Trust Co., etc.

THOMPSON, Justice.

The plaintiffs have appealed from a judgment which was rendered against them for failure to amend their complaint within the time allowed therefor after separate general and special demurrers had been sustained. The trial court held that the complaint failed to state a cause of action to quiet title to real property under Section 738 of the Code of Civil Procedure, to remove a cloud from the title under Sections 3412 and 3413 of the Civil Code, or for declaratory relief under Section 1060 of the Code of Civil Procedure.

The complaint is lengthy and complicated. It contains two counts. The first cause alleges that plaintiffs are owners and in possession of specified lots in "Tahoe Cedars Addition" in El Dorado County, according to the map thereof recorded in that county; that the named defendants claim an interest in said lots "as trustee, mortgagee and beneficiary" under a trust or mortgage which is attached to the complaint as "Exhibit A"; that said declaration of trust is "void, and casts a cloud upon the title of said plaintiffs". That cause fails to allege facts upon which plaintiffs rely for holding that the trust is void or defective. The first cause then asserts, as a mere conclusion, that it is brought "under sections 738 and 1060 of the California Code of Civil Procedure."

The second cause contains fifteen pages. It adopts the essential allegations of the first count. The two causes of action appear to be interrelated and dependent upon the same facts which are recited chiefly in the last count. Both causes are founded on certain alleged defects of three instruments which are marked exhibits "A", "B" and "C" which are attached to the complaint and made a part thereof, and which the plaintiffs declare constitute clouds upon their title, which they ask the court of chancery to determine to be void. Those documents are the "Declaration of Trust" marked "Exhibit A", which was executed February 10, 1930, between Metropolitan Trust Company, as trustee, and H. L. Henry and Clara S. Henry, as beneficiaries, to "hold, subdivide, improve and sell said real property, and to distribute the proceeds therefrom", in the manner specifically provided therein. Exhibit B is an assignment of a beneficial interest in the lots in said tract to the defendant R. H. Strosnider, in satisfaction of a lien to secure a loan of several thousand dollars, executed August 12, 1933, between said trustee and beneficiary. Exhibit C is a deed executed after sale on May 5, 1937, by which the Metropolitan Trust Company conveys the property in question to R. H. Strosnider. Neither of these instruments appears on its face to be invalid or void.

Paragraph XX of the second count of the complaint alleges that plaintiffs acquired title to the real property in question from W. M. Peterson, by deed dated December 30, 1939, and that their grantor obtained title thereto from H. L. Henry and Clara S. Henry, his wife, by deed dated July 25, 1939. It is conceded the common source of title of the respective parties is H. L. and Clara S. Henry.

After carefully analyzing the allegations of the complaint as a whole we are persuaded that, aside from certain conclusions, the plaintiffs rely upon their assertions, based solely on information and belief, that a former deed to the real property in question from H. L. and Clara S. Henry to the Metropolitan Trust Company, dated December 20, 1927, was in fact intended as a mere mortgage to secure an antecedent debt, without assigning alleged facts or reasons therefor; that the Declaration of Trust attached to the complaint as Exhibit A is also a mere mortgage with power of sale, to secure a debt of $10,000 owing to the Henrys, and as a second lien for payment to Girlie Strosnider of the further sum of $13,000, due to her from the Henrys; that for default of said payments the holder was authorized by said Declaration of Trust to foreclose the mortgage and sell the beneficial interest of the Henrys at public auction only pursuant to Section 2924 of the Civil Code and Section 692 of the Code of Civil Procedure, after publication of notice; that the trustee did unlawfully sell and assign the beneficial interest of the Henrys for default in payment of said sum of $13,000 to Girlie Strosnider, upon publication of notice therefor, without conforming to the requirements of Section 2924 of the Civil Code, which rendered said sale and assignment void; that said default and sale are barred by the statute of limitations and are void and cast "a cloud upon plaintiffs' title". The prayer of the complaint asks that the court decree that the sale and assignment of the beneficial interest of the Henrys be adjudged "null and void and the clouds thereby created * * * be removed and discharged" and that it be determined that the Declaration of Trust is a mere mortgage and lien upon the property to secure payment of the indebtedness secured thereby to H. L. and Clara S. Henry.

Separate general and special demurrers to the complaint were filed by Metropolitan Trust Company and by R. H. and Girlie Strosnider. The demurrers were sustained with leave to amend the pleading within ten days. On motion, for failure to amend their complaint, judgment was rendered against the plaintiffs, from which they have appealed.

The appellants contend that the complaint states three separate causes of action, namely, the statutory suit to quiet title to real property under Section 738 of the Code of Civil Procedure, a cause to remove the cloud upon the title created by the alleged invalidity of the instruments attached to the complaint as exhibits thereto, and an action for declaratory relief under Section 1060 of the Code of Civil Procedure. It is asserted that if any one of said causes is sufficiently alleged in the complaint, the demurrers were erroneously sustained.

[1] We are of the opinion the complaint fails to state facts sufficient to constitute a cause of action. Both counts of the complaint refer to the Declaration of Trust which is attached to and made a part thereof, and designate that instrument as a cloud upon plaintiffs' title without assigning any reason therefor except such as are clearly in conflict with the language of the trust. The counts are interrelated and dependent upon the same facts, and, in effect, constitute but one cause of action based on alleged infirmities of the Declaration of Trust creating a cloud on the title. The plain language of the trust instrument refutes the defects complained of. The gist of the allegations of the complaint amounts to an ineffectual effort to state a cause of action to remove a cloud upon the title. It is true that an ordinary complaint to quiet title to real property under Section 738 of the Code of Civil Procedure is sufficient if it alleges that the plaintiff is the owner and entitled to possession of the property, and that the defendant claims an interest therein adverse to plaintiff's title thereto, which claim is without right, and prays for a decree quieting title in plaintiff. Hyatt v. Colkins, 174 Cal. 580, 163 P. 1007; 22 Cal. Jur. 146, secs. 28–30. But the authorities are uniform to the effect that the statutory suit to quiet title must be distinguished from an action to remove a cloud on the title alleged to have been created by a designated instrument. In a suit to remove a cloud the complaint must state facts, and not mere conclusions, showing the apparent validity of the instrument designated, and point out the reason for asserting that it is actually invalid. Hibernia Savings & Loan Society v. Ordway, 38 Cal. 679; Castro v. Barry, 79 Cal. 443, 21 P. 946; Hughes v. Beekley, 85 Cal.App. 313, 318, 259 P. 337; Kroeker v. Hurlbert, 38 Cal. App.2d 261, 101 P.2d 101; Thompson v. Moore, 8 Cal.2d 367, 65 P.2d 800, 109 A.L. R. 1027; 22 Cal.Jur. 151, secs. 31–33; 51 C.J. 215, §§ 154–165; 4 Bancroft's Code Pleading, 3900, sec. 2188; 44 Am.Jur. 63, sec. 79.

In reconciling the cases with relation to the necessity of pleading facts upon which an action to remove clouds from titles, as distinguished from a simple suit to quiet title to real property, it should be observed that some complaints to quiet title have been upheld by disregarding as surplusage certain allegations with respect to asserted void instruments for the reasons that no demurrers were filed to the complaints, or because the answers tendered the issues and the cases were tried on that theory without objection.

[2-4] In the present case the insufficiency of the complaint was challenged by

demurrers which were sustained, and the plaintiffs elected to stand upon their complaint. It is apparent that each of the counts in this complaint is directed against the Declaration of Trust which is referred to as a cloud on the title. It is attached to the pleading as an exhibit and made a part thereof. The plaintiffs allege their title was derived by deed dated December 30, 1939, through W. M. Peterson from H. L. and Clara S. Henry, by deed dated July 25, 1939, which was approximately six years after the Henrys executed the Declaration of Trust. The written Declaration of Trust, which was executed by H. L. and Clara S. Henry as trustors appears to be a valid voluntary trust conforming to the provisions of Section 2221 of the Civil Code for the purposes of subdividing, selling and accounting for the proceeds of sales of the real property in the manner specifically provided therefor. It may not be held to constitute a mere mortgage or deed of trust to secure the grantors' interest in the real property in payment of specified debts, as the plaintiffs contend. The Declaration of Trust does provide for a lien on the land for repayment of $10,000 advanced to the Henrys by the Metropolitan Trust Company; for payment of a second lien thereon to secure an indebtedness of $13,000 owing from the Henrys to Girlie Strosnider, and for sale of land in the manner specifically prescribed to satisfy said indebtedness in case of default in the payments. For default in payment by the Henrys to Girlie Strosnider of the last-mentioned indebtedness, certain lots were sold in the manner designated by the trust instrument, and the assignment in satisfaction of that debt was made August 12, 1933, as shown by Exhibit B also attached to the complaint and made a part thereof. Any claim for a beneficial interest in the real property which the Henrys may have had on account of alleged irregular or defective procedure in said sale of lots was adjusted and settled as this court held in a prohibition proceeding determined in November, 1936. Strosnider et al. v. Superior Court, 17 Cal.App.2d 647, 62 P.2d 1394, 1396. The parties to that suit included the Henrys, the Strosniders and the Metropolitan Trust Company, who are involved in this action. The Henrys were declared bankrupts February 12, 1934. In a controversy over the same claim which is involved in the challenged sale of land in this case, this court said: "During the bankruptcy proceedings the trustee in bankruptcy entered into negotiations with the Strosniders and the trust company to settle the controversies existing between themselves and the Henrys, and on April 22, 1935, an agreement was entered into whereby, for a valuable consideration paid, all matters of dispute were settled and the agreement approved. The Henrys appealed from the order approving the compromise, but said appeal was dismissed by the federal court and said order is now final."

The deed upon which the plaintiffs in this case rely was not executed by the Henrys until July 25, 1939. We must assume the Henrys then had no title to convey. We also assume this court may take judicial notice of its determination in that prohibition proceeding that the Henrys had no beneficial interest in said land. Schomer v. R. L. Craig Co., 137 Cal.App. 620, 627, 31 P.2d 396; Roberts v. Roberts, 81 Cal. App. 499, 253 P. 1112; 31 C.J.S., Evidence, p. 619, § 50, subsec. a.

[5, 6] The alleged defect in the sale of the lots upon which the appellants rely was the asserted failure to give notice thereof according to Section 2924 of the Civil Code. But paragraph VI of the Declaration of Trust provides specifically for the manner of publishing notice. It does not refer to Section 2924 of the Civil Code, and the Declaration of Trust does provide that "the recitals in each such assignment of default and of publication of notice of sale," etc., "shall be conclusive proof of such failure to pay, of due publication of such notice, and that the sale was made after due and proper demand, and of all facts recited therein." In compliance therewith, the Assignment of Beneficial Interest, which is also attached to the complaint and marked Exhibit B, recites that due notice of the sale of lots was made in the manner required by the Declaration of Trust. We must therefore assume that due notice was given, and that there is no merit in the contrary allegation of the complaint in that regard. Moreover, Section 2924 of the Civil Code has no application to sales under this Declaration of Trust. That section provides that it applies to "Every transfer of an interest in property, * * * other than * * * any transfer in trust." The real property which is involved in this case was transferred "in trust" for specified purposes. We therefore conclude

that, if there is a defect of notice of sale pursuant to Section 2924, it has no application to the present case.

[7, 8] Where a written contract, which is the foundation of an action, is attached to the complaint and made a part thereof, the allegations of mere conclusions with respect to the legal construction of the instrument, and averments in conflict with its clear provisions should be disregarded as surplusage. Stoddard v. Treadwell, 26 Cal. 294; Peak v. Republic Truck Sales Corp., 194 Cal. 782, 790, 230 P. 948; Bashford v. A. Levy & J. Zentner Co., 123 Cal. App. 204, 11 P.2d 51; Meer v. Cerati, 53 Cal.App. 497, 200 P. 501; 49 C.J. 618, § 882, 883. In the Stoddard case, supra, it is said in that regard: "Where a plaintiff himself sets forth the contract in the terms in which it is written, and then proceeds by averment to put a false construction upon the terms, the allegations, as repugnant to the terms, should be regarded as surplusage."

In 49 Corpus Juris at page 619 it is said: "In case of a variance between the allegations of a pleading and the terms of an instrument set out as an exhibit, the exhibit will control, as far as its legal effect is concerned."

In accordance with the foregoing principle of pleading we are warranted in holding that the complaint does not state a cause of action on the theory that the Declaration of Trust is a mere mortgage which may be canceled as a cloud upon plaintiffs' title, or that the notice of sale thereunder was defective.

[9, 10] We are of the opinion the complaint does not state facts constituting a present cause of action for declaratory relief. No separate count of that nature was included in the complaint. Paragraph VI of the first cause merely asserts that plaintiffs "bring this action under Sections 738 and 1060 of the California Code of Civil Procedure." That statement is a mere conclusion. No facts of ownership of the land, of an actual controversy between the parties, or otherwise, are stated to confer jurisdiction in a suit for declaratory relief. Nor does the mere injecting of paragraph XIII in the second count state facts conferring jurisdiction in an action for declaratory relief. It merely states that "by reason of the above and foregoing" there exists a controversy between the parties. By reference to the allegations in the cause to remove a cloud from the title to the real property, upon which the plaintiffs rely, it affirmatively appears there is no valid present controversy between the parties. To state a cause of action for declaratory relief it is necessary to state facts from which the court may assume a valid present controversy exists. In the case of Merkley v. Merkley, 12 Cal.2d 543, 86 P.2d 89, 91, the Supreme Court said: "The plaintiff must show that the conditions exist which will justify the court in exercising its discretion to grant the relief sought."

See 5 California Jurisprudence, Ten Year Supplement, 109, section 3, and cases cited.

Moreover, it appears from the allegations of the complaint that it is not necessary or proper for the court to grant declaratory relief under the present circumstances of this case. Whatever interest in the land the Henrys may have had upon which plaintiffs rely for a cause of action was terminated by settlement in the bankruptcy case long before plaintiffs procured their deed from them. It also affirmatively appears the statute of limitations bars this action. Section 1061 of the Code of Civil Procedure provides that: "The court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances."

[11] Even assuming, without so deciding, that the Declaration of Trust was a mere mortgage, the plaintiffs' alleged cause is barred by the statute of limitations which was raised by both demurrers. The complaint alleges that the deed which is challenged was recorded July 9, 1937. The complaint in this action was not filed until October 22, 1943, after the lapse of more than five years. It therefore appears on the face of the complaint that this action is barred by the statute of limitations.

For the foregoing reasons the demurrers were properly sustained.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

In re WIERZBICKY'S ESTATE.

WIERZBICKY et al. v. WIERZBICKY et al.

Civ. 12788.

District Court of Appeal, First District, Division 2, California.

June 25, 1945.

Rehearing Denied July 25, 1945.

Hearing Denied Aug. 20, 1945.

1. Wills 🔑455

A testator who drew his own will, presumably without legal aid, may not be supposed to have used the same niceties of descriptive language as would be employed by an expert draftsman.

2. Wills 🔑449

That testator made will raised presumption of intention to dispose of all his property.

3. Wills 🔑448, 449

In construction of a will, whenever disputed word or phrase may reasonably be given more than one meaning, that meaning should be given, if possible, which will prevent intestacy, partial or total. Probate Code, § 102.

4. Wills 🔑488

Where language of will is ambiguous, court may resort to extrinsic evidence to aid in its proper construction.

5. Wills 🔑571

Where testator was a former employee of Union Oil Company and a beneficiary of its retirement system, formerly known as Union Oil Provident Fund, and also was insured under an employees' group policy issued to such company, and such insurance coverage had been assigned by testator to trustees of the Provident Fund, finding that holographic will giving the "Union Provident Insurance" to two daughters, share and share alike, was intended to designate such assigned insurance, was justified, in view that partial intestacy would otherwise result. Probate Code, § 102.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Proceeding in the matter of the estate of Theodore Wierzbicky, deceased. From a portion of a decree involving construction of the holographic will of decedent, John Wierzbicky and another, legatees, opposed by Annie Wierzbicky and another, administratrices with the will annexed of the estate of said deceased, appeal.

Affirmed.

Irving M. Liner, of Oakland, for appellants.

Walter & Brown, of Oakland, for respondents.

DOOLING, Justice pro tem.

The appellants herein are the surviving sons, and the respondents the surviving daughters, of Theodore Wierzbicky, deceased. The appeal involves the proper construction of the holographic will of the decedent. The dispositive portion of the will is sufficiently brief to justify our quoting it in full. It reads:

"I leave to my daughters Katherine and Annie Wierzbicky share and share alike my share of house and lot situated at 1462 Stannage Avenue, Berkeley, California and Union Oil Provident Insurance.

"To my sons John and Paul Wierzbicky monies in two banks and Post Office share and share alike after all expenses have been paid."

The question of the proper construction of the language "Union Oil Provident Insurance" as used by the testator is here presented. This question was submitted to the probate court on an agreed statement of facts, from which the following appears:

At the time the will was executed, July 28, 1941, the testator was a retired employee of Union Oil Company of California. He was a beneficiary of a pension or retirement system established by that company which had formerly been known as "Union Oil Provident Fund" and was later denominated "Pension Maintenance Trust." He was entitled to receive therefrom $25.25 per month, and any balance remaining in the fund at his death was to go to designated beneficiaries in accordance with the rules and regulations established for the fund. His life was also insured for a total amount of $5,000 under a group insurance policy issued by the Equitable Life Assurance Society to Union Oil Company of California. In order to secure greater monthly payments from the Union Oil Provident Fund than the $25.25 authorized by its rules and regulations the testator on August 16, 1937, assigned to the trustees of the fund, as security for the repayment to the fund of such additional payments, his certificates of insurance under the group life insurance policy. After the testator's death the trustees deducted from the proceeds of this insurance the amount due the fund for such advances and paid the balance amounting to $4,048 into the testator's estate.

The balance due from the so-called Provident Fund is approximately $3,400. It is the subject of a pending action for declaratory relief to determine whether it should be disposed of in accordance with the rules and regulations or paid to the estate to be therein distributed under the will, and for this reason the probate court reserved any disposition of this money. The probate court determined that the proceeds of the group life insurance policy issued to Union Oil Company was bequeathed to the daughters of the testator and ordered distribution accordingly, and it is this portion of the decree that is here under attack.

Appellants argue that the words of the will "Union Oil Provident Insurance" cannot be construed to include the proceeds of the group life insurance policy issued to Union Oil Company for the benefit of its employees including the testator, but must be construed to refer solely to the beneficial interest of the testator in the Union Oil Provident Fund. The probate court took a different view.

[1-4] Certain settled rules for the construction of wills support the construction given to this language of the will by the probate court. The will was drawn by the testator, presumably without legal aid, and he may not be supposed to have used the same niceties of descriptive language as would be employed by an expert draftsman. Estate of Olsen, 9 Cal.App.2d 374, 50 P.2d 70; Estate of Gracey, 200 Cal. 482, 253 P. 921; 26 Cal.Jur. p. 895. The will as construed by the probate court disposes of the testator's entire estate. The construction contended for by appellants would result in intestacy as to the group insurance. " 'The very fact of making a will raises a presumption that the testatrix intended to dispose of all of her property.' 26 Cal.Jur. p. 899. Whenever a disputed word or phrase may be reasonably given either of two meanings, that meaning should be given which will prevent intestacy. While this rule is codified as to total intestacy (Probate Code, § 102), the principle is also applicable to avoid partial intestacy. Estate of Parelly, 214 Cal. 199, 206, 4 P.2d 948; Estate of Heberle, 153 Cal. 275, 95 P.2d 41; O'Connor v. Murphy, 147 Cal. 148, 81 P. 406. In other words, constructions which lead to either total or partial intestacy are not favored. Estate of Gracey, 200 Cal. 482, 253 P. 921; Estate of O'Gorman, 161 Cal. 654, 120 P. 33." Estate of Olsen, supra, 9 Cal.App.2d at page 379, 50 P.2d at page 72. Cf. Estate of Northcutt, 16 Cal. 2d 683, 689, 690, 107 P.2d 607. Where an ambiguity or uncertainty is discovered in the language of a will the court may resort to extrinsic evidence to aid in its proper construction. Estate of Franck, 190 Cal. 28, 210 P. 417; Sears v. Rule, 45 Cal.App. 2d 374, 114 P.2d 57; 26 Cal.Jur. 891–893.

[5] It appears from the agreed statement of facts that the testator as a former employee of Union Oil Company was a beneficiary of its retirement system, formerly known as Union Oil Provident Fund, and also was insured under a group policy of life insurance issued to Union Oil Company for the benefit of its employees. It further appears that this insurance coverage had been assigned by the testator to the trustees of Provident Fund. The Union Oil Company was the source of both and the control of both, by virtue of the assignment, was in the trustees of the Provident Fund. The probate court could reasonably conclude that in using the words "Union Oil Provident Insurance" the testator had intended to designate the life insurance procured through the Union Oil Company and assigned by the testator to the trustees of the Provident Fund, particularly in view of the apparent completeness of the will on its face and the partial intestacy that would otherwise result. We agree with the conclusion of the probate court embodied in its decree "that while no doubt the description of some of the property is not as perfect as could have been made by a lawyer and not a layman, nevertheless the court is satisfied that distribution as prayed for in said petition is in entire accord with the intention of the testator."

The portion of the decree appealed from is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

69 Cal.App.2d 533

PEOPLE v. STONE.

Cr. 3878.

District Court of Appeal, Second District, Division 2, California.

June 8, 1945.

Hearing Denied July 5, 1945.

1. Criminal law 🔑1202(1)

Prior convictions of burglary committed prior to passage of the habitual criminal statute were sufficient basis for adjudicating defendant an habitual criminal upon subsequent burglary conviction. Pen.Code, § 644(a).

2. Constitutional law 🔑203
Criminal law 🔑1201

The habitual criminal statute is not an "ex post facto law," since it does not affect penalty for the prior offenses but merely increases the penalty for the later offense. Pen.Code, § 644(a); U.S.C.A.Const. Art. 1, § 9, cl. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Ex Post Facto Law".

3. Criminal law 🔑1202(3)

Prisoner's confession of his guilt as charged, as well as of the truth of allegation of prior conviction, was sufficient evidence upon which to support judgment that defendant was an habitual criminal. Pen. Code, § 644(a).

◆

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

William A. Stone was convicted of grand theft and was sentenced as an habitual criminal, and he appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Carl S. Kegley, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant was accused by amended information of two felonies, namely, burglary, count 1, and grand theft, count 2. Two prior convictions were charged against him. He pleaded not guilty and denied the prior convictions. Subsequently with the court's consent he withdrew his first plea, plead guilty to the grand theft charged and admitted having served terms in the California state prison for two burglaries of which he had been convicted August 3, 1921, and December 17, 1924. Following such plea and admissions the court dismissed the charge of burglary and adjudged the defendant guilty of grand theft, adjudicated him an habitual criminal as required by law, Penal Code, Sec. 644, and sentenced him to the state prison for the term of his natural life.

This appeal is based upon two assignments, namely: (1) Error in finding appellant to be an habitual criminal; (2) error in adjudging appellant an habitual criminal without the taking of any evidence.

[1] The basis of appellant's first contention is that the habitual criminal statute was first passed in 1923 and therefore the court was without jurisdiction to consider the prior conviction of August 3, 1921. The crime of grand theft was committed by appellant on March 12, 1944. On that date the two prior convictions of burglary were ingredients of the habitual criminal statute, Penal Code, sec. 644, subd. a, and were sufficient basis for correctly adjudicating appellant an habitual criminal.

Subdivision a of Section 644, in force on the date of appellant's crime of grand theft, reads as follows: "Every person convicted in this State of any felony who shall have been previously twice convicted upon charges separately brought and tried, and who shall have served separate terms therefor in any State prison * * *, of the crime of robbery, burglary, * * * shall be adjudged an habitual criminal and shall be punished by imprisonment in the State prison for life." The statute contains no requirement that the crimes for which the accused has suffered prior convictions must have been subsequent to the enactment of the habitual criminal statute. Section 644 is a legislative directive to the courts to impose a greater punishment upon an habitual criminal than upon a first offender. The proof requisite to a finding that the prisoner at the bar is an habitual criminal is that he must already have been convicted of two or more of the felonies specified in the statute, Sec. 644, and have served terms in a state prison in expiation of those crimes. No particular period in the world's history is defined as that in which the former crimes must have been committed. The criminal character of a person is established by his repetitious commission of any of the named major felonies without regard to the dates of their occurrences.

[2] The contention that section 644 is an ex post facto law has been conclusively rejected. People v. Biggs, 9 Cal.2d 508, 512, 71 P.2d 214, 116 A.L.R. 205; In re Rosencrantz, 205 Cal. 534, 271 P. 902. The two-time loser is not punished for the former crimes but for the crime of which he is convicted on the third or subsequent trial. The legislature having the obligation to prescribe penalties for crime, has wisely determined upon this method Sec. 644, of attempting to diminish the opportunities for the commission of evil deeds by one whose pattern of life is cut for the felon's career by removing him from the theater of free men.

The case of People v. D'A Philippo, 220 Cal. 620, 32 P.2d 962, does not sustain appellant's contention. He was tried for felonies committed between April 7, 1930, and April 9, 1931, whereas the two prior felonies alleged, towit forgeries, had been committed prior to April 1930. Forgery did not become an ingredient of the habitual criminal statute, section 644, until August 19, 1931. It requires no extraordinarily high degree of perspicacity to discern that by adjudicating a person in 1932 to be an habitual criminal and sentencing him to life imprisonment on account of forgeries committed over two years before August 1931 served to increase his punishment for the thefts committed between April, 1930, and April, 1931. Such an application of section 644 operated ex post facto, in violation of Article I, section 9, clause 3 of the federal Constitution. For that reason the adjudication of d'A Philippo as an habitual criminal was reversed.

[3] Contention that the trial court's judgment is erroneous because it did not take evidence upon the question of the prior convictions is utterly without merit. It is not an arbitrary judgment of the court when it adjudicates a prisoner to be an habitual criminal after he admits in open court two prior convictions for felonies and service of prison terms therefor at the time of his pleading guilty to the felony charged in the pending accusation. The confession of a prisoner at the bar of his guilt as charged as well as of the truth of the allegation of prior convictions is, in the absence of insane delusions, most satisfactory evidence upon which to convict and will support a judgment that he is an habitual criminal. People v. Nicholson, 34 Cal.App.2d 327, 93 P.2d 223; In re Boatwright, 216 Cal. 677, 15 P.2d 755; People v. Dawson, 210 Cal. 366, 292 P. 267; People v. Birdsell, 6 Cal.App.2d 749, 45 P.2d 378.

Judgment affirmed.

W. J. WOOD and McCOMB, JJ., concur.

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69 Cal.App.2d 546

PEOPLE v. HAMET.

Cr. 3897.

District Court of Appeal, Second District, Division 2, California.

June 12, 1945.

1. Criminal law 🔑1144(13)

On defendant's appeal the evidence is viewed in the light most favorable to the people.

2. Gaming 🔑98(5)

Evidence authorized conviction of keeping or occupying specified premises for the purpose of recording or registering bets on horse races. Pen.Code, § 337a, subd. 2.

3. Criminal law 🔑1186(4)

A judgment of conviction will not be set aside on the ground of improper admission or rejection of evidence unless there has been a miscarriage of justice. Const. art. 6, § 4½.

4. Criminal law 🔑1186(4)

Where defendant in prosecution for keeping or occupying specified premises for the purpose of recording or registering bets on horse races admitted that he had been making book at place specified for about two months prior to his arrest, no miscarriage of justice resulted from alleged erroneous ruling on the admission of evidence. Pen.Code, § 337a, subd. 2; Const. art. 6, § 4½.

◆

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Reginald D. Hamet was convicted of keeping or occupying specified premises for the purpose of recording or registering bets upon horse races, and he appeals.

Affirmed.

George Stahlman, of Los Angeles, for appellant.

Robert W. Kenny, of San Francisco, and Fred N. Howser and Robert Wheeler, both of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment of guilty of violating section 337a, subdivision 2 of the Penal Code[1], after trial before the court without a jury, defendant appeals.

[1] The evidence[2] being viewed in the light most favorable to the People (respondent), the essential facts are:

On April 23, 1944, Los Angeles city police officers entered an apartment at 329 South Cloverdale Street. The officers found defendant and his wife in the apartment. They also found a racing publication called Metropolitan Scratch Sheet, a telephone, a small order book and some order blanks upon which were notations. In the opinion of a duly qualified expert the latter constituted betting markers.

Defendant relies for reversal of the judgment on two propositions which will be stated and answered hereunder seriatim:

First: *There is not any substantial evidence to sustain the conviction.*

[2] This proposition is untenable. Defendant admitted to one of the police officers that he was engaged in bookmaking at the apartment. Officer Fisk testified as follows:

"The defendant asked me if he could talk to me and I told him he could. We went out to the police car and he asked me where I worked and I told him where I worked * * * I then asked him how long he had been making book at this place and he said for about two months. I asked him if he had taken the bets or if he wrote the bets, and he said 'No', that his wife did, * * * he said all the papers I had found on that particular time—and I hadn't found all of the papers as yet—were all of the papers for that day and they recorded all the bets he had taken that day."

The foregoing admission of the defendant constituted substantial evidence to sustain each and every fact upon which the conviction was necessarily predicated. Further discussion of the evidence would not serve any useful purpose.

Second: *The trial court committed prejudicial error in considering certain evidence contained in the preliminary transcript.*

[3, 4] This proposition is also without merit. The law is settled that a judgment will not be set aside in any case on the ground of improper admission or rejection of evidence, unless there has been a miscarriage of justice. Art. VI, sec. 4½, Const. of Calif. Therefore, conceding without deciding that the trial court's rulings were erroneous, defendant may not urge them as error in this court, in view of his admission that "he had been making book at this place" for about two months. Such statement constituted a confession that he had participated in the crime with which he was charged. Thus no prejudice or miscarriage of justice resulted to him from the alleged erroneous rulings. People v. Epstein, 21 Cal.App.2d 488, 490, 69 P.2d 454.

For the foregoing reasons the judgment and order are and each is affirmed.

MOORE, P. J., concurs.

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[1] Section 337a, subdivision 2 of the Penal Code reads thus:

"Every person, * * *

"2. Who, whether for gain, hire, reward, or gratuitously, or otherwise, keeps or occupies, for any period of time whatsoever, any room, shed, tenement, tent, booth, building, float, vessel, place, stand or inclosure, of any kind, or any part thereof with a book or books, paper or papers, apparatus, device or paraphernalia, for the purpose of recording or registering any bet or bets, or any purported bet or bets, or wager or wagers, or any purported wager or wagers, or of selling pools, or purported pools, upon the result or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever * * *.

"Is punishable by imprisonment in the county jail or state prison for a period of not less than thirty days and not exceeding one year."

[2] The matter was submitted to the superior court by stipulation upon a transcript of the testimony taken at the preliminary hearing.

69 Cal.App.2d 682

TERRELL v. KEY SYSTEM et al.

Civ. 12775.

District Court of Appeal, First District, Division 1, California.

June 25, 1945.

1. Appeal and error ⚷927(3)

Reviewing court on appeal from a judgment of nonsuit must consider the evidence most favorable to plaintiff, together with every favorable inference which can be reasonably drawn therefrom without attempting to evaluate the weight to be given to conflicting or contradictory testimony.

2. Carriers ⚷280(1)

Generally, carriers of persons must exercise the utmost care and diligence for the safety of their passengers consistent with the character and mode of conveyance adopted and the practical operation of the carrier's business. Civ.Code, § 2100.

3 Carriers ⚷280(1)

Rule that a carrier of persons for reward must use the utmost care and diligence for their safe carriage is applicable to the recognized duty of a carrier to protect a passenger from assault by fellow passenger. Civ.Code, § 2100.

4. Carriers ⚷280(1)

Duty of carrier of persons to use the utmost care and diligence to protect a passenger from assault by fellow passengers can only arise if, in the exercise of required degree of care, the carrier has or should have knowledge of conditions from which it may reasonably be apprehended that an assault on a passenger may occur and has the ability in the exercise of that degree of care to prevent the injury. Civ. Code, § 2100.

5. Carriers ⚷320(6)

Where there was testimony that on previous occasions, when craps were played between negroes and white persons while passengers on train, tempers had flared and knives had been drawn, it was for jury to say whether carrier with knowledge of those facts in exercise of utmost diligence required of it should have foreseen the danger of assault upon other passengers. Civ.Code, § 2100.

6. Carriers ⚷320(6)

In passenger's action against railroad to recover for injuries as result of fall from train when struck or pushed by another passenger, evidence, showing previous experience of similar disorders arising from crap games from which particular disorder also arose, presented a question for jury whether the carrier should have taken some steps either to suppress the games or to protect passengers from their consequences. Civ.Code, § 2100.

7. Carriers ⚷305(1)

In action to recover for injuries to passenger on railroad as result of fall from train when struck or pushed by another passenger during a brawl participated in by other passengers following a crap game, the carrier could not escape liability on theory that its negligence, if any, could not be proximate cause of injuries because they were the result of an intervening tort. Civ. Code, § 2100.

8. Carriers ⚷325

A railroad passenger is bound to take only ordinary care for his own safety.

9. Carriers ⚷347(6)

Under evidence showing that passenger, injured as result of fall from train when struck or pushed by another passenger during a brawl following a crap game, had fled to platform for safety and had no knowledge of earlier quarrels that had arisen from other crap games, the question as to whether he exercised ordinary care for his own protection was for jury.

10. Negligence ⚷136(9)

A plaintiff can only be held guilty of contributory negligence as a matter of law where there is no room for reasonable minds to differ, and the conclusion that he was guilty of negligence is the only one that can rationally be drawn from the evidence.

◆

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Clyde Terrell against Key System and others to recover for personal injuries as result of a fall from a moving train upon which plaintiff was a passenger. Judgment of nonsuit, and plaintiff appeals.

Reversed.

Darrell B. Edwards, of Oakland, for appellant.

Donahue, Richards & Hamlin, of Oakland, for respondents.

DOOLING, Justice pro tem.

[1] This appeal is taken from a judgment of nonsuit. Plaintiff, a Negro, received personal injuries in a fall from a moving train upon which he was a passenger. In reciting the evidence we shall be mindful of the rule, so frequently restated that any supporting citation would be superfluous, that we must consider the evidence most favorable to plaintiff, together with every favorable inference which can be reasonably drawn therefrom, without attempting to evaluate the weight to be given to conflicting or contradictory testimony.

Plaintiff boarded a train operated by defendant Key System about 11:18 p. m. The train was one which carried workers to the Richmond shipyards. Plaintiff entered the last car, which was closest to him and in which he, with many other Negroes, was accustomed to ride. The car was crowded and plaintiff was compelled to stand. He had observed through the car windows as the train pulled in that passengers were also standing in the two preceding cars. Two crap games were in progress in the rear car when plaintiff entered it, one toward the front of the car and the other toward the back. Both white men and Negroes were gambling on the throw of the dice in the game near the front of the car. At least two of the white men in this game were drunk, boisterous, abusive and quarrelsome. They were cursing and swearing. Plaintiff stood watching the game. Several witnesses testified that a conductor was present in the car. Others testified that they did not see a conductor. In any event, no effort was made by any employee of defendant Key System to stop the game, control the boisterous and offensive conduct of the drunken participants or maintain order in any way. One of the drunken white men and a Negro player got into an argument over a bet. The white man, ascribing canine ancestry on the maternal side to the Negro, threatened "to gut" him. A non-participant in the game, ascribing similar ancestry to all Negroes, encouraged the drunken white man to carry out his threat, and for good measure struck a Negro with his lunch bucket. The drunken white man then drew a knife and cut or stabbed another Negro who was seated near by and not participating in any way in the game or the controversy. A general melee ensued and plaintiff withdrew to the front platform of the car. A milling, brawling crowd followed and a white man struck or pushed plaintiff, knocking him from the train.

There was evidence that over a considerable period of time crap games had been regularly engaged in by both Negroes and whites, not only in the last car of the train but in other cars as well; that fights had resulted from such games on earlier occasions in which knives had been drawn; there is no evidence that the trainmen had ever interfered in any way; and in some instances they had been seen to stake certain of the players.

[2, 3] The duty of a carrier of persons for reward is codified in Civil Code, section 2100. In general, such carriers must exercise the utmost care and diligence for the safety of their passengers consistent with the character and mode of conveyance adopted and the practical operation of the carrier's business. 4 Cal.Jur., pp. 931–934, sec. 87. While there is some diversity among the authorities in other jurisdictions as to the degree of care required of carriers for hire to protect their passengers from the assaults of fellow passengers, in a large majority of American states whose courts have passed on the question, it is held that the carrier is required to exercise the same high degree of care for that purpose as it is bound to generally. Spalt v. Eaton, 118 N.J.L. 327, 192 A. 576; Falzarano v. Delaware, L. & W. Co., 119 N.J.L. 76, 194 A. 75; Holton v. Boston Elevated Ry. Co., 303 Mass. 242, 21 N.E.2d 251; Kinsey v. Hudson & Manhattan R. Co., 130 N.J.L. 285, 32 A.2d 497; Koenig v. St. Louis Public Service Co., Mo.App., 45 S.W.2d 896; Spires v. Atlantic Coast Line R. Co., 92 S.C. 564, 75 S.E. 950; Spangler v. St. Joseph & G. I. R. Co., 68 Kan. 46, 74 P. 607, 63 L.R.A. 634, 104 Am.St.Rep. 391; Wright v. Chicago, B. & Q. R. Co., 4 Colo.App. 102, 35 P. 196; Pittsburg, C., C. & St. L. Ry. Co. v. Richardson, 40 Ind.App. 503, 82 N.E. 536; Grubb v. Kansas City Rys. Co., 207 Mo.App. 16, 230 S.W. 675; Hines v. Rice, 142 Ark. 159, 218 S.W. 851; Washington Railway & E. Co. v. Perry, 47 App.D.C. 90; Jansen v. Minneapolis & St. L. Ry. Co., 112 Minn. 496, 128 N.W. 826, 32 L.R.A.,N.S., 1206; Hillman v. Georgia R. & Banking Co., 126 Ga. 814, 56 S.E. 68, 8 Ann.Cas. 222; McMahon v. Interborough Rapid Transit Co., 59 Misc. 242, 110 N.Y.S. 876; Glennen v. Boston Elevated Ry. Co., 207 Mass. 497, 93 N.E. 700, 32 L.R.A.,N.S., 470; Pittsburg & Connellsville Railroad Co. v. Pillow, 76 Pa.

510, 18 Am.Rep. 424; Norfolk & W. Ry. Co. v. Birchfield, 105 Va. 809, 54 S.E. 879; Kelly v. Navy Yard Route, 77 Wash. 148, 137 P. 444; West Memphis Packet Co. v. White, 99 Tenn. 256, 41 S.W. 583, 38 L.R.A. 427; Blackwell v. Fernandez, 324 Ill.App. 597, 59 N.E.2d 342; Adams v. Chicago Great Western R. Co., 156 Iowa 31, 135 N.W. 21, 42 L.R.A.,N.S., 373; 10 Am.Jur. 266; 3 Michie on Carriers, sec. 2553, p. 2016. This court applied the rule of utmost care in connection with the transportation of a dog in a passenger coach, holding that while the carrier was entitled to permit the transportation of a dog in charge of a passenger it was bound to use the utmost care to prevent the dog from injuring other passengers. Westwater v. Southern Pacific Co., 38 Cal.App.2d 369, 101 P.2d 154. Neither Hicks v. Scott, 48 Cal.App.2d 481, 120 P.2d 107, nor Schwerin v. H. C. Capwell Company, 140 Cal.App. 1, 34 P.2d 1050, is clear upon the subject of the degree of care owed to a passenger by a carrier for hire to protect him against a fellow passenger's misconduct. We can see no reason not to apply the rule of Civil Code section 2100 that "A carrier of persons for reward must use the utmost care and diligence for their safe carriage" to the recognized duty of a carrier to protect a passenger from assaults by fellow passengers.

[4] This duty can only arise if in the exercise of the required degree of care the carrier has or should have knowledge of conditions from which it may reasonably be apprehended that an assault on a passenger may occur (3 Michie on Carriers, secs. 2555–2556, pp. 2020–2022, sec. 2564, pp. 2027–2028; 10 Am.Jur. 267; Hicks v. Scott, supra; Schwerin v. H. C. Capwell Co., supra), and has the ability in the exercise of that degree of care to prevent the injury, 3 Michie on Carriers, sec. 2565, pp. 2032, 2033; 10 Am.Jur., pp. 268, 270.

[5] On the question of notice or knowledge of the danger of assault upon one or more passengers from Negroes and whites engaging in the particular crap game there is the testimony that on previous occasions when craps were played tempers had flared and knives had been drawn and the additional factor that in this particular game some of the white men were drunk, boisterous, abusive and quarrelsome. It was for the jury to say whether the carrier, with knowledge of these facts, in the exercise of the utmost diligence required of it should have foreseen the danger of assault upon other passengers. A few examples from other decisions will serve to make this clear.

In Stockwell v. Board of Trustees, 64 Cal.App.2d 197, 148 P.2d 405, this court held that it was a question of fact for the jury whether the trustees of a university, with knowledge that trespassers were in the habit of firing guns on its grounds, in the exercise of ordinary care should have taken steps for the safety of its invitees.

In Neering v. Illinois Cent. R. R. Co., 383 Ill. 366, 50 N.E.2d 497, the Supreme Court of Illinois held it actionable negligence for a railroad company, with knowledge that vagrants were in the habit of congregating about a station, to fail to furnish protection against assaults by such vagrants upon arriving or departing passengers.

In Exton v. Central Railroad Company, 62 N.J.L. 7, 42 A. 486, 56 L.R.A. 508, the custom of cabmen crowding and jostling at the defendant's station in the solicitation of fares from departing passengers of defendant was held sufficient to put defendant on notice of the danger to its passengers of being knocked down and injured by such cabmen.

In Spires v. Atlantic Coast Line R. Co., supra, 92 S.C. 564, 75 S.E. 950, the court decided that knowledge of disorderly conduct by unruly passengers on previous excursions run by defendant railroad put it on notice of the danger of assaults upon passengers being committed on a particular excursion train.

Anderson v. South Carolina & G. R. Co., 81 S.C. 1, 61 S.E. 1096, and Rambo v. Puget Sound Nav. Co., 12 Wash.2d 637, 123 P.2d 355, announce the rule that where a carrier knows that large crowds are accustomed to take passage at certain hours and to crowd and jostle to gain admittance to the carrier's train or vessel they are put on notice of the danger of injury to intending passengers from the conduct of such crowds.

[6] Respondent insists, however, that conceding that it may have been put on notice of the possible danger of unruly conduct arising from this crap game endangering the safety of its passengers, its ability to protect the plaintiff from such danger was not proved. In this, respondent takes too narrow a view of the evidence. Its argument is, in effect, that the single conductor present in the car, as testified to

by some of the witnesses, could have had no notice of impending danger to plaintiff until the quarrel suddenly flared up and then it was impossible for one man to successfully do anything to control a fight engaged in by so many passengers so quickly. The argument overlooks the testimony of previous quarrels arising from earlier crap games in which knives were drawn. Had this particular crap game been an isolated instance of gambling with no showing of previous disorderly conduct arising from other similar games, the rule of Tall v. Baltimore Steam-Packet Co., 90 Md. 248, 44 A. 1007, 47 L.R.A. 120, relied on by respondent, might apply. The holding in that case was that the mere fact that a carrier permits passengers to gamble does not make the carrier liable for the shooting of one passenger by another in a quarrel over the game. But in our case the carrier had the warning of previous experience that such games had actually led to quarrels and even to threats of assault with a deadly weapon. In the face of those previous experiences of disorders arising from similar games, it was clearly a jury question whether the carrier should have taken some steps either to suppress the games or to protect its passengers from their consequences. Indeed we are satisfied that on the evidence in this case it was a jury question whether the conductor, with notice of the boisterous and vituperative conduct of the drunken crap shooters engaged in the particular game, should not have taken some steps to maintain or restore order before tempers got so far out of control that he was powerless to prevent the injury which occurred to plaintiff. Nor can respondent's argument that the evidence is not clear that any conductor was present in the rear coach on that evening avail it to support the judgment of nonsuit. Whether or not the conductor was present would be, at most, a jury question to be resolved from conflicting testimony, and if the jury determined that no conductor was in the car it might find that the failure to have any employee in the coach was itself negligence in view of the carrier's notice of disorderly and violent conduct on other occasions.

[7] The argument that the negligence, if any, of the carrier could not be the proximate cause of plaintiff's injuries because they were the result of an intervening tort is well answered by the Supreme Court of Illinois in Neering v. Illinois C. R. R. Co., supra, 383 Ill. 366, 50 N.E.2d at pages 503, 504:

"Defendant further contends that even though it had been guilty of negligence on the occasion in question, the criminal act of the colored man was an intervening cause and defendant's negligence was not the proximate cause of plaintiff's injury and that the abnormal criminal act of the third person broke the chain of causation. It cannot be denied that if the negligence of the defendant only furnishes a condition and that condition causes an injury by the subsequent independent act of a third person, the creation of the condition is not the proximate cause of an injury. However, the rule is that the subsequent independent act, in order to break the causal connection, must be one, the intervention of which was not probable or foreseeable by the first wrongdoer. What constitutes proximate cause has been defined in numerous decisions, and there is practically no difference of opinion as to what the rule is. The injury must be the natural and probable result of the negligent act or omission and be of such a character as an ordinarily prudent person ought to have foreseen as likely to occur as a result of the negligence, although it is not essential that the person charged with negligence should have foreseen the precise injury which resulted from this act. * * * The intervention of independent concurrent or intervening forces will not break causal connection if the intervention of such forces was itself probable or foreseeable."

The point need not be further elaborated. This rule of proximate cause is implicit in every decision holding a carrier liable for negligently permitting one passenger to assault another. We content ourselves with the citation of Katz v. Helbing, 215 Cal. 449, 10 P.2d 1001; Mosley v. Arden Farms Co., 26 Cal.2d 213, 157 P.2d 372; Rest. Torts, sec. 449.

[8, 9] The question of plaintiff's contributory negligence was likewise one for the jury. A passenger is bound to take only ordinary care for his own safety. The plaintiff was entitled under his contract of carriage to be where he was and to be protected from the unprovoked assaults of his fellow passengers by the carrier's exercise of the high degree of care required of it to carry him safely. It is not shown that any other passenger left the coach or the proximity of the crap game before it degenerated into an affray. When it did so

plaintiff fled to the platform for safety. He could not proceed further because of the crowd at the door of the next carriage. There is no evidence that plaintiff had any knowledge of the earlier quarrels that had arisen from other crap games. Whether he exercised ordinary care for his own protection was a question that should have been left for the jury to decide. Cf. Hines v. Rice, supra, 142 Ark. 159, 218 S.W. 851; Wachser v. Interborough Rapid Transit Co., 69 Misc. 346, 125 N.Y.S. 767.

[10] A plaintiff can only be held guilty of contributory negligence as a matter of law where there is no room for reasonable minds to differ and the conclusion that he was guilty of negligence is the only one that can rationally be drawn from the evidence. 19 Cal.Jur., pp. 735–738; Dwelly v. McReynolds, 6 Cal.2d 128, 133, 56 P.2d 1232; McDougall v. Morrison, 55 Cal.App. 2d 92, 96, 130 P.2d 149.

Judgment reversed.

PETERS, P. J., and WARD, J., concur.

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69 Cal.App.2d Supp. 810

YONCICH et al. v. QUINN.

Civ. A 6004.

Appellate Department, Superior Court,
Los Angeles County, California.
June 12, 1945.

1. Landlord and tenant 🔑278½
War 🔑4

A written notice of termination of month to month tenancy under rent regulation on ground of immediate use of premises as a dwelling for owner must state that owner seeks possession of premises for his own use in good faith and that he acquired property prior to effective date of rent regulation. Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq.

2. Landlord and tenant 🔑278½
War 🔑4

A written notice of termination of month to month tenancy based on certificate of O.P.A. rent director authorizing landlord to pursue his remedy under local law on ground that landlord established that proposed removal is not inconsistent with purpose of Rent Control Act or rent regulation, and would not likely result in circumvention thereof, is not required under rent regulation to state any grounds of removal. Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq.

3. Landlord and tenant 🔑278½
War 🔑4

A complaint in unlawful detainer action against tenant under month to month tenancy alleging that landlord sought to remove tenant for occupation of premises as a dwelling for his son, and that O.P.A. rent director had by certificate authorized eviction for such purpose and that tenant was given notice of termination of tenancy, was sufficient, notwithstanding complaint did not allege that notice was given in good faith and that landlord acquired property prior to effective date of rent regulation. Emergency Price Control Act of 1942, 50 U.S. C.A.Appendix, § 901 et seq.

4. Landlord and tenant 🔑278½
War 🔑4

Rent regulation must be construed with the view that it is not a grant of rights, but an emergency limitation on rights which every landlord would otherwise possess, and that its mere failure to authorize an act or proceeding is not a prohibition. Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq.

5. Landlord and tenant 🔑278½
War 🔑4

Landlord authorized by certificate of O.P.A. rent director to remove tenant under local law is not required to establish any ground in unlawful detainer, unless certificate of eviction is limited to certain ground. Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq.

6. Landlord and tenant 🔑278½
War 🔑4

Certificate of O.P.A. rent director authorizing removal of tenant under local law is conclusive upon parties in unlawful detainer, since its validity can be attacked only in the Emergency Court of Appeals. Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq.

Appeal from Municipal Court of City of Los Angeles; May D. Lahey, Judge.

Proceeding in unlawful detainer by Martin Yoncich and others against W. H. Quinn. From a judgment for defendant, plaintiffs appeal.

Reversed and remanded with directions.

Glenn A. Wymore, of Los Angeles, and Howard E. Miller, of San Pedro, for appellants.

Jerrell Babb, of Los Angeles, for respondent.

SHAW, Presiding Judge.

This proceeding in unlawful detainer is here on appeal from a judgment for defendant entered after the sustaining of a demurrer to the complaint. The complaint states the following case: Plaintiffs are the owners of premises occupied by defendant as a dwelling under a tenancy from month to month, and plaintiffs seek to oust defendant from these premises in order that plaintiffs' son may occupy them as a dwelling for himself. Plaintiffs have obtained from the local O.P.A. Rent Director a "Certificate Relating to Eviction," authorizing them to pursue their remedies for the eviction of the defendant from these premises in accordance with local law, subject to the condition that eviction is authorized only for occupancy by plaintiffs' son. In this certificate, the Rent Director finds that such eviction is not inconsistent with the purposes of the Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq., or of the rent regulation issued thereunder for this area. Plaintiffs have given defendant a notice to terminate his month to month tenancy, the sufficiency of which to satisfy California law is not questioned here. In this notice they stated that it was given "pursuant to" the certificate above mentioned, "authorizing eviction of the tenant for occupancy" by plaintiffs' son.

In support of the judgment, defendant contends that the notice given him does not comply with the O.P.A. Rent Regulation for Housing, because it does not state that the plaintiffs seek possession of the premises in good faith for immediate use as a dwelling for themselves, and does not state that they acquired the property prior to November 1, 1942—the effective date of the rent regulation in this area. We find no merit in either objection, under the circumstances of this case.

[1] The rent regulation above mentioned prohibits the eviction of a rent paying tenant of housing accommodations except in cases where this is authorized by the regulation. A series of such authorizations appears in section 6(a), one of which is where the landlord owned the property prior to the effective date of rent regulation, and seeks in good faith to recover possession thereof for immediate use as a dwelling for himself (section 6(a) (6). Where the landlord attempts to proceed under this provision, we have held that in his notice to the tenant he must make the two statements for which the defendant contends in this case. Lester v. Isaac, 1944, 63 Cal.App.2d Supp. 851, 146 P.2d 524; Wrenn v. Sutton, 1944, 65 Cal.App.2d Supp. 823, 150 P.2d 589; Bauer v. Neuzil, 1944, 66 Cal.App.2d Supp. 1020, 1026, 152 P.2d 47. These decisions were based on section 6(d) (1) of the regulation, which expressly requires the notice to the tenant to vacate to state the ground for his eviction.

In the present case, plaintiffs do not allege a case within the above mentioned provision or any other provision of section 6, paragraph (a), of the rent regulation, and manifestly they are not proceeding under that paragraph. The next paragraph, (b), of section 6, provides, in clause (1), that "No tenant shall be removed or evicted on grounds other than those stated above" unless the Administrator (or the Rent Director acting for him by virtue of Section 13(a) (2) of the regulation) certifies that the landlord may pursue his remedy under local law, and that the Administrator (or Rent Director) "shall so certify if the landlord establishes that removals or evictions of the character proposed are not inconsistent with the purposes of the Act or this regulation and would not be likely to result in the circumvention or evasion thereof." Here, according to the complaint, the Rent Director issued to plaintiffs the certificate authorized by section 6(b) (1); and its issuance constitutes a finding of the existence of the conditions the landlord is there required to establish, no express finding regarding them being required.

[2, 3] This being a case under section 6(b) (1), the provision of section 6(d) (1) of the regulation requiring the notice to the tenant to state the grounds of eviction is not applicable, but instead the case is covered by the subsequent provision of that clause, which is really an exception to the former, that "The provisions of this para-

graph (d) (1) shall not apply where a certificate has been issued by the Administrator pursuant to the provisions of paragraph (b) of this section." Hence no statement of grounds of removal, whether those contended for by plaintiffs, or any other, was necessary in the notice given here. Bauer v. Neuzil, supra, 1944, 66 Cal.App.2d Supp. 1020, 1026, 152 P.2d 47.

[4-6] Defendant's argument here, though aimed at the notice, seemed to veer toward the conclusion that a tenant cannot be removed under section 6(b) (1) in order that any one other than the landlord may occupy the property; but we find no justification in the regulation for that conclusion. Its language does not purport to limit the nature of the grounds on which the Administrator or Rent Director may issue his certificate for removal or eviction. Where the landlord desires to occupy the property himself, but cannot proceed under section 6(a) (6) because he acquired the property on or after the effective date of rent regulation, section 6(b) (2) puts some limitations on him in order to make sure that his purchase is a real one; but there is nothing in this provision or elsewhere in the regulation to suggest that a certificate can be issued under section 6(b) (1) only for self-occupancy by the landlord. In construing this regulation we must bear in mind that it is not a grant of rights, but an emergency limitation on rights which every landlord would otherwise possess, and that its mere failure to authorize an act or proceeding is not a prohibition. Where the certificate provided by section 6(b) (1) is issued, it removes the prohibition laid on eviction of a tenant by the terms of section 6; and the landlord, being freed from the restraint, may proceed to evict the tenant, on compliance with state law. Jones v. Shields, 1944, 63 Cal.App.2d Supp. 846, 849, 146 P.2d 735. His grounds for doing so are immaterial unless in the certificate he is limited in that respect. Here the Rent Director did attach a condition limiting plaintiff to eviction for occupancy by plaintiffs' son. The complaint clearly alleged compliance with this condition, as we held it must in Bauer v. Neuzil, supra, 66 Cal.App.2d Supp. 1020, 152 P.2d 47. The certificate of the Rent Director is conclusive upon all parties in this proceeding. Its validity can be attacked only in the Emergency Court of Appeals set up by the Emergency Price Control Act. Jones v. Shields, supra.

The judgment is reversed and the cause remanded to the Municipal Court with directions to overrule the demurrer and permit the defendant to answer, plaintiffs to recover their costs of appeal.

BISHOP and KINCAID, JJ., concur.

FIRST INDUSTRIAL LOAN CO. OF CALIFORNIA v. DAUGHERTY, Com'r of Corporations, etc.

L. A. 19085.

Supreme Court of California.

June 19, 1945.

Rehearing Denied July 16, 1945.

1. Appeal and error ⚷917(1)

Where trial court overruled demurrer to complaint and upon defendant's refusal to plead further rendered judgment against him, reviewing court must for the purposes of appeal accept the allegations of complaint as true.

2. Constitutional law ⚷62

Legislature may, after declaring a policy and fixing a primary standard, confer upon executive or administrative officers power to fill up the details by prescribing administrative rules and regulations, and a provision by the Legislature that such rules and regulations shall have the force, effect, and sanction of law does not violate the constitutional inhibition against delegating a legislative function.

3. Pawnbrokers and money lenders ⚷1

A regulation by the Commissioner of Corporations respecting the maintenance by industrial loan companies of statutory surplus required by statute, if falling within power expressly conferred upon commissioner by the act to establish such rules and regulations as may be reasonable and necessary to carry out the purposes and provisions of the act, is valid. Gen.Laws Supp.1941, Act 3603, § 10.

4. Constitutional law ⚷77

A ministerial officer may not under the guise of a rule or regulation vary or enlarge the terms of a legislative enactment or compel that to be done which lies without the scope of the statute and which cannot be said to be reasonably necessary or appropriate to subserving or promoting the interests and purposes of the statute.

5. Pawnbrokers and money lenders ⚷1

Under statute regulating financial institutions, the word "surplus" as applied to financial structures has a reasonably definite and recognized meaning as that which remains when use or need is satisfied as excise or overplus and ordinarily may be used to absorb at least extraordinary losses. Gen.Laws Supp.1941, Act 3603, § 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Surplus".

6. Pawnbrokers and money lenders ⚷1

If purpose of Commissioner of Corporations in adopting regulation in respect to industrial loan company's maintenance of statutory surplus was in effect to convert the surplus into the full status, as far as impairment is concerned of capital stock or of an insurance company or bank reserve, it would be such a change in the capital structure of a corporation as was beyond the reasonable scope of regulatory power under the Industrial Loan Act. Gen. Laws Supp.1941, Act 3603, §§ 7, 10. 11a.

7. Pawnbrokers and money lenders ⚷1

The fund sought to be established by the Industrial Loan Act requiring the maintenance of a surplus by industrial loan companies is not a "reserve fund" such as is required to be maintained by insurance companies, banks, and building and loan associations. Gen.Laws Supp.1941, Act 3603, § 7; St.1935, p. 537, as amended; Deering's Gen.Laws 1937, Acts 652, 986.

See Words and Phrases, Permanent Edition, for all other definitions of "Reserve Fund".

8. Pawnbrokers and money lenders ⚷1

Provision of Industrial Loan Act relating to maintenance of statutory surplus by industrial loan companies contemplates the possible use of surplus to offset losses and also contemplates continued operation of the company in such event. Gen.Laws Supp.1941, Act 3603, §§ 5, 7, 11.

9. Pawnbrokers and money lenders ⚷1

Power given to Commissioner of Corporations by the Industrial Loan Act to establish such rules and regulations as may be reasonable or necessary to carry out purposes and provisions of the act does not include power to alter the statute or impair its scope. Gen.Laws Supp.1941, Act 3603, § 10.

10. Pawnbrokers and money lenders ⚷1

Rule of Commissioner of Corporations, requiring industrial loan company to maintain statutory surplus and not use any portion thereof to offset bad debts or for other special reserve accounts, imposed requirement not included in the statute and not consistent with typical financial structure there contemplated, and was invalid. Gen.Laws Supp.1941, Act 3603, §§ 7, 10.

TRAYNOR, J., and GIBSON, C. J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by the First Industrial Loan Company of California against Edwin M. Daugherty, as Commissioner of Corporations, to review and annul an order made by the commissioner and for an injunction restraining enforcement of said order. Judgment for plaintiff, and defendant appeals.

Affirmed.

Prior opinion, 148 P.2d 439.

Robert W. Kenny, Atty. Gen., and T. A. Westphal, Jr., and Carl W. Wynkoop, Deputy Attys. Gen., for appellant.

O'Melveny & Myers, Paul Fussell, and Pierce Works, all of Los Angeles, for respondent.

SCHAUER, Justice.

The question before us concerns the validity of a regulation of the Commissioner of Corporations, effective November 1, 1941 (Industrial Loan Act Rules and Regulations, ch. 5, § 4), which provides that "An industrial loan company shall maintain the statutory surplus required by section 7 of the Industrial Loan Act and shall not use any portion of said statutory surplus to offset bad debts, doubtful accounts or for other special reserve accounts." Upon the validity of such regulation hinges the propriety and effectiveness of an order of the commissioner, here sought to be reviewed, made after a hearing upon an agreed statement of facts. Such order requires plaintiff, a corporation organized under the Industrial Loan Act (Stats. 1917, ch. 522, p. 658; Stats.1941, ch. 1187, p. 2945; Deering's Gen.Laws, 1937, Act 3603, and supplements thereto) "to restore and maintain the surplus required to be established under section 7 of the Industrial Loan Act and to be maintained under section 4 of chapter 5 of the Rules and Regulations of the Commissioner of Corporations relating to industrial loan companies." Section 7 of the Industrial Loan Act provides that before any dividend is declared and paid to the stockholders of an industrial loan company "not less than 10 per cent of the net profits of such corporation for the preceding half year, or for such period as is covered by the dividend, shall be carried to its surplus until such surplus shall equal the amount of the paid-up capital stock." The rule in question was promulgated by the Commissioner of Corporations pursuant to section 10 of the Industrial Loan Act, which confers upon him the power "to establish such rules and regulations as may be reasonable or necessary *to carry out the purposes and provisions of this act*." (Italics added.) (See, also, § 11a.)

Following the hearing before the commissioner and the issuance of his order, as related above, plaintiff filed in the superior court its complaint (which includes as an exhibit the agreed statement of facts) by which it sought to have such order declared null and void and of no effect and to have enforcement thereof enjoined. The trial court overruled defendant's demurrer to the complaint and, upon his refusal to plead further, rendered judgment permanently restraining enforcement of the order. We have concluded that the judgment must be affirmed.

[1] According to the allegations of the complaint, which must be taken as true for the purposes of this appeal, plaintiff has, prior to each declaration of a dividend, set aside 10 per cent of its net profits for the dividend period as surplus. However, on various occasions during the four-year period of 1932 through 1935 it used portions of this surplus for the purposes of offsetting bad debts, doubtful accounts, and losses incurred during those difficult years. No net profits were realized and no dividends paid during that period. Such operating losses first exhausted plaintiff's reserves for losses and undivided profits and thereafter caused a reduction of its surplus to an amount lower than the aggregate amount which theretofore had been carried to surplus and which had not at the time of the issuance of the commissioner's order been completely restored. The complaint also alleges the issuance to plaintiff by defendant commissioner, from 1932 through 1941, of permits for the sale of securities despite such use of surplus; the adoption by the commissioner in 1941 of the regulation here in question; and the issuance of the order requiring plaintiff immediately to restore its surplus.

Section 11 of the Industrial Loan Act provides, among other things, that a company against which such an order is issued may commence suit "to restrain enforcement of such order."

Plaintiff, in support of the trial court's judgment restraining enforcement of defendant commissioner's order quoted hereinabove, contends that neither the Industrial Loan Act nor any other statute of this state nor any valid regulation of the commissioner, requires it to maintain unimpaired under all circumstances the surplus which it had accumulated pursuant to the provisions of section 7 of the Industrial Loan Act. Defendant, on the other hand, maintains that his regulation (ch. 5, § 4) and the order issued to plaintiff merely require compliance with section 7 of the act and therefore are within the scope of his rule-making powers under sections 10 and 11a of the act, supra. We are of the view that such regulation and order, as they are phrased, impose requirements not intended by the Legislature and that therefore the making of the regulation and of the order based thereon exceed the powers bestowed by the Legislature upon the commissioner.

It should be noted that no question is here presented to us, and we express no opinion, as to whether under the present statute the commissioner may require that more than 10 per cent of profits be applied to the restoration of an impaired surplus before any dividend is paid. The statute (Industrial Loan Act, § 7) provides for the carrying to surplus of "*not less* than 10 per cent of the net profits" (italics added) for the dividend period before any dividend is declared. The problem before us does not concern any conditions sought to be imposed as a prerequisite to the payment of dividends; it is limited to the narrow confines of the validity of the absolute prohibition by defendant commissioner against the use by an industrial loan company, under any operating circumstances, of any portion of its minimum accumulated legal surplus to offset bad debts, doubtful accounts, and operating losses.

Each party hereto asserts that section 7 of the Industrial Loan Act is unambiguous but their respective interpretations of it are as divergent as though it were two different statutes. Defendant argues that because of such lack of ambiguity the courts may not vary its provisions and may not read it as omitting the power which he has sought to invoke, while plaintiff insists that for the same reason the section must be construed as written and without implementation by the commissioner.

[2-4] In considering the issue presented certain general rules are to be recognized. To narrowly proscribe the rule-making power of the commissioner would be to overlook one of the fundamental purposes of the policy of delegation of powers and to deprive the Legislature and the people of the state of one of the major benefits thereof. The essentials of the legislative function are the determination and formulation of the legislative policy. Generally speaking, attainment of the ends, including how and by what means they are to be achieved, may constitutionally be left in the hands of others. The Legislature may, after declaring a policy and fixing a primary standard, confer upon executive or administrative officers the "power to fill up the details" by prescribing administrative rules and regulations to promote the purposes of the legislation and to carry it into effect, and provision by the Legislature that such rules and regulations shall have the force, effect, and sanction of law does not violate the constitutional inhibition against delegating the legislative function. (United States v. Grimaud (1911), 220 U.S. 506, 515-518, 31 S.Ct. 480, 55 L.Ed. 563; Red "C" Oil Mfg. Co. v. Board of Agriculture of North Carolina (1912), 222 U.S. 380, 394, 32 S.Ct. 152, 56 L.Ed. 240; Opp Cotton Mills v. Administrator (1941), 312 U.S. 126, 144-145, 657, 61 S.Ct. 524, 85 L.Ed. 624; Gaylord v. City of Pasadena (1917), 175 Cal. 433, 437, 166 P. 348; In re Halck (1932), 215 Cal. 500, 505, 11 P.2d 389; In re Weisberg (1932), 215 Cal. 624, 12 P.2d 446; Fillmore Union High School Dist. v. Cobb (1935), 5 Cal.2d 26, 32, 53 P.2d 349; 1 Cooley's Constitutional Limitations (8th ed.), pp. 228-232.) Accordingly, the regulation in question (Rules and Regulations, ch. 5, § 4), if it falls within the power specially conferred upon the commissioner (by § 10 of the Industrial Loan Act) "to establish such rules and regulations as may be reasonable or necessary to carry out the purposes and provisions of this act," is valid. (Koshland v. Helvering (1936), 298 U.S. 441, 446-447, 56 S.Ct. 767, 80 L.Ed. 1268, 105 A.L.R. 756; cf. California Drive-In Restaurant Ass'n v. Clark (1943) 22 Cal.2d 287, 303, 140 P.2d 657, 147 A.L.R. 1028.) A ministerial officer may not, however, under the guise of a rule or regulation vary or enlarge the terms of a legislative enactment or compel that to be done which lies without the scope of the statute and which cannot be said to be reasonably necessary

or appropriate to subserving or promoting the interests and purposes of the statute. (Boone v. Kingsbury (1928), 206 Cal. 148, 161, 273 P. 797; Whitcomb Hotel, Inc., v. California Emp. Comm. (1944), 24 Cal.2d 753, 757, 151 P.2d 233.)

Plaintiff contends that the regulation in question transcends the scope of the statute, while defendant commissioner maintains that such regulation does no more than require compliance with the statute. The difference in the two views is more clearly apprehended in the arguments of counsel to support their respective contentions. Plaintiff argues that there is nothing in the statute expressly forbidding the use of the surplus and claims that the ordinary and usual function of a surplus fund is to absorb losses in time of stress and prevent impairment of capital. Defendant commissioner, on the other hand, takes the position that since there is no language in the statute expressly permitting the use of the surplus, any such use is contrary to law and any used portion must be immediately restored as required by his rule and order now before us. In ultimate analysis the dispute centers on the proper function of a surplus fund.

A lending institution such as plaintiff, by the nature of its business, is not in danger of incurring large scale liabilities to the public as is an insurance company. Nor is such an institution authorized to issue certificates of deposit or to receive deposits (see Industrial Loan Act, § 4), as is a bank. It is empowered to sell "investment certificates" which must bear the endorsement, "this is not a certificate of deposit." (Id.) The uses to which its surplus fund might be put are mainly of two classes: (1) To be constantly preserved as a source of refund, upon dissolution or other appropriate event, to stockholders or investment certificate holders; (2) as an offset for extraordinary losses incurred in the course of business. If employed for the latter use a particularly beneficent purpose may be subserved by the fund in times of stress, by perpetuating the life of the company and its status as a going concern through keeping its capital stock free from impairment and maintaining its solvency.

[5, 6] The word "surplus," as applied to financial structures, has a reasonably definite and recognized meaning, as appears from the authorities hereinafter cited. Ordinarily a surplus may be used to absorb at least extraordinary losses. As defined in the standard lexicons and various decisions the word means "That which remains when use or need is satisfied; excess; overplus." (See e. g., Webster's New Int. Dict. (2d ed.); State v. State Tax Commission (1920), 282 Mo. 213, 220, 221 S.W. 721, 722.) A surplus that is used to absorb extraordinary losses serves probably the most important purpose for which it was created. To absolutely forbid its use for such purpose, as is essayed by the regulation in question, tends to destroy in large part its typical usefulness, to impair the solvency of the corporation, or at least its status as a going concern, during periods of abnormal losses, and to impede the normal conduct of its business. Such effects, obviously, do not conduce to the authorized object of regulations; i.e., "to carry out the * * * provisions of this act." If it is the purpose of the commissioner, in effect, to convert the surplus into the full status, so far as impairment is concerned, of capital stock or of an insurance company or bank reserve, it is equally obvious that such a change in the capital structure of the corporation is beyond the reasonable scope of regulatory power under the present act.

In Interstate Mortg. Trust Co. v. Barnes (1918), 102 Kan. 334, 338-339, 170 P. 33, 35, L.R.A.1918C, 986 (consolidated with First National Bank v. Moon), state taxing officials were involved in controversies with banks and a loan company. The court in explaining the framework of banks stated, among other things, that "In order to create a fund to meet unforeseen contingencies and unusual losses, the bank does not distribute all the profits among the stockholders, but retains some of them. The fund so created is designated surplus," and then declared that "The foregoing explanation will serve quite as well for * * * loan companies as for * * * banks."

In Pullen v. Corporation Comm. (1910), 152 N.C. 548, 68 S.E. 155, 161, the court observed that "The primary purpose of a bank surplus is the accumulation of a sum against which bad debts may be charged so that at all times the capital may be kept unimpaired."

In Chicago Title & Trust Co. v. Central Trust Co. (1924), 312 Ill. 396, 144 N.E. 165, 172, in speaking of the "surplus" of a bank the court said, "The item designated as 'surplus' represents permanent surplus or a liability that is carried permanently on the books and is rarely ever decreased or increased except by necessity, in case of a loss to the bank, or in case of an increase by reason of a new declaration of a permanent fund to be carried under that designation."

In Reynolds v. Bank of Mt. Vernon (1896), 6 App.Div. 62, 39 N.Y.S. 623, 626, cited with approval in Mulcahy v. Hibernia S. & L. Society (1904), 144 Cal. 219, 224, 77 P. 910, the claim was made that the accumulation of a surplus was illegal. In answer to such contention the court stated. "The propriety of accumulating some surplus is too palpable to require extended discussion. When the capital stock of a bank is impaired, the deficiency must be made good by an assessment on the stockholders; and, in case the deficiency is not made good within 60 days, proceedings may be instituted against it, as in the case of insolvent corporations. Hence, if such a corporation should divide all its profits and accumulate no surplus, any business loss would subject it to the hazard of a receivership and the loss of its corporate life."

[7] The fund sought to be established by the Industrial Loan Act is not a "reserve fund" such as is required to be maintained by insurance companies (Ins.Code, § 981 et seq.; Stats.1935, p. 537, as amended), banks (Bank Act, §§ 20, 68; Deering's Gen. Laws, 1937, Act 652), and building and loan associations (Building and Loan Act, § 5.03; Deering's Gen.Laws, 1937, Act 986). The amounts of these respective reserve funds are computed upon the basis of liabilities to the particular class of the public served by the respective institutions. "The accounting use of the word reserve as part of an account title is mostly in a literal sense, to convey the idea of retaining, withholding, setting aside, or setting apart especially for a particular purpose." (MacFarland, Accounting Fundamentals (McGraw-Hill Book Co. (1936), p. 383.) In the case of insurance companies the "reserve" of an insurer must equal the liability of the insurer on its policies. (See Ins. Code, §§ 10870, 980–993, 10530, 11554.) In the case of commercial banks the reserve is proportionate to the deposits. (Bank Act, § 20; Deering's Gen.Laws, 1937, Act 652.) Building and loan associations are required to maintain an "investment certificate reserve" equaling specific percentages of their total investment certificate liability for the protection of those investors who are investment certificate holders. (Building and Loan Act, § 5.03; Deering's Gen. Laws, Act 986.) No such requirement is found in the Industrial Loan Act. Recognizing the distinct character of such a fund is the requirement that banks maintain a "surplus" to be created out of the one-tenth part of the net profits calculated at each dividend period until such surplus shall amount to 25 per cent of the paid-up capital stock; the right to use the surplus to offset losses sustained is expressly recognized. (Bank Act, supra, § 21.) In the case of building and loan associations (of the stock company type), if a sum is set aside by the corporation for the purpose of declaring dividends on the stock at a rate in excess of that at which they are declared on installment shares, a "stock surplus" must be maintained; into such surplus one-tenth of the amount set aside for such excess dividends on the stock must be placed until the surplus amounts to at least 25 per cent of the par value of the outstanding stock and in the event of impairment of the surplus it is to be restored in the same manner as created. (Building and Loan Act, supra, § 10.03.)

It is noteworthy that impairment of any of the reserves mentioned above leads to the immediate imposition of penalties and inhibitions but that no such sanctions are provided in the case of impairment of the surplus to be accumulated under the Industrial Loan Act. Thus, section 20 of the Bank Act, supra, provides that if the total reserves of a bank are less than the amount required, the bank shall not increase its liabilities by making new loans or discounts, except by discounting bills of exchange on sight, and shall not pay dividends from profits until the full amount of the total reserve has been restored. In the event of nonrestoration of the total amount of the reserves within thirty days after being ordered by the Commissioner of Banks to make restoration, the bank may be deemed insolvent and proceeded against as provided in the act. If an insurer's "reserve" is impaired the insurer is defined as insolvent (Ins.Code, § 981 et seq.) and the Insurance Commissioner is authorized to take possession of its assets, records, etc. (Ins.Code, § 1011(j), St.1937, p. 2563.)

[8] The Industrial Loan Act, although neither expressly forbidding nor expressly authorizing use of the surplus to meet operating losses, contains language which at least impliedly recognizes that a corporation organized under the act may use or "impair" its statutory surplus and still con-

tinue to operate. Section 5 provides that "No corporation under * * * this act shall: (a) Hold at any one time the * * * obligations of any person * * * as primary debtor, in excess of 5 per cent of the amount of the capital stock of such industrial loan company actually paid in and unimpaired and 5 per cent of its *unimpaired surplus fund.*" (Italics added.) Section 11 makes express provision that "whenever * * * the commissioner shall have reason to conclude, that the *capital* of any company hereunder is impaired or reduced below the amount required by law, he may, by an order * * * direct such company to * * * make good the deficiency or impairment of capital alleged by him to exist within 60 days * * *." (Italics added.) There is no similar provision in respect to an impairment or reduction of surplus. Since under standard accounting practices the surplus would be exhausted before the capital would be impaired it seems obvious that the act contemplates the possible use of surplus to offset losses and also contemplates continued operation of the company in such event.

It is thus apparent that the Legislature has not used the term "surplus" in the Industrial Loan Act to specify a fund which, as an indispensable requisite to continued business, must remain forever unimpaired; its maintenance is rather a factor of protection for the going concern and it may be reduced by usage to that end when necessity demands. In other words we think that the Legislature by using the word "surplus" evidenced an intent to provide for a surplus rather than for a reserve.

Although not of controlling importance it is also noteworthy that the construction which we place on section 7 of the Industrial Loan Act is in accord with the construction given over a period of years by the federal administrative authorities to section 60 of the National Bank Act, which since 1864 has been worded similarly to the present language of section 7 of the California Industrial Loan Act and which is silent as to use or impairment of surplus. In 1935, section 60 of the National Bank Act was amended to require national banks to augment surplus to an aggregate of 100 per cent of capital instead of 20 per cent (49 Stats. 712), and by revision of our Industrial Loan Act in 1941 the ultimate minimum surplus for loan companies was similarly raised from 25 per cent to 100 per cent of capital. Sections 51 and 60 of the National Bank Act (12 U.S.C.A. §§ 51, 60), as amended in 1935, read as follows:

Section 51. "* * * No such association shall hereafter be authorized to commence the business of banking until it shall have a paid-in surplus equal to 20 per centum of its capital. * * * "

[9, 10] Section 60. "The directors of any association may, semiannually, declare a dividend of so much of the net profits of the association as they shall judge expedient; but each association shall, before the declaration of a dividend on its shares of common stock, carrying* not less than one-tenth part of its net profits of the preceding half year to its surplus fund until the same shall equal the amount of its common capital * * *."

The comptroller of the currency has issued the following ruling relative to reduction of surplus of a national bank: "Since the Banking Act of 1935 which requires an ultimate surplus equal to capital, it has been the position of the office that the surplus cannot be reduced, except to provide for expenses and losses, until it exceeds the amount of the capital. Where the surplus is equal to the capital it must not be reduced below that amount, unless losses have been sustained in amount greater than can be taken care of with existing undivided profits and reserves." (Ruling under Title 12, U.S.C.A. § 60; U.S.R.S. § 5199, footnote (par. 3670) (1), P.F. 12-6088.)

Had the Legislature intended that the surplus provided for by section 7 of the Industrial Loan Act be maintained without impairment it seems reasonable to assume that it would have expressly so stated. It did make express provision in relation to impairment of capital. It is elementary that the power given to the Commissioner of Corporations (by section 10 of the act) "to establish such rules and regulations as may be reasonable or necessary to carry out the purposes and provisions of this act" does not include power to alter the statute or enlarge or impair its scope. The effect of the rule enunciated in section 4 of chapter 5 of the Industrial Loan Act Rules and Regulations would be to impose requirements not included in the statute and not wholly consistent with the typical financial structure there contemplated. Hence, such

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* "Probably should read 'carry.'" (Ed., U.S.C.A.)

rule cannot be sustained. (See Koshland v. Helvering (1936), supra, 298 U.S. 441, 447, 56 S.Ct. 767, 80 L.Ed. 1268, 105 A.L.R. 756; Hodge v. McCall (1921), 185 Cal. 330, 334, 197 P. 86; Boone v. Kingsbury (1928), supra, 206 Cal. 148, 161-164, 273 P. 797; Whitcomb Hotel, Inc., v. California Emp. Comm. (1944), supra, 24 Cal. 2d 753, 759, 151 P.2d 233.)

Corollary to the conclusion hereinabove announced—that section 4 of chapter 5 of the Industrial Loan Act Rules and Regulations is invalid—it follows that the commissioner's order, based on such rule, requiring the forthwith restoration and maintenance of the surplus, is also invalid.

For the reasons above stated the judgment is affirmed.

SHENK, EDMONDS, and CARTER, JJ., concurred.

TRAYNOR, Justice (dissenting).

I dissent. In my opinion the Commissioner of Corporations was not only empowered to issue the regulation in question but was under a positive duty to do so. The regulation is merely declaratory of sound accounting principles that cannot be disregarded without frustrating the very purpose of section 7 of the Industrial Loan Act to insure the maintenance of a surplus as a margin of safety over the legal capital. By prohibiting charges against the statutory surplus that should properly be made against income the regulation guards against the diversion of the surplus into dividends in violation of the act.

The regulation states: "Provision shall be made by each industrial loan company for the maintaining of current, adequate reserves for unearned interest, unearned discount, losses and doubtful accounts. The balance in such accounts shall be adjusted annually, or if dividends are paid oftener than annually such adjustments shall be made before dividends are declared. An industrial loan company shall maintain the statutory surplus required by section 7 of the Industrial Loan Act and shall not use any portion of said statutory surplus to offset bad debts, doubtful accounts or for other special reserve accounts."

In the stipulated facts the parties have quoted only the last sentence of this regulation. The validity of any part of the regulation, however, can be determined only by a reading of the regulation in its entirety (see Weber v. County of Santa Barbara, 15 Cal.2d 82, 86, 98 P.2d 492) and the court should therefore exercise its authority to take judicial notice of the entire regulation even though only part of it is encompassed by the stipulation. Code Civ.Proc., § 1875(3); Drillon v. Industrial Acc. Comm., 17 Cal.2d 346, 352, 110 P.2d 64; Parker v. James Granger, Inc., 4 Cal. 2d 668, 677, 52 P.2d 226; Varcoe v. Lee, 180 Cal. 338, 343, 181 P. 223; Stanislaus Lumber Co. v. Pike, 51 Cal.App.2d 54, 56, 124 P.2d 190; Arnold v. Universal Oil Land Co., 45 Cal.App.2d 522, 529, 114 P.2d 408; Livermore v. Beal, 18 Cal.App.2d 535, 541, 64 P.2d 987. The prohibition of the use of the statutory surplus for offsetting bad debts, doubtful accounts or for other special reserve accounts is an inseparable counterpart of the requirement that the companies maintain adequate reserves for losses and doubtful accounts. By maintaining adequate reserves for losses from bad debts the companies charge to income the prospective losses from bad debts and thus decrease the profits available for dividends. The prohibition of the charging of bad debts and doubtful accounts to the statutory surplus insures the charging against income of that part of the losses from these sources exceeding the reserved amount. Thus a company cannot account for its bad debt losses by reducing the statutory surplus account; it must deduct its bad debt losses from current and future gross income and abstain from paying dividends until the bad debt losses in excess of the special bad debt reserve are fully accounted for. If the current income is insufficient for that deduction, the ensuing deficit must be absorbed by future income.

The requirement of special reserve accounts is merely declaratory of what in any event would be a principle of sound management of any credit institution, particularly a credit institution engaged in small loan business. By maintaining reserves for unearned income, such as interest paid in one accounting period but earned in another, the company allocates its receipts to those accounting periods in which they are earned. By maintaining and adjusting in each dividend period reserve accounts for bad debts and similar contingent losses, the company allocates continuously part of its gross income to losses, which are an inherent risk of the business of a credit institution. The establishment and continuous adjustment of a reserve for bad debts precludes the company's carrying loans on its books at a higher value than that which may reasonably be expected to be realized therefrom. See Pacific States Sav. & Loan Co. v. Hise, 25 Cal.2d 822, 836, 155 P.2d 809. By adding to this reserve what sound business judgment demands before paying a dividend, the company allocates to each dividend period its proper share of the losses from bad debts. A company is thus precluded from making it appear that its profits for a given period are higher than the actual profits for that period and that the losses in another period are greater than they actually are for that period. The reserve method of treating bad debts prevents such debts from creating losses at haphazard at times when they must be actually charged off by requiring deductions from gross income for such losses over the whole period of the company's business operations. The effect of this method is to treat losses from bad debts as they would be treated under accepted accounting practice, namely, as continuous business expenses. See Patton, Advanced Accounting, p. 18; McKinsey-Noble, Accounting Principles, Rev. Ed., p. 237.

There is a particular need for the accumulation of a reserve for bad debts in an enterprise where bad debts are significant in amount and frequent in occurrence. See Mason, Fundamentals of Accounting, p. 171. Bad debts reserves are therefore customarily maintained in credit institutions, whose principal assets are loans and whose principal business risks are losses from bad debts. See American Institute of Banking, Fundamentals of Banking, 1943, pp. 449, 450. It is in fact the general practice of industrial loan companies to set up such reserves from earnings as part of their expenses (see Robinson and Nugent, Regulation of the Small Loan Business, pp. 223-224), in recognition of the fact that earnings in the small loan field quickly reflect losses from accounts that prove uncollectible because of changes in the personal circumstances of the borrower. See Stone and Thomas, California's Legislature Faces The Small Loan Problem, 27 Cal.L.Rev. 286, 291.

If a company could conceal the inadequacy of a bad debt reserve by charging the deficiency to the statutory surplus, it could make its income appear higher than if the deficiency were charged against income, and thus create the illusion that assets in an amount equal to the losses were available for dividends. The offsetting of losses against surplus in this manner would be tantamount to using the surplus account directly for the payment of dividends. The commissioner's regulation precluding the company from making such withdrawals in favor of the shareholders insures the maintenance of the surplus prescribed by section 7. The very terms of that section make it plain that the surplus must be built up and maintained out of the company's income before any dividend is declared: "Before any * * * dividend is declared, not less than 10 per cent of the net profits of such corporation for the preceding half year, or for such period as is covered by the dividend, shall be carried to its surplus until such surplus shall equal the amount of paid-up capital." This surplus is "earned surplus" created out of corporate earnings, as distinguished from "paid-in surplus" representing the excess of the price of issuance over par or stated value, or other capital surplus arising from such sources as the revaluation of assets. If, however, the statutory surplus were available for all purposes for which earned surplus is ordinarily available under the general corporation law of this state, nothing would prevent an industrial loan company from applying the surplus retained at one dividend period to the payment of dividends in the next period, for section 346 of the Civil Code provides that a corporation may declare a dividend "out of earned surplus." The provisions of section 7 requiring an accumulation of surplus up to the amount of paid-up capital would be of no avail, however, if a company were allowed to undo in one period what it is required to do in the preceding period.

Industrial loan companies, like banks and other credit institutions, use funds that are for the most part furnished by others and that must be returned upon request. Statutory requirements with respect to a surplus, either to be paid up with the capital or to be built up out of profits, are designed to insure the maintenance of a reasonable ratio between the company's own capital and the funds of others. The maintenance of such a ratio insures the security of the enterprise when substantial amounts of credited funds are withdrawn. The Industrial Loan Act includes several provisions in addition to section 7 requiring the retention of a prescribed proportion of the company's own funds in the enterprise. A minimum legal capital is required, ranging from $25,000 to $100,000 depending on the size of the communities in which the company transacts business. § 3. The capital must be paid into the treasury of the company in cash, at least 25 per cent thereof before the articles of incorporation are filed and the balance at the rate of at least 10 per cent per month following the initial payment. § 3. To restrict the employment of credited funds, the act provides that no company may have outstanding more than ten times the amount of its paid-up capital in investment certificates. § 5 (e). The commissioner has added the provision that the amount of outstanding investment certificates shall not exceed a limitation fixed by him, if it is lower than the maximum amount allowed in section 5(e) of the act. Rules and Regulations, ch. 3, § 5. Like a prescribed cash reserve of a bank, the statutory surplus is designed not as a protection against bad debt losses (Allen v. Luke, C.C., 163 F. 1018, 1019), but as a permanent addition to the capital invested in the enterprise (see Chicago Title & Trust Co. v. Central Trust Co., 312 Ill. 396, 144 N.E. 165, 172), a security to the certificate holders and other creditors and to the public in addition to the required legal capital. Thus the surplus of a bank has been described as "a balance pure and simple belonging to the stockholders of the bank and remaining in the business in order to give depositors further assurance of the stockholders' confidence in the business. In the banking business it has a real significance beyond that of accounting. It is a supplementary reserve to protect the bank's depositors beyond the capital stock that may be required by law." Dewing, Financial Policy of Corporations, 3d Ed., p. 581. The purpose of section 7 of the Industrial Loan Act would be frustrated if charges were made against the statutory surplus that should be made against income, to create an appearance that income was available for dividends. The surplus would then in effect be distributed to the shareholders instead of being maintained as the Legislature intended, as additional security to the certificate holders and other creditors of the company.

The majority opinion assumes that the statutory surplus is a fund ostensibly to be used for absorbing losses so that an industrial loan company can meet its obligations without an impairment of its legal capital, which would subject it to the risk of seizure by the commissioner. The statutory surplus, however, is no more a fund than the legal capital, nor does the regulation prevent the use of any assets of the the company to meet its obligations. Moreover, far from causing any impairment of the legal capital, the regulation protects that capital from impairment.

The Industrial Loan Act does not require an industrial loan company to maintain the statutory surplus as an earmarked fund of cash or other assets. It merely requires the company to retain a specified percentage of profits in the business until the margin of assets over liabilities equals the amount of the legal capital. "The surplus account represents the net assets of a corporation in excess of all liabilities including [legal capital]." Edwards v. Douglas, 269 U.S. 204, 214, 46 S.Ct. 85, 88, 70 L.Ed. 235; Randall v. Bailey, 288 N.Y. 280, 43 N.E.2d 43; Landesman-Hirschheimer Co. v. Commissioner of Int. Rev., 6 Cir., 44 F.2d 521, 522; Porto Rico Coal Co. v. Domenech, 1 Cir., 41 F.2d 183, 185; Winkelman v. General Motors Corp., D.C., 44 F.Supp. 960; see 11 Fletcher, Cyclopedia of The Law of Private Corporations, § 5335. The statutory surplus therefore cannot be compared with liquid reserves required of a bank, which are actual liquid funds to meet requirements for cash payments when withdrawals of deposits are not balanced by new deposits. Bank Act, § 20, Deering's Gen.Laws, 1944, Act 652. The statutory surplus required by the Industrial Loan Act also differs from the surplus equivalent to 25 per cent of a bank's capital required by the Bank Act. Bank Act, § 21. The latter must be paid in by the shareholders along with the capital. It can be absorbed by any losses, subject to the limitation that the aggregate paid-up capital plus surplus must equal the percentages of deposit liabilities specified in section 19 of the Bank Act. The shareholders of a bank, if the deposits are not insured by the Federal Deposit Insurance Corporation pursuant to the Federal Reserve Act, are liable for all debts owed by the bank to depositors and other contract creditors. Stockholders' Liability Act, Deering's Gen. Laws, 1944, Act 652a. In the absence of a voluntarily established surplus, the statutory surplus required by an industrial loan company represents to the creditors the only margin of safety over the company's legal capital.

The commissioner's regulation against offsetting bad debt losses against the statutory surplus does not prevent the company from using its assets freely for any legitimate purpose. The company can offset its bad debt losses against profits voluntarily retained in the business, for such earned surplus may be used like current income. If there is not an adequate voluntarily accumulated earned surplus or adequate income against which to charge the losses from bad debts, a deficit should appear on the books and statements of the company to be charged against future income. Such a deficit would show that the statutory surplus was impaired, that the margin of assets over liabilities was less than the aggregate accumulations out of previous profits required as statutory surplus. So long as the deficit does not exceed the amount of the statutory surplus there is no impairment of capital. The statutory surplus thus serves to protect the legal capital from impairment. See Mulcahy v. Hibernia S. & L. Society, 144 Cal. 219, 224, 77 P. 910. The company is not subject to being taken over by the commissioner merely because a deficit indicates that its statutory surplus is impaired. It is not free, however, to charge the deficit against the statutory surplus account and thereby make future earnings available for dividends. The prohibition of the payment of dividends while a deficit exists is the essential legal effect of the commissioner's regulation. The majority opinion withholds judgment on the question of the commissioner's authority to require the statutory surplus to be fully restored before dividends are paid. In my opinion it is arbitrary to hold the regulation invalid without passing on that question, for the very purpose of the regulation is to insure the payment of dividends out of income and to prevent the depletion of the statutory surplus for such payments.

The majority opinion states that its holding is limited to the validity of the absolute prohibition by the commissioner of the use by an industrial loan company under any operating circumstances, of any portion of the statutory surplus "to offset bad debts, doubtful accounts, and operating losses." There is no prohibition, however, of the offsetting of operating losses generally. The regulation disallows the use of "any portion of said statutory surplus to offset bad debts, doubtful accounts or for other special reserve accounts." The prohibition is therefore limited to losses that should be charged against income by means of adequate reserve accounts. There is no showing that the company has been disallowed offsets against the statutory surplus account of losses that need not be charged against income. The question whether a regulation prohibiting the offsetting of such losses against the statutory surplus would be valid is therefore not involved in this case. Accepted accounting practice differentiates losses chargeable to income from other losses. It is thus not permissible to charge to "paid-in surplus" items that are properly chargeable to income. In the words of the Chief Accountant of the Security and Exchange Commission: "It is my conviction that capital surplus should under no circumstances be used to write off losses which, if currently recognized, would have been chargeable against income. In case a deficit is created, I see no objection to writing off such a deficit against capital surplus, provided appropriate stockholder approval has been obtained." S.E.C. Accounting Release No. 1, April 1, 1937, 3 C.C.H. Fed. Sec. Laws Service, 61,701, § 72,002; see, also, Am.Inst. of Accountants, Accounting Research Bulletin, No. 3 (1939); Katz, Accounting Principles in Corporate Distributions, 89 U. of Pa. L. Rev. 764, 767-768. It is improper to charge to paid-in surplus an expense or loss properly chargeable to income in view of the right of the shareholders to have their investment, including the paid-in surplus, maintained. The maintenance of the statutory surplus by an industrial loan company, however, is required in the interest of the certificate holders and other creditors and of the public generally, and is therefore not dependent on the approval of the shareholders.

Since the commissioner's regulation prescribes a rule of sound accounting practice essential to the purposes of the Industrial Loan Act, there can be no valid objection to his order requiring plaintiff to restore the statutory surplus depleted by offsets of bad debts previous to the regulation prohibiting such offsets. Plaintiff was under a duty to provide for its bad debts out of income independently of the commissioner's regulation. By reducing its statutory surplus, it has either paid as dividends income that was not properly available for that purpose or has failed to show a deficit to be charged against future income. The depositors and other creditors of the company are entitled to the restoration of the statutory surplus. The commissioner's order proceeds directly from his power to supervise and control industrial loan companies as to all their corporate powers (§ 4), and to make reasonable regulations to carry out the purposes of the act §§ 10 and 11a. The statutory surplus is so closely related to the public interest and the interest of the certificate holders and other creditors, which the commissioner is charged with safeguarding, that the restoration of that surplus could not be waived by his failure to insist on its restoration on the occasion of applications by the company for the issuance of investment certificates under the Corporate Securities Act and on the occasion of his examination of the books and records of the company.

GIBSON, C. J., concurred.

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26 Cal.2d 519

POLK v. CITY OF LOS ANGELES et al.
L. A. 19187.

Supreme Court of California.
June 12, 1945.

Rehearing Denied July 9, 1945.

1. Electricity 🔑14(1)

One maintaining wires carrying electricity is required to exercise the care that a person of ordinary prudence would exercise under the circumstances, and among the circumstances are the well-known dangerous character of electricity and inherent risk of injury to persons or property if it escapes.

2. Electricity 🔑16(2)

Wires carrying electricity must be carefully and properly insulated by those maintaining them at all places where there is reasonable probability of injury to persons or property therefrom.

3. Electricity 🔑16(5)

One controlling wires carrying electricity has duty of reasonable and prompt inspection of wires and appliances and should be diligent therein.

4. Electricity 🔑19(5)

Evidence supported jury's finding that place where injury to tree surgeon when his pruners came in contact with worn space on electric wires was one requiring that wires be insulated by municipality maintaining them and that inspection be diligent in order to keep them in repair.

5. Electricity 🔑16(1)

Municipality, in maintaining electric wires which ran through trees standing on private property, should have anticipated as a matter of common knowledge that owner would trim the trees both for reasons of safety and of esthetics.

6. Electricity 🔑19(10)

Evidence, including fact that electric wires maintained by municipality passed through trees standing on private property the limbs of which swayed and contacted the wires, presented question for jury as to whether semi-annual inspection of the wires by municipality was sufficient to absolve municipality from negligence, so that municipality would not be liable for injuries sustained by tree surgeon when his pruners came in contact with worn space on wires.

7. Electricity 🔑16(2)

Conformity by defendant municipality to general custom of power companies with relation to manner of maintaining power lines and right of way did not excuse defendant municipality from liability for injuries sustained by tree surgeon when his pruners came in contact with worn space on wire unless the practice was consistent with due care.

8. Electricity 🔑16(5)

If only purpose of insulation on wires running through trees standing on private property which municipality was required to anticipate would be trimmed was to insure continuous service, and insulation was not intended to protect persons from injury, municipality, in maintaining the wires, was guilty of negligence in failing to take precautions for protection of persons whom they should anticipate might come in contact with the wires.

9. Electricity 🔑19(12)

Whether tree surgeon who was injured when his pruners came in contact with bare spaces on electric wires running through trees which he was trimming was guilty of contributory negligence in not observing exposed place on wire, so as to preclude recovery from municipality which was maintaining the wires, was for jury.

10. Negligence 🔑136(14)

As respects negligence, actor's conduct must be gauged in relation to all other material circumstances surrounding it, and if such other circumstances admit of a reasonable doubt as to whether such questioned conduct falls within or without the bounds of ordinary care, then such doubt must be resolved as a matter of fact rather than of law.

11. Electricity 🔑18(3)

Where tree surgeon, from his inspection, thought that electric wires passing through trees which he was about to trim were all well insulated, and that he was safe because of the insulation, tree surgeon was not guilty of contributory negligence because working near electric wires without using an insulated pruning hook and without wearing rubber gloves.

12. Electricity 🔑19(12)

Whether there was a custom among tree trimmers working near electric wires to use an insulated pruning hook and wear rubber gloves, so that failure of tree surgeon who was injured when his pruners came in contact with worn spaces on wire to do so constituted contributory negligence, was for jury.

13. Negligence 🔑136(14, 26)

Whether negligence or contributory negligence may be predicated upon departure from custom is a question for jury.

14. Negligence 🔑65

The standard of care required to relieve a plaintiff of a charge of contributory negligence is that exercised by man of ordinary prudence under the circumstances, the same as the standard of care required to relieve a defendant of a charge of negligence.

15. Trial 🔑296(4)

An instruction that not any degree of negligence, however slight, which directly concurred in producing the injury, will prevent recovery, but if plaintiff's negligence contributes proximately in any degree to the injury, it will prevent recovery, though inadvisable because of its lack of clarity, did not constitute prejudicial error, in view of complete and exhaustive instructions given on subject of negligence and contributory negligence.

16. Appeal and error 🔑1066
Trial 🔑253(4)

An instruction that failure of defendant municipality, in maintaining its power lines which ran through trees standing on private property, to anticipate all uses of property and trees, and to take reasonable precautions to prevent wires from interfering therewith, was improper in that it failed to limit municipality to only such uses as they could reasonably anticipate, but did not constitute prejudicial error, where it did not appear that jury was misled.

17. Electricity 🔑19(13)

An instruction if jury believed that plaintiff, before undertaking to perform his work of trimming trees, exercised reasonable and ordinary care as a reasonable and prudent person in observing electric wires strung through the trees, and that in so making his observations, wires appeared to him insulated and in a reasonably safe condition so as to permit him to trim trees without danger of an electric shock, plaintiff was entitled to assume that wires were insulated throughout the trees and was not under duty to seek out concealed and hidden defects, if any, in insulation of the wires, was proper.

18. Electricity 🔑9(1)
Municipal corporations 🔑733(3)

The rules of the state Railroad Commission with reference to maintenance of pole power lines are applicable to a city, although the Commission has no authority to regulate or control city utilities.

19. Municipal corporations 🔑64

If a state statute affects a municipal affair only incidentally in accomplishment of a proper objective of state-wide concern, then the state law applies to charter cities.

20. Electricity 🔑19(13)

In action against municipality for injuries suffered by tree surgeon from electric shock, trial court properly advised jury that safety rules and regulations promulgated by state Railroad Commission for privately owned public utilities could be considered in determining whether defendant municipality had exercised standard of care required of those maintaining electric power lines.

21. Appeal and error 🔑1066
Trial 🔑253(4)

In action against municipality for injuries suffered by tree surgeon from electric shock, instruction relating to safety regulations promulgated by state Railroad Commission concerning tree trimming was erroneous in omitting part of the regulation, but did not constitute prejudicial error in view of generality of language used and apparent propriety of rules set forth.

22. Electricity ⚷19(13)

In action for injuries resulting from electric shock, instruction that unavoidable accident was an affirmative defense, and that defendants had burden of proving it was erroneous.

23. Negligence ⚷134(1), 135

The defense of unavoidable or inevitable accident is not an "affirmative defense", and burden of proof rests upon plaintiff to prove negligence and proximate cause by preponderance of evidence.

See Words and Phrases, Permanent Edition, for all other definitions of "Affirmative Defense".

24. Appeal and error ⚷1064(1)
Electricity ⚷19(13)

In action for injuries resulting from electric shock, instruction that unavoidable accident was an affirmative defense and that defendants had burden of proving it, though erroneous, was not prejudicial error, where instruction left it for jury to determine issue of defendants' negligence, and jury were elsewhere comprehensively instructed that burden of proof of negligence rested on plaintiff.

EDMONDS, J., dissenting.

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In Bank.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Earl H. Polk against the City of Los Angeles and another for injuries caused by contact with an electric wire. From a judgment for plaintiff, the defendants appeal.

Affirmed.

Prior opinion, 150 P.2d 520.

Ray L. Chesebro, City Atty., S. B. Robinson, Asst. City Atty., and Everard L. McMurrin, Deputy City Atty., all of Los Angeles, for appellants.

Samuel A. Rosenthal and Burton B. Crane, both of Los Angeles, for respondent.

CARTER, Justice.

Plaintiff recovered a judgment for damages against defendants for personal injuries suffered by him as the result of a fall from a tree alleged to have been caused by the negligence of defendants in maintaining an electric power line in a dangerous condition through said tree.

Rancho Street in defendant city of Los Angeles is an east-west street which at the place involved carried little traffic. Norman Levin owns a parcel of property on the north side of the street. There are growing along the south line of his property parallel to and near the street, six eucalyptus trees and one oak tree. The eucalyptus trees range from 60 to 70 feet in height and are 6 to 10 feet apart. Some of the branches spread over the street. Defendant city as a part of its business of distributing and selling electricity, maintains a power line along the north line of the street right of way, consisting of poles 155 feet apart and cross-arms on the poles which support three laterally parallel wires about 3 feet apart and 42 to 45 feet above the ground. The wires carry 4,800 volts of electric energy. They pass through the branches and foliage of the above mentioned trees. The wires, except at the points where worn, as will presently appear, were insulated making their diameter about three-fourths of an inch, the wire itself being about one-eighth of an inch in diameter. There are brisk winds prevailing in the vicinity during the spring months causing the trees to do "a good deal of swaying" with the result that insulation is worn off the wires at contact points.

Plaintiff contracted with Levin to trim the above mentioned trees. In the performance of his contract he was working on March 29, 1942, equipped with ropes, ladder and two uninsulated pruning hooks measuring about 8 feet and 12 feet in length respectively. Before commencing work he examined the trees and wires from the ground, and also while in the trees, and "noticed they (the wires) were well insulated" and he did not see any bare places on them. He finished the oak tree and five of the eucalyptus trees. He had partially completed the sixth eucalyptus tree, having trimmed the portion of the tree above the wires. His ladder was leaning against the sixth tree. He was standing on it at the fourth or fifth rung from the top, 25 to 30 feet from the ground when he leaned out, extending the 12-foot pruning hook full length, to cut a branch about midway between the fifth and sixth trees. His hook apparently contacted the wires and the resulting electric shock dislodged him from the ladder. The fall caused the injuries here involved. The insulation on one wire was worn off at a point about half way between the fifth and sixth trees for a space of about three feet. The bare section had resulted from the wind moving a limb of the fifth eucalyptus tree against the wire causing the limb to be somewhat charred. The bare space on the wire could be seen from the ground as shown by an inspection after the accident.

Defendants inspected their power lines twice a year. They had last inspected the wires here involved in October, 1941. However, nothing was done, even if the insulation was found worn, unless the condition existed at the same point on two parallel wires.

Plaintiff knew of the dangerous character of wires carrying electricity and observed a sign near the scene of the accident stating that the wires in question carried a high voltage. He did not insulate the pruning hook or wear rubber gloves. He had had experience trimming trees through which ran electrically charged wires and knew that the insulation was likely to be worn where rubbed by a limb.

Defendants contend that there is insufficient evidence to support the jury's implied finding of negligence; that plaintiff was contributorily negligent as a matter of law; and that error was committed in giving instructions to the jury.

[1-3] On the subject of negligence the standard of care is, that one maintaining wires carrying electricity is required to exercise the care that a person of ordinary prudence would exercise under the circumstances. Among the circumstances are the well known dangerous character of electricity and the inherent risk of injury to persons or property if it escapes. Hence, the care used must be commensurate with and proportionate to that danger. See Irelan-Yuba, etc., Min. Co. v. Pacific G. & E. Co., 18 Cal.2d 557, 116 P.2d 611; McCormick v. Great Western Power Co., 214 Cal. 658, 8 P.2d 145, 81 A.L.R. 678; Smith v. San Joaquin Light & Power Corp., 59 Cal.App. 647, 211 P. 843; Monroe v. San Joaquin L. & P. Corp., 42 Cal.App.2d 641, 109 P.2d 720; 10 Cal.Jur. 184-185; 1 Joyce on Electric Law, §§ 438-438b; Rest., Torts, § 298. Specific application of that standard requires that wires carrying electricity must be carefully and properly insulated by those maintaining them at all places where there is a reasonable probability of injury to persons or property therefrom. See Monroe v. San Joaquin L. & P. Corp., 42 Cal.App.2d 641, 109 P.2d 720; Dow v. Sunset Tel. & Tel. Co., 157 Cal. 182, 106 P. 587; Anstead v. Pacific Gas & Elec. Co., 203 Cal. 634, 265 P. 487; Royal Indemnity Co. v. Midland Counties Pub. Service Corp., 42 Cal.App. 628, 183 P. 960; McCormick v. Great Western Power Co., 214 Cal. 658, 8 P.2d 145, 81 A.L.R. 678; Stanley v. Lander, 3 Cal.App.2d 284, 39 P.2d 225; 1 Joyce on Electric Law, § 445; 29 C.J.S., Electricity, § 44; 18 Am. Jur. Electricity, § 93 et seq. Upon those controlling such instrumentality and force is imposed the duty of reasonable and prompt inspection of the wires and appliances and to be diligent therein. See Stasulat v. Pacific Gas & Elec. Co., 8 Cal. 2d 631, 67 P.2d 678; Irelan-Yuba, etc., Min. Co. v. Pacific G. & E., 18 Cal.2d 557, 116 P.2d 611; Dow v. Sunset Tel. & Tel. Co., 157 Cal. 182, 106 P. 587. And, in the places where there is a probability of injury, they must not only make the wires safe by proper insulation, but as stated in Dow v. Sunset Tel. & Tel. Co., 157 Cal. 182, 186, 106 P. 587, 589, "keep them so by vigilant oversight and repair."

[4, 5] Unquestionably the jury was justified in finding that the place where the injury to plaintiff occurred was one requiring that the wires be insulated and that the inspection be diligent in order to keep them in repair. The wires ran through trees standing on private property in an area, which, although not heavily populated, was suburban. The prevailing and customary wind would probably, as apparently it did, cause the limbs of the tree to rub against the wires and impair the insulation thereon. A man of ordinary prudence should anticipate the occurrence of those events and also that the owner of the property would trim those trees. Defendants should have anticipated as a matter of common knowledge that the owner would trim the trees both for reasons of safety, that is, falling limbs, and of esthetics. As an incident of that work the trimmer would necessarily be near and about the wires. It may be that under some circumstances the height of the wires from the ground would satisfy defendants' duty but that is not true where the wires pass through trees which they should anticipate would be trimmed. An analogy to the probability that the trees would be trimmed, appears in Monroe v. San

Joaquin L. & P. Corp., 42 Cal.App.2d 641, 109 P.2d 720, where an employee of a company using electricity furnished by defendant, was injured by coming into contact with an electrically charged wire which had been improperly installed by defendant, having insufficient insulation. The employer company, not defendant, owned and maintained the wires which were connected to a transformer in a transformer yard. The employee was engaged in cutting weeds in the yard at the order of the employer company. The court said at page 649 of 42 Cal.App.2d, at page 724 of 109 P.2d: "In applying the test of foreseeability, for the purpose of determining negligent conduct, *it was not necessary that appellant have knowledge* of the fact that employees might be required to clear out weeds within the transformer yard. A considerable portion of the transformer yard was left in its natural state, and the growth of weeds therein was simply a normal act of nature. The necessity of requiring employees to clear out the growth of weeds from time to time was one of the circumstances which an ordinarily prudent person should have anticipated." (Emphasis added.) On the issues here involved the case of Holden v. Cincinnati Gas & Electric Co., 57 Ohio App. 448, 14 N.E.2d 943, is helpful. There, plaintiff, a worker on a federal relief project, was injured while trimming trees when his pruning hook contacted a bare spot on an insulated electrically charged wire running through the tree on which he was working. The court affirmed a judgment for him, stating at page 946 of 14 N.E.2d:

"The last question is whether there is any substantial evidence of negligence on the part of the defendant. Appellant's counsel point out that there was no statute requiring these wires to be insulated. That is conceded, but that does not conclude the inquiry. There is a rule of universal application that wherever a person or corporation through his or its activities is brought into proximity with another, some care is required so that harm will not result to such person. The duty of care exists in the absence of any statute and, if care is omitted and injury directly results therefrom, liability arises.

"In this case the defendant was conscious of the danger of electricity escaping from these wires and for that reason had them insulated originally, but failed to see that the insulation was maintained. While these wires were about 20 feet above the street, they were directly over a row of trees and among the branches of some of them. *A reasonable person would anticipate that these trees would be trimmed in course of time, and that to do so workmen would be required to climb thereon and get near these wires, and at the time have shears or saws with them.*" See, also, Royal Indemnity Co. v. Midland Counties Pub. Service Corp., 42 Cal.App. 628, 183 P. 960.

[6] With reference to inspection of the wires by defendants, it was for the jury to determine whether the semiannual inspection which they made was sufficient, considering all of the circumstances and especially the fact that the wires passed through trees, the limbs of which swayed and contacted the wires. As stated in McCormick v. Great Western Power Co., 214 Cal. 658, 663, 8 P.2d 145, 147, 81 A.L.R. 678, on the issue of negligence: "'Either the wire must be insulated, or it must be so located as to be, comparatively speaking, harmless.' * * * Such is the doctrine everywhere. * * * 'The standard to be attained is that of ordinary and reasonable care, and this means such care as a reasonably careful and prudent person, having in view the dangers to be avoided and the likelihood of injury therefrom, would exercise, under the circumstances, in order to prevent injury.' * * * 'If,' therefore, says the court in Minter v. San Diego Consol. Gas, etc., Co., 180 Cal. 723, 182 P. 749, 750, 'guided by those considerations which ordinarily regulate the conduct of human affairs, an ordinarily prudent person would have had reasonable ground to suspect that the wires so placed would cause injury, the plaintiff can be said to have proved a breach of duty.' And where the evidence is such that reasonable men might fairly differ as to the answer to the above question, the issue is one of fact for the jury to determine, and, if it finds in favor of the plaintiff, its verdict will not be disturbed." We conclude therefore that there was sufficient evidence to support the jury's finding of negligence.

There is nothing in Minter v. San Diego Consol. Gas, etc., Co., 180 Cal. 723, 182 P. 749, contrary to the foregoing views. There a boy was killed when he contacted insulated wires running through a tree on his father's property. The boy's purpose in ascending the tree did not appear and the court pointed out that defendant, the owner of the wires, had trimmed the trees, the court stating at page 727 of 180 Cal., at page 750 of 182 P.: "By analogy, the defendant in the case at bar was bound to prevent its wires from interfering with *any use* of the highway and, in particular, *of the eucalyptus tree which was reasonably to be anticipated. It affirmatively appears from the plaintiff's testimony that the trees were trimmed by the defendant's workmen.* No evidence was adduced to show that the tree was used or needed for anything but shade or ornament, or to show the existence of any custom with reference to the care of the tree of which the defendant would be reasonably expected to take notice and which would be likely at times to require the presence of the deceased or of any other person in the tree at a height of 27 feet from the ground. In the absence of such evidence, we do not think that the existence of any such business or duty was fairly inferable under the circumstances here presented." (Emphasis added.) As we have seen the trimming of the trees under the circumstances here presented was an activity defendants should have anticipated.

[7, 8] Defendants point to evidence that insulation on wires carrying electricity passing through trees is not intended to protect persons from injury, but rather to insure continuous service and that their evidence showed that the wires were maintained in accordance with the custom and practice in the industry. Suffice it to say that "Conformity by defendant to general custom of power companies with relation to the manner of maintaining power lines and rights of way does not excuse defendant unless the practice is consistent with due care. Anstead v. Pacific Gas & Electric Co., 203 Cal. 634, 265 P. 487; McCormick v. Great Western Power Co., 134 Cal.App. 705, 26 P.2d 322; Lim Ben v. Pacific Gas & Electric Co., 101 Cal.App. 174, 281 P. 634." Irelan-Yuba, etc., Min. Co. v. Pacific G. & E. Co., 18 Cal.2d 557, 567, 116 P.2d 611, 618. If, as defendants aver, the purpose of insulation on wires running through trees under the circumstances here involved is not to protect persons from injury, then they confess that they took no precautions for the protection of persons whom they should anticipate might come in contact with the wires. See Anstead v. Pacific Gas & Elec. Co., 203 Cal. 634, 265 P. 487.

[9, 10] On the subject of contributory negligence, it will be recalled that plaintiff examined the trees and the wires running through them first as a whole, and then each tree before he commenced trimming it, and later examined the wires while in the trees when he was working in them. He testified that he did not see any bare spots on the wires and they appeared to him to be "well insulated." There were places where a view of the wires was obscured by the foliage on the trees, it being thick. At the time of the accident he was on the ladder on the north side of the tree, the side opposite from the street. The ladder was lashed to the tree. He had finished the top of the tree and was on the fourth or fifth rung from the top of the ladder. Inasmuch as the branches of the sixth tree on which he was working, and those of the fifth tree overlapped, he was trimming some of the branches of the latter tree. He wrapped his left leg around the tree. He was holding with both hands his long pruning hook fully extended when, as expressed by him, he "had occasion to use my long pruner on No. 5, and the last thing I remember I was reaching out to do some kind of work, I can't recall now, and the convulsions started, and I come in some way in contact with the live wire and I couldn't free myself. All it was, it was just a jerking, and I * * * I couldn't let myself loose, and I prayed that something would help me or somebody would come to my rescue from the estate. And that is the last I remember." The point of contact with the wire was probably 12 to 20 feet from him. He stated that he did not see the wires at the time of the accident. They were obscured by foliage. It is true that he had had many years' experience in trimming trees, including working near and about wires carrying electricity and knew of the danger, but he testified that he considered insulation as a protection against a shock; and that he did not know the amount of electricity flowing in the wires. Under all the circumstances it was a question for the jury whether plaintiff conducted himself as a man of ordinary prudence.

Defendants refer to evidence that the bare spot on the wire and a charred place on the tree was visible from the ground, having been seen by defendants' lineman, and were also visible from the trees; that, therefore, plaintiff must have seen them, or if he had exercised proper care he would have seen them. That creates nothing more than a conflict in the evidence. Plaintiff may have, consistently with due care, failed to make an inspection of the wires from the same place that others did. From his position in the tree at the time of the accident his view may well have been obscured by foliage. Under all of the circumstances it was a question of fact whether plaintiff as a person of ordinary prudence should have observed the bare spots. As recently stated by this court in Toschi v. Christian, 24 Cal. 2d 354, 360, 149 P.2d 848, 852: "In other words, the actor's conduct must always be gauged in relation to all the other material circumstances surrounding it and if such other circumstances admit of a reasonable doubt as to whether such questioned conduct falls within or without the bounds of ordinary care then such doubt must be resolved as a matter of fact rather than of law."

[11-13] Defendants produced evidence that it was the custom among tree trimmers working near electric wires to use an insulated pruning hook and wear rubber gloves. However, plaintiff with years of experience as a tree trimmer, testified: "Q. Do you know whether tree trimmers do or do not use rubber gloves when they are working in close proximity to live wires? A. I never seen one yet that did, and I have not in all my years." In regard to the use of a non-electricity conducting rope on a pruning hook instead of a wire to operate the cutting blades, he testified:

"Q. Now, then, do you know that had you used a pruner that was operated by a rope that you would thereby have been insulated against the possibility of shock? * * * A. Well, not altogether, no. There are several different ways you may receive a shock if you are up amongst the live limbs.

"Q. No; but I say if you had been using one of these pruners that have been described here, the blade of which was operated by the pulling of a rope, and you reached out with the pruner and contacted the electric line with the blade of the pruner, do you know whether the dry wood handle and the rope would have protected you against the possibility of shock? * * * A. Well, that I think in my own opinion depends upon where my body was; that if my body was touching a live limb and that live limb should happen to be touching a bare spot in the wire or any place that would contact electricity, I would receive the shock just the same.

"Q. By Mr. McMurrin: No, but I am not asking you, Mr. Polk, if a live branch were in contact with the wire and then the branch is in turn in contact with you. Assume for the moment that you are not touching any branches at all, but you use one of these pruners with the dry wood pole and the rope, and by accident you place the blade of that pruner against the live electric wire, do you know whether you would be insulated from shock by reason of using that dry wood and that rope to pull the blade? * * * A. Well, I don't know enough to say that I do know."

Furthermore, from plaintiff's inspection he thought the wires were all well insulated and that he was safe because of the insulation. As expressed in Royal Indemnity Co. v. Midland Counties Pub. Service Corp., 42 Cal.App. 628, 635, 183 P. 960, 962: "He had the right to assume that the guy wire was safe, either by reason of its strength or by reason of proper insulation. He was doing nothing unusual or foolhardy for a man charged with his duties and performing his work, in assisting the horse in disentangling iself from the wires." Moreover, in addition to the apparent lack of knowledge by plaintiff of any such custom or practice, and the province of the jury to find that none such existed, it is pertinent to observe that even though the actor's conduct is that customarily followed, he is not conclusively or as a matter of law absolved from the charge of negligence or contributory negligence. 19 Cal.Jur. 581. Nor does a variation from the custom conclusively establish contributory negligence. Whether negligence or contributory negligence may be predicated upon departure from custom is a question for the jury. Adamson v. City and County of San Francisco, 66 Cal.App. 256, 225 P. 875. Thus, whether plaintiff voluntarily chose the more dangerous of two courses of conduct or whether he was contributorily negligent was a question for the jury under all the circumstances of the case.

Defendants cite many cases on the subject of contributory negligence. Each case depends upon its own circumstances and those cases do not have present the factors here involved.

[14, 15] Defendants complain of a jury instruction requested by plaintiff and given by the trial judge, reading: "Applicable to the defense of contributory negligence, the rule is not that any degree of negligence, however slight, on the part of plaintiff, which directly concurs in producing the injury, will prevent his right to recover, but the rule is that if the negligence of the plaintiff amounting to the absence of ordinary care exercised by an ordinarily prudent person shall contribute proximately, in any degree, to the injury, it will prevent his right to recover." As an abstract proposition of law and when properly interpreted that instruction is a correct statement of the law. Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066; Robinson v. Western Pacific R. Co., 48 Cal. 409; Strong v. Sacramento & P. R. Co., 61 Cal. 326.

The first part of the instruction refers to the difference in degrees of negligence or care, and states, in effect, that slight negligence or a failure to exercise great care are not the tests for contributory negligence, but rather, as stated in the last part of the instruction, that the care must be ordinary or that exercised by a man of ordinary prudence. As indicated in Strong v. Sacramento & P. R. Co., supra, 61 Cal. 328, after stating the rule: "A very timid or cautious person would not, perhaps, have driven in the direction of the railroad, knowing that a train *might* pass along the track, and that the warning bell might not be sounded. But the question is: Did the plaintiff exercise ordinary care and prudence in doing what he did? The degree of caution required is relative to the risk; but no person is bound to assume that another will abandon any reasonable precaution, or violate the obligation imposed upon him by the laws of the land." Or it may mean merely that plaintiff's negligence must have proximately contributed to the injury rather than that he was negligent regardless of its proximity. See Rush v. Lagomarsino, supra. In Lufkin v. City of Bakersfield, 131 Cal.App. 21, 20 P.2d 788, we have a substantially similar situation. The court said at page 27 of 131 Cal.App., at page 790 of 20 P.2d:

"Complaint [by defendant of an instruction on contributory negligence given at plaintiff's request] is next made of the following instruction: 'You are further instructed that if you find that there was on the part of the plaintiff contributory negligence in this matter which concurred directly in producing the injury, then such negligence will not bar the right of recovery of the plaintiff if such negligence is so slight as not to amount to want of ordinary care.'

"It is urged that this instruction permitted the jury to compare the negligence, if any, of the drivers of the two cars. While we do not think this instruction was necessary or to be recommended, it is true, as pointed out in Strong v. Sacramento & P. R. Co., 61 Cal. 326, that in a legal sense a person is not guilty of negligence unless the acts said to be negligent are sufficient to amount to a want of ordinary care. In effect this instruction told the jury that if the acts of the plaintiff did not amount to negligence, they could not amount to contributory negligence. In some half dozen instructions the jury was told that it must not compare the negligence of the two drivers, that it must not attempt to determine which of the two was guilty of the most negligence, that if the respondent's husband failed to make reasonable use of all his faculties to make a safe crossing and avoid a collision, and if he failed to do all that a person of ordinary prudence would have done under the same or similar circumstances, he was negligent, and that if any such negligence contributed proximately to the happening of the accident, no matter how slightly, plaintiff could not recover. Under the circumstances shown by this record, we are of the opinion that no reversible error appears."

And in Metcalfe v. Pacific Electric R. Co., 63 Cal.App. 331, 336, 218 P. 486, 488: "Another point made by appellants is that the trial court erred in several of its instructions upon the question of contributory negligence. These instructions, taking a composite view of them, were to the effect that Mrs. Metcalfe's negligence, 'however slight,' or 'no matter how slight,' or contributing 'in the slightest degree,' to the accident, would preclude a recovery by appellants. In all, these and similar expressions were employed eight times in the course of the instructions, and appellants' objection is not merely that they were used at all, but that they were used so often. There is some slight confusion in the decided cases upon the question whether such qualifying terms are proper in an instruction on the law of contributory negligence, but this confusion is more apparent than real, and is thoroughly dispelled if due regard be paid to the difference between the terms 'care' and 'negligence' and the relation which one bears to the other under the law. In an early case the Supreme Court said that 'the law regards the plaintiff as innocent, unless he has been guilty of what has been called (somewhat awkwardly) "ordinary negligence"; that is, unless the evidence shows a want of ordinary care and prudence on his part. His failure to take great care is no defense. * * * The *formula* is, not that any degree of negligence on the part of the plaintiff which directly concurs in producing the injury (however slight) will constitute a defense; but if the negligence of the plaintiff, which amounts to the absence of ordinary care, shall contribute, in any degree, proximately to the injury, the plaintiff shall not recover.' Robinson v. Western Pac. R. Co., 48 Cal. 409. Due attention to this language will convince that it declares the law to be exactly as the trial judge stated it to the jury in the present case. Taking the excerpt as a whole it is plain that the Supreme Court, in saying, 'not * * * any degree of negligence on the part of the plaintiff * * * will constitute a defense,' intended to convey the idea that no negligence consisting only of a failure to exercise great care will constitute a defense. No other construction of the language last quoted will harmonize with the final statement of the court, 'but if the negligence of the plaintiff, which amounts to the absence of ordinary care, shall contribute, in any degree, proximately to the injury, the plaintiff shall not recover.' The law thus declared has never been departed from in this state. See Strong v. Sacramento & P. R. Co., 61 Cal. 326; Tobin v. Omnibus Cable Co., 4 Cal.Unrep. 214, 34 P. 124; Sinclair v. Pioneer Truck Co., 51 Cal.App. 174, 196 P. 281. It is true that in the case last cited the appellate court declined to reverse because the trial court had refused to use the qualifying words 'in any degree' in an instruction upon the law of contributory negligence. Nevertheless, the language of the court shows that it would have adopted the same attitude toward an objection to an instruction on the ground that it contained those words. As to appellants' objection that the trial court so often used the qualifying words with which they find fault, it is enough to say that if it was right to use them once it was right to use them in every instance in which the court did use them. No harm was wrought by the repetitions found in the instructions."

It cannot be doubted that the standard of care required to relieve a plaintiff of a charge of contributory negligence is that exercised by a man of ordinary prudence under the circumstances, the same as the standard of care required to relieve a defendant of a charge of negligence. 19 Cal.Jur. 648–9; Rest. Torts, § 464. The cases of Meredith v. Key System Transit Co., 91 Cal.App. 448, 267 P. 164; Markham v. Hancock Oil Co., 2 Cal.App.2d 392, 37 P.2d 1087; Metcalfe v. Pacific Electric R. Co., 63 Cal.App. 331, 218 P. 486; Kirchhof v. Morris, 29 Cal.App.2d 481, 84 P.2d 1053; Cummins v. Yellow & Checker Cab Co., 127 Cal.App. 170, 15 P.2d 536; Botti v. Savill, 97 Cal.App. 524, 275 P. 1029; Creamer v. Cerrato, 1 Cal.App.2d 441, 36 P.2d 1094; Watkins v. Nutting, 17 Cal.2d 490, 110 P.2d 384, cannot be said to announce a different rule. While it is probably not advisable to give the instruction here attacked because of its lack of clarity and possible confusing character, we are satisfied that in view of the complete and exhaustive instructions given on the subject of negligence and contributory negligence that no prejudicial error occurred. For illustration the instruction immediately preceding the attacked instruction reads:

"You are instructed that the law does not concern itself with the relative degrees of negligence of the plaintiff and the defendants. Therefore, even if you should find that the defendants were negligent, still, if you further find that the plaintiff himself was negligent, and that his negligence proximately contributed to causing the injuries of which he complains, then you are not to concern yourself with the question as to whether the plaintiff's contributory negligence was equal to, or greater than, or less than, that of the defendants.

"Contributory negligence, if a proximate cause of plaintiff's injury, is a bar to his recovery, regardless of its relative degree." And that directly following it stated:

"You are instructed that the contributory negligence of the plaintiff, if proved, is a complete defense to this action; because it is the law of this state that if the plaintiff is guilty of the slightest amount of negligence proximately contributing to his injuries, he cannot recover regardless of how guilty of negligence the defendants may have been."

[16] Defendants object to the following jury instruction: "It was the duty of defendants, in conducting their business of transmitting and furnishing electric power

and maintaining their power lines, to consider carefully and anticipate *all* uses of the property and the eucalyptus trees upon, over and through which they maintain their power lines and to take reasonable precautions to prevent its wires from interfering therewith.

"A failure to perform this duty constitutes negligence." (Emphasis added.)

They contend that the instruction is faulty because it in effect makes them insurers; that they are not required to anticipate *all* uses by Levin of his property, and the trees, but only such uses as they should reasonably anticipate. The instruction is subject to that criticism. As has heretofore been pointed out, defendants were only required to take precaution against uses of the property which they should anticipate as persons of ordinary prudence. However, no prejudicial error has been suffered by defendants. The sole and only use of the property involved in the instant case was the trimming of the trees, and we have determined that defendants should have reasonably anticipated such use. With no other use of the property involved or shown by the record there is no reason to suppose that the jury was misled or based its verdict on improper grounds. Those factors, coupled with other instructions which clearly advised the jury correctly upon the law, negative the existence of any prejudice. The questioned instruction cannot be said to create such a conflict with other instructions as to have misled the jury in view of the situation that the only use of the property shown by the record was that which defendants should have anticipated. Moreover, the other instructions rather than being in conflict with the questioned instruction may be described more accurately as amplifications and explanations of it.

[17] Defendants claim error in the following instruction: "If you believe from the evidence that plaintiff, before undertaking to perform his work of trimming the trees on the property of Norman Levin, exercised reasonable and ordinary care as a reasonable and prudent person in observing defendants' electric wires strung through the said trees, and that in so making his observations of said wires they appeared to him insulated and in a reasonably safe condition so as to permit him to trim said trees without danger of an electric shock to his person, plaintiff was entitled to assume, and act upon this assumption, that defendants' wires were insulated through-out said trees, and he was not imposed with the duty to seek out concealed and hidden defects, if any, in the insulation of said wires, and he cannot be charged with negligence in failing to do so." They contend that it required that plaintiff make no inspection of the wires other than that made from the ground, excusing him from making an inspection while the trimming progressed, and that from the one inspection before he commenced work he could while working assume that the wires were properly insulated at all points. We do not so interpret the instruction. It left to the jury the determination of whether plaintiff exercised reasonable and ordinary care in making an inspection of the wires before commencing work, and that, if from such inspection the wires appeared safe, he could assume the wires were insulated throughout, even though there were sections of the wires concealed from his view. The jury were advised they could determine that such an inspection was not sufficient if it did not reveal defects in the insulation, that is to say, the inspection was to be measured by the standard of whether plaintiff acted as a reasonable and prudent person in making the inspection. Furthermore, the jury was instructed that:

"* * * [T]he plaintiff owed a duty to use ordinary care for his own safety, and to that end to observe the conditions surrounding him *while at work,* and the structures reasonably near and about him, and the dangers, if any, which would be open and obvious to one using reasonable care and caution for his own safety, and thereupon to use the care of an ordinarily prudent workman so to carry on his work as to guard against injury to himself, so far as by such reasonable care he could protect himself.

"In other words, plaintiff was under obligation to use for his own safety all such care and caution as an ordinarily prudent intelligent workman ordinarily uses under like circumstances. And it is for the jury to say whether in this case plaintiff used that degree of care."

In connection with the foregoing instruction defendants argue the issues relative to the duty to insulate the wires, the height thereof and the place where they were strung. We have discussed these subjects in the forepart of this opinion.

Defendants contend that the court erroneously instructed the jury as to the provisions of certain rules promulgated by the Railroad Commission dealing with the maintenance of power lines. Those rules and the instructions relating to them are as follows:

"Plaintiff's Instruction No. 11.

"Said General Order No. 64-A of the California Railroad Commission provided further concerning the rules for overhead lines construction, as follows:

"31. Application.

"These provisions apply to all classes of overhead electric lines under all conditions.

"31.1. Design, Construction and Maintenance.

"Electrical supply and communication systems shall be of suitable design and construction for their intended use, regard being given to the conditions under which they are to be operated, and shall be maintained in a condition which will enable the furnishing of safe, proper and adequate service.

"The owners and employees of such systems shall at all times exercise due care to reduce to a minimum the hazard of accidental injury to their own or fellow employees, to the public and other utilities, due to the presence of overhead wires. * * *

"Lines shall be inspected frequently and thoroughly for the purpose of insuring their maintenance in a good condition so as to conform with these rules. Any defects found shall be promptly rectified. Lines temporarily out of service shall be inspected and maintained in such condition as not to create a hazard.

"A failure to inspect the lines frequently and thoroughly for the purpose of insuring their maintenance in good condition and to promptly rectify defects found, if any, constitutes negligence on the part of defendants."

"Plaintiff's Instruction No. 11a.

"Said General Order No. 64-A of the California Railroad Commission provided further concerning the rules for overhead lines construction, as follows:

"31.2. Inspection of lines.

"Lines shall be inspected frequently and thoroughly for the purpose of insuring their maintenance in a good condition so as to conform with these rules. Any defects found shall be promptly rectified. Lines temporarily out of service shall be inspected and maintained in such condition as not to create a hazard.

"A failure to inspect the lines frequently and thoroughly for the purpose of insuring their maintenance in good condition and to promptly rectify defects found, if any, constitutes negligence on the part of defendants."

"Plaintiff's Instruction No. 11b.

"Said General Order No. 64-A of the California Railroad Commission provided further concerning the rules for overhead lines construction, as follows:

"32. General Clearances.

"These clearances shall apply to all overhead lines under the various conditions met.

"33. Tree Trimming.

"Where overhead wires pass through trees, safety and reliability of service demand that a reasonable amount of tree trimming be done in order that the wires may clear branches and foliage.

"Trees so located that they can fall into a crossing span or into any span that could communicate the trouble to the crossing span shall be removed wherever practicable."

Defendants offered instructions to the effect that the above orders were inapplicable to the case and should be disregarded by the jury. Their request was refused. It is defendants' position that the safety rules of the Railroad Commission are not binding upon a municipality operating an electric system inasmuch as it has no jurisdiction over municipally operated utilities. (Cases are cited which will be discussed presently.)

The present Railroad Commission was created by an amendment to the Constitution on October 10, 1911. Cal.Const. art. XII, § 22. Thereafter it was held that the powers conferred on the commission did not extend to the regulation of utilities operated by municipalities; that its power of regulation was limited to privately operated public utilities; and that the Legislature could not extend that power to embrace municipally operated utilities. City of Pasadena v. Railroad Commission, 183 Cal. 526, 192 P. 25, 10 A.L.R. 1425. The following cases hold to the same effect. Jochimsen v. City of Los Angeles, 54 Cal. App. 715, 202 P. 902; Water Users', etc., Ass'n v. Railroad Comm., 188 Cal. 437, 205 P. 682; Durant v. City of Beverly Hills, 39 Cal.App.2d 133, 102 P.2d 759. And according to the same principle a municipal corporation is not required to obtain from the Railroad Commission a certificate of public convenience and necessity to maintain and operate a public utility. Los Angeles Gas, etc., Corp. v. Department of Pub. Serv., 52 Cal.App. 27, 197 P. 962. However, there are two valid grounds for holding that the above rule does not render inapplicable to municipally operated utilities, in actions based upon the negligence of the municipality, the safety standards established by the Railroad Commission with reference to the maintenance of wires carrying electricity. First, a statute was adopted in 1911 which sets forth certain safety requirements for such electric equipment. Stats.1911, p. 1037, Deering's Gen. Laws 1944, Act 2284. That act by its express terms applies to municipalities.

"No commission, officer, agent or employee of the State of California, or of any city and county or city or county or other political subdivision thereof, and no other person, firm, or corporation shall * * *" and then follow the various requirements. Stats.1911, p. 1037, § 1. A violation of the act is a misdemeanor. § 4. It is also provided in said act that: "The railroad commission of the State of California is hereby vested with authority and power, * * * and is hereby instructed to inspect all work which is included in the provisions of this act, and to make such further additions or changes as said commission may deem necessary for the purpose of safety to employees and the general public, and the said railroad commission is hereby charged with the duty of seeing that all the provisions of this act are properly enforced." § 8, St.1915, p. 1063.

The rules embraced in the instructions to the jury in the instant case were promulgated pursuant to the foregoing statute. There can be no doubt that the Legislature was empowered to pass such a statute and make it applicable to municipally operated electric systems even though the municipality is chartered and has control over municipal affairs. The safety of overhead wire maintenance is a matter of state-wide, rather than local, concern, and the state law is paramount. It has been held that the public liability act (Stats.1923, p. 675, Deering's Gen.Laws 1944, Act 5619) which imposes liability upon municipalities for dangerous or defective condition of public streets, highways, buildings, grounds, works and property embraces a subject of state-wide concern rather than municipal affairs. Douglass v. City of Los Angeles, 5 Cal.2d 123, 53 P.2d 353; Rafferty v. City of Marysville, 207 Cal. 657, 280 P. 118; Helbach v. City of Long Beach, 50 Cal. App.2d 242, 123 P.2d 62. And the requirements with respect to maintenance and elimination of grade crossings in a municipal corporation where the carrier is a private public utility, is not a municipal affair (City of San Mateo v. Railroad Commission, 9 Cal.2d 1, 68 P.2d 713), because danger to the public is a matter of state concern.

[18, 19] Specifically, the rules of the Railroad Commission with reference to maintenance of pole lines are applicable to a city, although the commission has no authority to regulate or control city utilities. See Sincerney v. City of Los Angeles, 53 Cal.App. 440, 445, 200 P. 380. Such safety rules are in reality not regulations or the exercise of control by the commission of the municipally owned utility as considered in City of Pasadena v. Railroad Commission, supra, and the cited cases. Rather they are nothing more than safety requirements in which the entire state has an interest. The imposition of liability for dangerous condition of municipal property undoubtedly imposes upon the city the alternative of adopting safety measures or suffering the ensuing liability for failure in its duty. Likewise, the safety rules here involved impose the same alternative. Furthermore, it is pertinent to observe that "If a state statute affects a municipal affair only incidentally in the accomplishment of a proper objective of state-wide concern, then the state law applies to charter cities. Department of Water and Power v. Inyo Chem. Co., 16 Cal.2d 744, 108 P.2d 410." Wilson v. Walters, 19 Cal.2d 111, 119, 119 P.2d 340, 344. The effect of the rules in the instant case is purely incidental.

[20] Even if it be assumed that the commission's authority is limited to the regulation of privately owned public utilities and that the commission had no authority to adopt rules and regulations applicable to defendants and none could be conferred upon it by the Legislature (see City of Pasadena v. Railroad Commission, supra), yet the Legislature has conferred upon the commission the duty of making safety rules and regulations applicable to privately owned public utilities, and it is clear that such rules and regulations establish the standard of care required of such utilities. We can perceive of no reason why the same standard of care should

not be applicable to all utilities whether publicly or privately owned. Hence, it was proper for the trial court to advise the jury that such rules and regulations had been adopted and promulgated by the Railroad Commission and that they could be considered in determining whether defendant had exercised the standard of care required of those maintaining electric power lines under the circumstances here presented.

[21] Defendants further complain of instruction 11b in that part of the regulations are omitted and that there is no relation between the clearance of trees mentioned in section 32 and section 33 of General Order No. 64-A of the Railroad Commission concerning tree trimming. While the instructions are subject to criticism we do not believe prejudicial error was committed in view of the generality of the language used and the apparent propriety of the rules of care set forth.

[22-24] Objection is made to an instruction reading: "The defendants in this case claim as a defense that the accident involved herein was an inevitable or unavoidable accident insofar as the said defendants are concerned. This is an affirmative defense and the burden of proving it rests entirely upon the defendants who allege the same. You are instructed that an inevitable or unavoidable accident is one that happens without negligence in any manner or degree contributing thereto; but if you find in this case that the defendants City of Los Angeles and Department of Water and Power were guilty of negligence, if any, no matter how slight, which was the sole proximate cause of the accident, or a contributing proximate cause, then it is said in law, and I so charge you, that the accident in which the plaintiff was involved and which is now being submitted to you, was not an inevitable or unavoidable accident as to the said defendants, City of Los Angeles and Department of Water and Power," on the ground that it erroneously imposes upon defendants the burden of proving an unavoidable accident in connection with the charge of negligence against it. That instruction is clearly erroneous inasmuch as the so-called defense of inevitable accident is nothing more than a denial by defendant of negligence or a contention that his negligence, if any, was not the proximate cause of the injury. It is not an affirmative defense and the burden of proof rests upon plaintiff to prove negligence and proximate cause by a preponderance of the evidence. See Jolley v. Clemens, 28 Cal.App.2d 55, 82 P.2d 51, for a discussion of the matter and the cases bearing thereon. However, there was no prejudicial error in the instant case. It will be noted that the latter part of the questioned instruction left it for the jury to determine the issue of defendant's negligence. The jury were elsewhere comprehensively instructed that the burden of proof of negligence rested on plaintiff. On the issue of defendants' negligence, we believe the case, unlike Jolley v. Clemens, supra, is not a close one. The evidence clearly establishes defendants' negligence.

For the foregoing reasons the judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

EDMONDS, Justice (dissenting).

My associates hold that the rules and regulations promulgated by the Railroad Commission "could be considered in determining whether defendant had exercised the standard of care required of those maintaining electric power lines under the circumstances here presented," but the jury was instructed that a violation of any one of those rules constitutes negligence as a matter of law. For that reason, in my opinion, the giving of such instructions amounted to prejudicial error entitling the defendants to a new trial.

Quoting specified rules of the Railroad Commission, the trial court twice instructed the jury: "A failure to inspect the lines frequently and thoroughly for the purpose of insuring their maintenance in good condition and to promptly rectify defects found, if any, constitutes negligence on the part of defendants." These instructions were immediately followed by one which reads: "However, in this action a violation of law is of no consequence unless it was a proximate cause of or contributed to some degree as a proximate cause to any injury found by you to have been suffered by the plaintiff." By this charge, the jury was told that the regulations of the Railroad Commission constituted the law binding upon the municipal utility, a violation of which would subject it to liability yet the instructions are justified as going no further than stating a standard of care which might be considered by the jury in determining whether the defendants were guilty of negligence.

The distinction between the proof relating to (1) the establishment of the standard of care and (2) the conduct of the party charged with negligence in failing to meet that standard was clearly made in Clinkscales v. Carver, 22 Cal.2d 72, 136 P.2d 777, 778. As the court there pointed out, "The decision as to what the civil standard should be * * * rests with the court * * *. In the absence of such a standard the case goes to the jury, which must determine whether the defendant * * * acted as a reasonably prudent man would act in similar circumstances. The jury then has the burden of deciding not only what the facts are but what the unformulated standard is of reasonable conduct. * * * When the court accepts the standard it rules in effect that defendant's conduct falls below that of a reasonable man as the court conceives it."

In that case, the defendant failed to comply with a stop sign which had been erected at a highway intersection without legal authority. If the defendant failed to stop at that sign, the jury was instructed, he was guilty of negligence as a matter of law. A majority of this court affirmed the judgment for the plaintiff upon the ground that, although there was no violation of a traffic ordinance, the stop sign stood as a warning to drivers and constituted a standard of care the violation of which constituted negligence as a matter of law. The dissenting opinion of Justice Shenk, in which I joined, called attention to the fact that the cases cited in support of the decision "go no further than to hold that the jury may consider the existence of a so-called de facto stop-sign in determining the question of the defendant's negligence. The withdrawal of that issue from the jury * * * [therefore] was manifestly prejudicial."

By the present decision, my associates have not held that the rules of the Railroad Commission were accepted by the trial court as fixing the standard of care, but the instructions to the jury are justified notwithstanding the lack of such a premise. Accordingly, in my opinion, even if it be assumed that the reasoning of the majority opinion in the Clinkscales case is correct, it is not authority for the present holding.

Summarizing the situation shown by the record now before the court, the instructions relating to the rules of the Railroad Commission are entirely inconsistent with the statement of Justice Carter concerning the effect to be given the rules. Clearly under such circumstances, it seems to me, the instructions were prejudicially erroneous and the judgment should be reversed.

26 Cal.2d 386

McCLATCHY NEWSPAPERS v. SUPERIOR COURT OF SACRAMENTO COUNTY.

Sac. 5660.

Supreme Court of California.

May 29, 1945.

1. Mandamus 🔑4(1)

Mandamus is the appropriate remedy to secure the enforcement of a litigant's statutory right to take depositions, since, when trial court improperly refuses to order that a deposition be taken, an appeal from a final judgment is neither speedy nor adequate. Code Civ.Proc. § 2021.

2. Depositions 🔑9

Ordinarily, trial court has no discretion to refuse to exercise its power so far as necessary to secure to a litigant the right to a deposition in case defined by the code. Code Civ.Proc. § 2021.

3. Depositions 🔑9

The code section providing that testimony of a witness may be taken by deposition confers upon litigant the right to take depositions rather than conferring upon trial court discretion to permit depositions to be taken. Code Civ.Proc. § 2021.

4. Depositions 🔑9
Mandamus 🔑40

The trial court may exercise a reasonable control over the exercise of a litigant's right to take depositions, but, if trial court acts in such a manner as to deny the right, its actions will be controlled by mandamus or other appropriate remedy. Code Civ. Proc. § 2021.

5. Mandamus 🔑40

Mandamus lies to direct trial court to compel witnesses to answer questions on the taking of their depositions on theory that it is court's judicial duty to secure to a litigant means of obtaining in advance of trial information concerning issues and means of producing at trial evidence necessary to sustain action or defense. Code Civ.Proc. § 2021.

6. Depositions ⚷64(2)
Evidence ⚷99

The relevancy of evidence on the taking of a deposition is to be determined by subject matter of action and by potential as well as actual issues, as distinguished from trial evidence, the relevancy of which is determined from the pleadings. Code Civ.Proc. §§ 2021, 2065, 2066.

7. Depositions ⚷64(2)

The fact that certain defenses to libel action had been eliminated by ruling on demurrer to answer did not prevent such issues from being classed as potential so as to authorize inquiry concerning such issues by way of deposition, since sustaining of demurrer relates only to issues raised by pleadings as they existed at time of ruling. Code Civ.Proc. §§ 2021, 2065, 2066.

8. Discovery ⚷73

In libel action wherein the truth or falsity of alleged libel involved, directly or indirectly, sources of plaintiff's income during his term of office, defendant's inquiries, in the taking of plaintiff's deposition, as to sources of plaintiff's income, were relevant as related to actual or potential issues, and defendant was entitled to complete the taking of plaintiff's deposition along such line of inquiry. Code Civ.Proc. §§ 2021, 2065, 2066.

9. Discovery ⚷84, 97(4)

One seeking an inspection of papers and documents in hands of an adverse party or a third person must show clearly that he has a right thereto, and that constitutional guaranties will not be infringed; hence affidavit in support of demand for inspection must identify desired books, papers, and documents and must clearly show that they contain competent and admissible evidence which is material to the issues to be tried.

10. Discovery ⚷97(4)
Witnesses ⚷16

Affidavit in support of a subpoena duces tecum or a demand for an inspection containing merely a legal conclusion, stated in general terms, that desired documentary evidence is relevant and material, is insufficient to satisfy requirement that affidavit must identify desired books, papers, and documents, and must clearly show that they contain competent and admissible evidence.

11. Discovery ⚷84, 89, 97(4)

The statutory proceeding of inspection is remedial in character, and right of inspection should be encouraged as an aid to proof of issues before the court; hence, if it is shown that documents contain material evidence, it is sufficient if they are identified by a description that can be reasonably understood by the adverse party.

12. Discovery ⚷97(4)

Defendant in libel action based upon statement in defendant's newspaper indicating a possibly improper increase in plaintiff's wealth during his term of public office was not entitled to an inspection of plaintiff's state and federal income tax returns during years he was in office, records of his bank deposits and withdrawals, loans procured from and financial statements supplied to certain banks during such period, records of purchases and sales of real estate, and records of his brokerage account during such period, in view of failure of affidavit to specify or particularly describe any papers or documents involving such transactions or describe the contents thereof.

13. Discovery ⚷84

Defendant in libel action was not deprived of right or ability to defend for want of necessary information to make explicit averments necessary to authorize an order for inspection of papers in plaintiff's possession which may be material or vital to the action, in view of defendant's right in taking deposition of plaintiff to examine plaintiff as to identity and contents of papers and documents pertaining to defenses of justification, mitigation and privilege, and to thereby secure necessary information. Code Civ.Proc. § 2021.

14. Witnesses ⚷16

Affidavit for subpoena duces tecum to inspect papers and documents in hands of third persons which failed to specifically describe any papers or documents or their contents, but merely referred to various financial and business transactions, and averred generally that records thereof in hands of respective witnesses were relevant and material was not sufficient.

CARTER, J., dissenting in part.

Proceeding in mandamus by McClatchy Newspapers, a corporation, against the Superior Court of Sacramento County and Malcolm C. Glenn, Judge thereof, to compel respondent court to set aside orders preventing the completion of a deposition, denying a motion for inspection of documents, and quashing subpoenas duces tecum.

Writ granted to set aside order first mentioned and denied with respect to setting aside other order.

Prior opinion 144 P.2d 885.

Alex J. Ashen, of Sacramento, Theo. J. Roche, of San Francisco, Downey, Brand & Seymour, of Sacramento, and Sullivan, Roche, Johnson & Farraher, of San Francisco, for petitioner.

Malcolm C. Glenn, of Sacramento, in pro. per., for respondent.

John L. Brannely and William A. White, both of Sacramento, McCutchen, Thomas, Matthew, Griffiths & Green and Allan P. Matthew, all of San Francisco, Sherrill Halbert, of Modesto, for Otis D. Babcock, the real party in interest.

Otis D. Babcock and John L. Brannely, both of Sacramento, amici curiæ on behalf of respondent.

GIBSON, Chief Justice.

Petitioner, who is the defendant in an action pending before the Superior Court of Sacramento County entitled Babcock v. McClatchy Newspapers, a Corporation, et al., seeks a writ of mandate directing respondent court to set aside orders discharging an order to show cause why the plaintiff in that action should not be compelled to answer certain questions and complete his deposition, denying petitioner's motion for an inspection of documents under the control of the plaintiff, and quashing and recalling subpoenas duces tecum served on witnesses who are not parties to the action. Petitioner further seeks to compel respondent court to permit the taking or completion of depositions and the making of an inspection.

In January, 1943, Otis D. Babcock, who will be referred to hereinafter as plaintiff, commenced an action in respondent court against McClatchy Newspapers, hereinafter referred to as defendant, and A. J. Harder, an attorney, for damages for alleged libel. The complaint averred that on August 8, 1942, when plaintiff was District Attorney of Sacramento County and a candidate for reelection, defendant published an article in the "Sacramento Bee" containing the following defamatory matter: "How was it possible for you, Mr. Babcock, going into office dead broke, on a salary of $4,500, to buy an office building at a purported price of $80,000? * * * In contrast to the record of the incumbent Babcock, John Quincy Brown * * * has an exemplary record, both as a member of the bar and in his private life. Sacramento County needs this man." It was further alleged that the article was false; that in publishing the same defendant acted maliciously and with intent and design to injure, disgrace and defame plaintiff; and that defendant intended thereby to be understood, and was understood by readers of the publication, as asserting that plaintiff was a dishonest public official and guilty of corruption in office.

Defendant filed an answer admitting publication of an article which included the passage above quoted and denying the other material averments of the complaint. The answer also contained pleas of privilege, mitigating circumstances and truth or justification. In support of the claim of privilege, defendant alleged that the article containing the asserted libelous matter was a fair report of a challenge issued by Harder to plaintiff to debate publicly certain questions relating to plaintiff's fitness for office; that the article constituted merely a reiteration of a news item previously published in another newspaper of general circulation; that the nature and source of the assets of a public official are proper matters of newspaper comment during a campaign wherein such official seeks reelection; and that the material contained in the article was of interest to the public and was published for public benefit.

As mitigating circumstances, it was alleged that at the time of publication defendant believed with good cause that plaintiff had accumulated property during his term of office not to be accounted for by his salary, and that, to defendant's knowledge, he had purchased an office building at a purported price of $80,000. The plea of justification rested upon allegations to the effect that the statements were true in that during his term of office plaintiff increased his net worth to an extent not reasonably to be accounted for by his salary and that he increased his assets by engaging in private business, including the buying and selling of real estate on a large scale, in violation of section 78 of the county charter which prohibits elective officers from engaging in any private practice or business.

Plaintiff's deposition was originally taken by defendant before an answer was filed in the case. He was questioned generally as to his financial status and transactions while district attorney, and he agreed to allow defendant to examine certain records relating thereto. In reliance upon plaintiff's offer, defendant did not complete its interrogation of the witness, but before the records were examined plaintiff withdrew his consent. The day after defendant filed its answer, it gave notice of the taking of the depositions of named officials of banks, title companies, and brokerage firms. Subpoenas duces tecum were issued directing the witnesses to produce records of plaintiff's bank deposits and withdrawals, loans to and financial statements from him, securities bought and sold by him, and real estate transactions handled for him during the period of his incumbency, as district attorney. On the same day, defendant filed and served notice of motion for inspection of records and documents under plaintiff's control, including state and federal income tax returns during the years he was district attorney, records of his bank deposits and withdrawals as well as of loans procured from and financial statements supplied to named banks during that period, records of his purchases and sales of real estate for the same period, and records of his brokerage account.

Shortly after the filing of the notices, plaintiff demurred to the answer and noticed a motion to quash the subpoenas duces tecum on the ground that they were unreasonable and oppressive in that the issues in the case had not been defined, and that the supporting affidavits failed to disclose the contents of the papers sought to be produced or their materiality and relevancy to the issues. The demurrer to the pleas of mitigation and justification was sustained, and orders were made quashing and recalling the subpoenas duces tecum and denying the motion for inspection.

Defendant thereafter amended its answer. In its defense of mitigation it alleged that at the time of the supposed libel it had knowledge that plaintiff had publicly announced, prior to his election, that he was a "poor man"; that it was aware he had been buying many parcels of realty during his term of office, including an office building in Sacramento; that the purchase of the building at a price of $80,000 had been widely publicized; that defendant therefore believed that plaintiff had gone into office "dead broke"; that plaintiff purchased many properties, including the office building, during his incumbency, and that the public had a right to know these facts and to have an explanation by plaintiff as to the source of his assets; that the publication was without malice; and that defendant did not thereby mean to be understood as asserting that plaintiff was a dishonest public official or guilty of corruption in office.

In support of its defense of justification defendant alleged on information and belief that the factual statement underlying the purported libel was true in that plaintiff had increased his net worth more than $80,000 during his term of office; that he was worth approximately $20,000 when he became district attorney; that after taking office he accumulated property with the result that his net worth exceeded $100,000 at the time of the alleged libel; that he received no property during his term of office by gift, devise, bequest or inheritance; that he was prohibited by law from engaging in private practice or business during his incumbency; and that the increase in his net worth did not result from his ownership of property acquired before the commencement of his term nor from the receipt of his salary as district attorney. A general demurrer was overruled as to the amended plea of mitigation, but was sustained without leave to amend as to the amended plea of justification.

Thereafter, the court made an order permitting defendant to reopen plaintiff's deposition. Plaintiff refused to answer questions pertaining to the preparation, filing, availability, and contents of income tax returns, the source of income shown therein, and the purchase of real property, including the source and amount of the purchase price thereof. Counsel for defendant stated that he desired to interrogate plaintiff to ascertain the extent to which and the means by which his net worth and income increased after he became district attorney; that defendant intended to show that plaintiff made over $80,000 while district attorney, that his real estate transactions were so great as to constitute doing business in violation of the charter provisions, and that he had practiced law during his incumbency. Plaintiff declined to answer such questions on the ground that they were incompetent, irrelevant, immaterial and without the issues. Application was therefore made by defendant for an order directing him to show cause why he should not be compelled to answer the questions propounded and complete his deposition. Respondent court, sustaining plaintiff's objections, in effect discharged the order to show cause and ruled that plaintiff would be required to answer only the questions directed to whether he purchased designated parcels of realty, that he would not be required to answer the remaining queries, and that defendant would not be permitted to question him along the lines indicated. The present proceeding was then commenced.

[1-4] Mandamus is the appropriate remedy to secure the enforcement of a litigant's statutory right to take depositions, and an appeal from a final judgment is neither speedy nor adequate where a trial court improperly refuses to order that a deposition be taken. Christ v. Superior Court, 211 Cal. 593, 296 P. 612; San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 99 P. 359, 17 Ann.Cas. 933; Crocker v. Conrey, 140 Cal. 213, 73 P. 1006; see Hays v. Superior Court, 16 Cal.2d 260, 265, 105 P.2d 975. It is contended, however, that the writ lies only where the trial court fails to exercise its authority, as where it refuses to issue a commission to take a deposition, and that the writ cannot issue in a proceeding such as this, because the trial court merely acted in a matter within its discretion. Ordinarily the trial court has no discretion to refuse to exercise its powers so far as necessary to secure to a litigant the right to a deposition in the cases defined by the code. Crocker v. Conrey, 140 Cal. 213, 218, 73 P. 1006; Moran v. Superior Court, 38 Cal.App.2d 328, 334, 100 P.2d 1096; Scott v. Shields, 8 Cal.App. 12, 16, 96 P. 385; cf. Christ v. Superior Court, 211 Cal. 593, 601, 296 P. 612. The language of section 2021 of the Code of Civil Procedure providing that "The testimony of a witness * * * may be taken by deposition" confers upon litigants the right to take depositions. See Hays v. Superior Court, 16 Cal.2d 260, 264, 105 P.2d 975. It is true that in the Hays case this court held that the trial court could, in its discretion, defer the taking of a deposition until the determination of a pending appeal of the cause in which the deposition was to be used, and, similarly, in Patrick Farms, Inc. v. Superior Court, 13 Cal.App.2d 424, 56 P.2d 1283, it was held proper to continue the taking until it was determined in another action then pending whether plaintiff had the right to maintain the action in which the deposition was sought. It was pointed out in the Hays case, however, that "If * * * the trial court acts * * * in such manner as to deny the right rather to exercise merely a reasonable control over the exercise of the right, * * * its actions would be controlled by mandamus or other appropriate remedy." 16 Cal.2d at page 265, 105 P.2d at page 978. The case now before us illustrates this distinction. There is a difference between a deferment of the right or conditional refusal to compel a witness to give a deposition and the unreserved refusal to compel a witness to complete his deposition or answer proper questions on the taking thereof. Here the court was passing upon the materiality and relevancy of the questions contained in the deposition, and its ruling, if improper, would in effect require defendant to proceed to trial without the benefits afforded by the deposition to which it is entitled under the code. This does not involve a matter within the discretionary powers of the trial court but, rather, the enforcement of a legal right of a party to the action. Although in the Hays and Patrick Farms cases the deferment of the time of taking the deposition was deemed justified by reason of special circumstances, there is no suggestion in those cases that it would be proper to compel a party to proceed to trial without a deposition for which a proper request had been made.

[5] By refusing to compel a witness to answer proper questions, a trial court may effectively deny a litigant the right to take a deposition, since a right without means of enforcement, if such can exist, is of little practical value. Consequently, trial courts have been directed by writ of mandate to compel witnesses to answer questions on the taking of their depositions on the theory that it is their judicial duty to secure to a party the means of obtaining in advance of the trial information concerning the issues and the means of producing at the trial the evidence necessary to sustain his action or

defense. Crocker v. Conrey, 140 Cal. 213, 73 P. 1006; Wissman v. Cabaniss, 34 Cal. App. 487, 168 P. 150; Johnston v. St. Sure, 50 Cal.App. 735, 195 P. 947; Scott v. Shields, 8 Cal.App. 12, 96 P. 385.

It is argued that if mandamus will lie whenever a court refuses to direct a witness to answer a question, the trial of actions will be delayed and the appellate courts will be deluged with petitions. In this case, however, it was stipulated on submission of the order to show cause that any questions similar to those asked of plaintiff "or along the line indicated by defendant's counsel" would be objected to by plaintiff and that the witness would decline to answer. The defendant is thus attempting to enforce its right to question plaintiff along the general lines indicated in the stipulation and, as will more clearly appear hereafter, the problem presented is not limited to the materiality of specific questions but involves the determination of the permissive scope of examination upon the taking of a deposition.

[6] The respondent court declined to compel plaintiff to answer the questions upon the ground that they were directed to defenses which had been eliminated by the ruling on demurrer, and that therefore the answers would be incompetent and immaterial as not within the issues. While the order on demurrer ruled out certain issues for the time being, the status of the pleadings as so limited is not the exclusive measure of the scope of inquiry on deposition. Different principles govern the determination of the materiality of evidence sought to be obtained by means of depositions and the admissibility of evidence offered upon the trial. The relevancy of evidence on the taking of a deposition is to be determined by the subject matter of the action and by the potential as well as actual issues in the case. Code Civ. Proc. §§ 2065, 2066; San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 99 P. 359, 17 Ann.Cas. 933; Most v. Superior Court, 25 Cal.App.2d 394, 77 P.2d 532; Rossbach v. Superior Court, 43 Cal.App. 729, 185 P. 879; Kibele v. Superior Court, 17 Cal.App. 720, 121 P. 412; see 26 C.J.S., Depositions, §§ 9, 67, pp. 815, 886. In San Francisco Gas & Electric Co. v. Superior Court, supra, where defendant sought to take the deposition of a witness while the case was pending on appeal, this court said: "As soon as the summons has been served, either party may commence the taking of depositions relevant to any possible issue that may arise upon a denial of the allegations of the complaint or upon the allegation of new matter in the answer. * * * the real question is not whether * * * testimony would be material to the issues which were tried, but whether it will be material on a new trial, and under such an amendment to the answer as the circumstances of the case would warrant the court in allowing." 155 Cal. at pages 34, 39, 99 P. at page 360, 17 Ann.Cas. 933. And in Rossbach v. Superior Court, supra, where plaintiff sought to take the deposition of the defendant after a general demurrer to the complaint had been sustained, the court stated that "plaintiff's right to have defendant's deposition depends not alone upon whether it is material to issues tendered [by the complaint], but the right thereto is equally clear if it would be material to any possible issue raised by new allegations contained in an amended complaint which the court might properly permit plaintiff to file." 43 Cal.App. at page 731, 185 P. at page 880.

[7] The fact that the ruling on demurrer eliminated the issues embraced by the deposition does not prevent such issues from being classed as potential. The sustaining of a demurrer relates only to the issues raised by the pleadings as they exist at the time of the ruling on the demurrer. A trial court may nevertheless properly permit an amendment to the pleadings during the course of trial; it may reconsider its ruling during trial; or the ruling may be reversed upon appeal. Thus if, in the present case, evidence of plaintiff's financial transactions would be relevant to such potential issues, defendant would be entitled to take his deposition along the lines suggested.

[8] The questions that plaintiff refused to answer related to the extent and means by which his net worth and income increased, if at all, after he became district attorney. Although these matters may not be relevant under the pleadings as limited by the ruling on demurrer, they clearly are relevant to possible or potential issues which might properly be raised during the course of this action. For example, the truth or falsity of the alleged libel is an actual or potential issue, which directly or indirectly involves the sources of plaintiff's income during his term of office. Since the evidence that defendant

sought to obtain by the deposition related to actual or potential issues, it is relevant, and defendant is entitled to complete the taking of the deposition.

[9, 10] The next question is whether the defendant has made a sufficient showing in support of its motion for an order of inspection of plaintiff's papers relating to his transactions with banks and his dealings in real estate and securities. Plaintiff makes the familiar contention that the object is a mere "fishing expedition" through his private papers, in violation of the constitutional guaranty against unreasonable searches and seizures, and claims that the affidavit is too general and does not state positively or with particularity what documents are sought or what facts each paper will establish.

The right to have an inspection of papers and documents in the hands of a party to the action or a third person is governed by different rules from those applying to depositions. A party or witness has a constitutional right to be free from unreasonable searches and seizures, and it is therefore incumbent upon the one seeking an inspection to show clearly that he has a right thereto and that the constitutional guaranties will not be infringed. Hence, the affidavit in support of the demand for inspection must identify the desired books, papers and documents and it must clearly show that they contain competent and admissible evidence which is material to the issues to be tried. The affiant cannot rely merely upon the legal conclusion, stated in general terms, that the desired documentary evidence is relevant and material.

[11, 12] Petitioner contends that under the decision in Union Trust Co. v. Superior Court, 11 Cal.2d 449, 81 P.2d 150, 118 A.L.R. 259, these rules must be liberally applied and that it has met the requirements there imposed. In that case after an exhaustive examination of the history and development of discovery, the court stated that "the trend of judicial decisions is to relax the rules which relate to the taking of evidence by ancillary proceedings, of which the inspection of documents is one method, to the end that the trial of actions may be expedited and justice be more efficaciously and speedily administered." 11 Cal.2d at page 462, 81 P.2d at page 157, 118 A.L.R. 259. The relaxation of the rule, however, does not mean an abolition of the requirements that the papers be identified and that they be shown to be relevant and material. The theory is that the statutory proceeding of inspection is remedial in character, and that the right of inspection should be encouraged as an aid to the proof of issues before the court. Accordingly, if it is shown that the documents contain material evidence, it is sufficient if they are identified by a description that can be reasonably understood by the adverse party. While the Union Trust Company case related to an action arising out of an alleged violation of duty under an express trust, the existence of a fiduciary relationship was only one factor considered by the court in reaching its conclusion and, as pointed out by defendant, the opinion supports a liberal application of the rule irrespective of the relationship of the parties. The affidavit therein incorporated by reference certain allegations of the pleadings from which it was apparent that evidence in the described records was material. In the present case the defendant has not brought itself within the rule for it has not alleged sufficient facts to show the materiality of the desired evidence.

In considering the sufficiency of the showing in support of the demand for inspection, we will assume, without so deciding, that the defenses of justification, mitigation and privilege have been adequately pleaded. The affidavit avers that plaintiff had certain business and financial transactions with various banks, that he bought and sold securities through a stockbroker, that he engaged in various real estate transactions and that he made state and federal income tax returns. The affidavit does not specify or particularly describe any papers or documents involving those transactions, but merely states, as to each type of document, the general conclusion that "the matters" or "the records and transactions" in question "are relevant and material in the above entitled action and to the issues therein and the defense thereof." Nowhere in the affidavit is there any more specific averment as to the contents of any one or more of those papers and documents, or as to what facts, if any, would or could be proved thereby.

It appears to be defendant's theory that plaintiff made profits and increased his assets during his term of office by means of private practice and business transactions in which he was prohibited from engaging by the terms of the county charter, and that these facts will appear from an examination of the records and documents in question. It may be admitted that, if such is the case, then some of the records and documents would probably show those ultimate facts, but it cannot be said that they must necessarily show such facts or any of them, nor can it be said, on the basis of defendant's affidavit, that their relevancy and materiality clearly appear. Although it would be unjust to permit plaintiff to recover for an alleged libel by suppressing or withholding evidence which is material or vital to the action, defendant must first show the materiality of the desired evidence and cannot obtain permission to search through all of plaintiff's papers and records merely in the hope or expectation that the investigation will disclose favorable information.

[13] Compliance with the rule requires more explicit averments in the affidavit than are present here, and may involve information which defendant does not now have, but it is not thereby deprived of the right or ability to defend, since it is entitled, before going to trial, to complete plaintiff's deposition. If the defendant, on deposition, is accorded its right to examine plaintiff as to the identity and contents of the papers and documents pertaining to the defenses of justification, mitigation and privilege, it may thereby secure the necessary information for use in making an affidavit which will disclose to the court the identity of the desired evidence and its materiality and relevancy to the issues presented in the libel action.

[14] What has been said applies with equal force to defendant's attempt, by subpoena duces tecum, to inspect papers and documents in the hands of third parties. The affidavit does not specifically describe any papers or documents, or their contents, but merely refers to various financial and business transactions, and avers generally that the records thereof, in the hands of the respective witnesses, are relevant and material.

It follows that defendant is not entitled, on the present showing, to compel an inspection of documents in the hands of plaintiff or the third parties, but it is entitled to a writ of mandate directing respondent to set aside its orders preventing the completion of plaintiff's deposition and to make the necessary orders to effectuate those proceedings in accordance with the views expressed in this opinion. Let the writ issue accordingly.

SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

CARTER, Justice.

I concur in the conclusion reached but I cannot agree with much that is said in the majority opinion relative to the power of a trial judge to control the taking of depositions, and particularly, with reference to what the trial judge in the case at bar failed to do or should have done in the exercise of his judicial power.

The specific problem presented is whether a party to an action may, as a matter of right, require a witness to answer questions on the taking of his deposition relevant only to issues which have been eliminated from the case by dismissal of the cause of action or defense which raised such issues. This problem has been the subject of considerable controversy among trial judges and lawyers. The decisions of this court and of the District Courts of Appeal on the subject are in hopeless conflict, and it is little wonder that trial judges should have difficulty in determining the proper course to pursue when problems of this character are presented to them. One line of cases headed by San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 99 P. 359, 17 Ann.Cas. 933, answers this question in the affirmative. Another line of cases headed by the case of Hays v. Superior Court, 16 Cal.2d 260, 105 P.2d 975, answers it in the negative. The majority opinion answers it in both the affirmative and negative, as it cites the Hays case with approval and then attempts to distinguish it from the case at bar.

The majority opinion does not fairly state either the factual situation or the legal problem involved. From the record as presented to this court it appears that plaintiff brought an action for libel against the defendant (petitioner herein) in the Superior Court of Sacramento County. Defendant answered denying certain allegations of the complaint and pleading eight separate defenses. The trial court sustained without leave to amend, a demurrer to the fourth, seventh and eighth separate defenses. Thereafter defendant sought to take plaintiff's deposition on the issues raised by the defenses to which the demurrer had been sustained without leave to amend. To this end certain questions were propounded to plaintiff, but he refused to answer them on the ground that they were not within the issues. Application was made to the trial court to require him to answer the questions so propounded, and the trial court denied the application with the following written opinion:

"According to a stipulation filed herein on the taking of the deposition of Otis D. Babcock, a number of questions were asked him to which his counsel objected on the grounds that the questions were incompetent, outside of the issues, and have previously been ruled on by the Court as incompetent, and said counsel advised the witness to refuse to answer for the reasons stated, and thereupon the witness declined to answer the questions, or any of them.

"Counsel for defendant then stated his reasons for desiring to so interrogate the witness, and stated that he particularly desired to interrogate the witness to elicit information relating to matters set forth in the fourth, seventh and eighth defenses of defendant's answer, and also to show that plaintiff made over $80,000 while District Attorney, and 'that his real estate transactions were so great as to constitute doing business and detract from his duties as District Attorney and that he engaged in private business and practiced law while District Attorney.'

"The last amendments to the pleadings filed by defendant were to the fifth and seventh separate defenses. The Court overruled the demurrer to the fifth defense, but sustained the demurrer to the seventh, without further leave to amend. The Court had previously sustained the demurrer to the fourth and eighth defenses without further leave to amend. The fourth defense was passed on in two opinions previously rendered, and the order was that the demurrer thereto be sustained without leave to amend, as previously stated.

"From the foregoing it will be noted that so far as the defenses referred to are concerned, they have been eliminated; hence, if the questions are directed to those defenses alone, the answers would be incompetent and immaterial, as not within the issues.

"In the stipulation counsel for defendant stated that he desired to interrogate the witness to find out, * * *

"1. To what extent, if at all, his net worth and income increased after he became district attorney; also (2) if he did increase his net worth and income by what means, he did it and where his funds, money and assets came from;

"For the above purpose counsel stated he desired to examine into the witness' financial transactions and records while he was district attorney, including for the period,—

"(a) Federal and state income tax returns, (b) records of real estate acquired by him; what he paid for it and where the money came from, including records of real estate transactions at various title insurance companies; (c) deposits and withdrawals by plaintiff at various banks, also plaintiff's brokerage account at Dean Witter & Company bond house.

"The first six questions propounded to the witness related to his state and federal income tax, whether he had filed same, whether he had copies, and a request to produce them at the trial, and the witness was asked if he would do so.

"The next six questions related to the income of the witness for the years 1935-42, how the gross '35 income compared with that of 1937; whether the income tax returns showed deductions for certain losses; and what, if any deductions were made in said years for certain oil royalties, mining and other oil stock. Interrogatory 12 is general:

" 'State generally the sources from which you derived income as shown by your income tax returns from 1935 to 1942, inclusive.'

"The last question relates to some twenty real estate transactions, the descriptions of the land being briefly given, and the witness having been asked to state as to each piece when he secured the same, what he paid down, and where he got the money to make the down payment.

"Defendant does not specify or point out where these questions, or any of them, relate to any of the issues contained in the pleadings.

"The fifth separate defense, as last amended, was demurred to and the demurrer overruled as above stated. This is a defense based on mitigating circumstances. In Wilson v. Fitch, 41 Cal. 363, at page 380 (and later cases are to the same effect) the Court points out that defendant, with a view of reducing damages, should be allowed to prove the 'mitigating circumstances', that is to say, the circumstances under which the publication was made, and the real motive which induced it. And in the short opinion filed in ruling on the fifth defense the Court also referred to Davis v. Hearst, 160 Cal. 143, at pages 193, 194, 116 P. 530, 552, in which the Court states what section 461 [Code Civ.Proc.] means:

"'If a defendant pleads justification, he may at the same time plead with his affirmance of good faith and honest belief all facts and circumstances within his knowledge at the time of the publication which support that knowledge and belief, even if they tend to establish the truth of the charge. Moreover, if he desires to plead justification, and also the truth or partial truth in mitigation, he must plead those facts and circumstances in mitigation, in which event they will be considered (as they never were or could have been at common law after Underwood v. Parks [2 Strange 1200]). Even if the justification fails these matters will be considered by the jury upon the question of malice.'

"It is not intended to intimate that only the facts pleaded in mitigation may be proven at the trial.

"Defendant based its allegation in the published article with regard to plaintiff having gone into office 'dead broke' upon its knowledge that he had said that he was a 'poor man' etc. This is all the information on that subject which defendant claims to have had, or at least all that is set forth in the fifth separate defense. The next fact stated, that was within the knowledge of defendant, was that it was known by defendant and was a fact that plaintiff had been buying many pieces of real property in and around Sacramento, etc. This knowledge and facts I think constitute surrounding circumstances, and may be proven. Then there are the allegations with regard to the Bryte building, and defendant's source of information. This defendant has a right to offer in evidence.

"There is an affirmative averment that at the time of the publication of the said alleged defamatory matter defendant did not believe, and does not now believe that the said alleged defamatory matter charged that plaintiff was a dishonest public official or that he was guilty of corruption while occupying the office of district attorney. There is also an averment with regard to defendant's good faith. The last sentence of the defense is as follows:

"'That defendant honestly and in good faith believed and always has believed that said alleged defamatory matter makes no charge whatever but asks without malice a fair and proper question of a public officer.'

"It seems to the Court that *the affirmative facts as known to defendant at that time upon which the plea of mitigation* is founded, as set forth in said defense constituting the surrounding circumstances would be entitled to be received in evidence. In other words, defendant is entitled to prove all the surrounding facts known to it and upon which it based the publication of the article.

"The only interrogatories which appear to touch the allegations of the fifth separate defense are those relating to the real estate purchased by defendant. The allegations of the said defense with which defendant had knowledge relate to the purchase of said real estate generally, including the Bryte building, and the amount thereof as reported by the broker etc.

"None of the questions propounded to the witness bears on the issues presented, except a part of question 13, involving whether defendant purchased the various parcels of real estate mentioned, and when he purchased the same.

"If defendant had a plea of justification, then, depending on the issues thereby raised, it is probable that all the questions might be material; but, as heretofore pointed out, there is, in the Court's opinion, *no plea of justification*. And as heretofore stated, *the plea of mitigation* depends on defendant's knowledge of the facts at the time of publication, together with the surrounding circumstances. Any questions touching these matters would be proper, and the Court has endeavored to permit latitude to cover any and all such matters.

"An order will be entered directing plaintiff to answer such interrogatories as are herein pointed out as being admissible under the issues as settled by the pleadings, including any surrounding circumstances at the time of the publication complained of. Plaintiff will not be required to answer questions 1 to 12, inclusive, and only that part of question 13, as indicated above."

As I understand the majority opinion it holds that the trial court had no power to do otherwise than to require plaintiff to answer the questions so propounded even though they were not in response to any issue remaining in the case. At least, the majority opinion does not hold that the questions so propounded are relevant to any issues other than those raised by the fourth, seventh and eighth separate defenses which have been eliminated from the case by the order of the trial court sustaining a demurrer thereto without leave to amend. In other words, the majority opinion does not purport to hold, contrary to the opinion of the trial judge, that the questions which the trial judge refused to require plaintiff to answer are in response to any issue in the case on the pleadings as settled at the time the questions were propounded.

Notwithstanding the failure of the majority opinion to pass upon the competency or relevancy of the evidence which defendant sought to elicit by the answers to said questions, the opinion purports to hold that said questions were proper. Said opinion states:

"There is a difference between a deferment of the right or conditional refusal to compel a witness to give a deposition and the unreserved refusal to compel a witness to complete his deposition or answer *proper* questions on the taking thereof." The query immediately arises as to whether a question is "*proper*" if it is not in response to any issue in the case. The trial court held that the questions so propounded were not "proper" because they were not so responsive. The majority opinion further states:

"Here the court was passing upon the materiality and relevancy of the questions contained in the deposition, and its ruling, if improper, would in effect require defendant to proceed to trial without the benefits afforded by the deposition to which it is entitled under the code." In other words, the majority opinion without determining whether or not the questions so propounded were in response to any issue in the case, purports to hold that the defendant was nevertheless entitled to have said questions answered before going to trial upon issues to which said questions had no relevancy or materiality. The majority opinion does not attempt to indicate how a party can be prejudiced by going to trial without being permitted to take a deposition *which he cannot use at the trial* because it is irrelevant to the issues being tried. In this respect the majority opinion is confusing and misleading and does not fairly present the legal problem involved in this case. It demonstrates a lack of appreciation of the broad concept embraced within the provisions of section 2021 of the Code of Civil Procedure which clearly contemplates the taking of depositions for the purpose of procuring and preserving evidence which may have some relevancy to any possible issue involved in the case regardless of whether such evidence may be used at a contemplated trial (Kibele v. Superior Court, 17 Cal. App. 720, 121 P. 412,) as this section gives a party the absolute right to take a deposition after a trial and judgment and while the case is pending on appeal. San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 99 P. 359, 17 Ann.Cas. 933. The obvious reason for this confusion is that the majority opinion attempts to distinguish the situation in the case at bar from that existing in the case of Hays v. Superior Court, supra, and Patrick Farms, Inc., v. Superior Court, 13 Cal.App.2d 424, 56 P.2d 1283, where it was held that a trial judge has discretionary power to control the taking of depositions, and that he may, in the exercise of such power, defer the taking of a deposition on issues not presently before the court. In other words, the majority opinion in attempting to distinguish this case from the Hays and Patrick Farms, Inc. cases, has injected into this case a false quantity or a factor which is not present, namely, that the questions here propounded were proper questions, which implies that they were responsive to issues now before the court in the case at bar.

In my dissenting opinion in the Hays case I pointed out the conflict between the holding in that case and all of the other decisions in this state with the exception of Patrick Farms, Inc. v. Superior Court, supra. That conflict should be obvious to anyone who has the mental capacity to read and understand the decisions. It is squarely presented in the case at bar and should be met. The majority opinion attempts to evade it, and in so doing it simply adds confusion to that which already exists upon the subject.

I can see no legal distinction between the situation in the case at bar and that existing in the Hays case so far as the law applicable thereto is concerned. In the case at bar the trial judge sustained a demurrer without leave to amend to the fourth, seventh and eighth separate defenses in defendant's answer. This was a determination by the trial court that the issues raised by said defenses should be excluded from the case, and the ruling of the trial court thereon can be reviewed on appeal from the final judgment in the action. But until such ruling is set aside by the trial court or reversed on appeal, the issues raised thereby are no longer in the case. In the Hays case the trial court granted a motion of defendant to dismiss the action for want of prosecution and plaintiff appealed. While the case was pending on appeal plaintiff sought to take defendant's deposition. The trial court denied plaintiff's application to require defendant to answer questions or to give her deposition upon the ground that the action had been dismissed and that defendant should not be required to give her deposition until the judgment of dismissal was reversed on appeal. This court held in the Hays case that the trial court properly exercised its discretion in so holding and that plaintiff had no absolute right to take defendant's deposition while the case was pending on appeal.

While the majority opinion cites the Hays case with approval, the inescapable effect of the holding in the majority opinion is diametrically opposed to the basic concept on which the Hays case was decided. The Hays case holds that a trial judge may in his discretion defer the taking of a deposition directed to an issue which has been eliminated until such issue has been restored or revived. The majority opinion holds that the trial judge has no such power, yet it approves the Hays case and attempts to distinguish it by devious and specious reasoning. It quotes an excerpt from the majority opinion in the Hays case to the effect that if the trial court acts in such manner as to deny the right to take a deposition rather than to exercise merely a reasonable control over the exercise of the right, its action would be controlled by mandamus. It then states: "The case now before us illustrates this distinction. There is a difference between a deferment of the right or conditional refusal to compel a witness to give a deposition and the unreserved refusal to compel a witness to complete his deposition or answer proper questions on the taking thereof." But wherein does that difference lie? If the trial judge says: "I will not direct the witness to answer because there is no issue now pending to which the answers would be relevant," is he not in effect deferring the inquiry until the issue arises? And is there any difference in legal effect whether the issue is eliminated by order of the court granting a motion to dismiss a cause of action or by sustaining a demurrer thereto or to a separate defense without leave to amend? Certainly not. And if a trial judge has power, as was held in the Hays case, to defer the taking of a deposition until a judgment of dismissal is reversed on appeal, he likewise has power to defer the taking or completion of a deposition relating to a defense which has been eliminated by sustaining a demurrer thereto without leave to amend. Any attempt to make a distinction between these two situations leads to an impasse where reason and logic are supplanted by a mere ipse dixit.

I do not agree with the holding of this court in the Hays case, and I pointed out in my dissenting opinion in that case that such holding was contrary to all of the decisions of this court and the District Courts of Appeal except the case of Patrick Farms, Inc. v. Superior Court, supra. I am still of the opinion that the holding in the Hays case was erroneous and that it is clearly contrary to the following well considered decisions of this court and the District Courts of Appeal. Burns v. Superior Court, 140 Cal. 1, 73 P. 597; Crocker v. Conrey, 140 Cal. 213, 73 P. 1006; Scott v. Shields, 8 Cal.App. 12, 96 P. 385; San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 99 P. 359, 17 Ann.Cas. 933; Kibele v. Superior Court, 17 Cal. App. 720, 121 P. 412; Rossbach v. Superior Court, 43 Cal.App. 729, 185 P. 879. Under the rule announced in these cases: "As soon as the summons has been served, either party may commence the taking of depositions relevant to any possible issue that may arise upon a denial of the allegations of the complaint or upon the allegation of new matter in the answer. * * * the real question is not whether * * * testimony would be material to the issues which were tried, but whether it will be material on a new trial, and under such an amendment to the answer as the circumstances of the case would warrant the court in allowing." San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 34, 39, 99 P. 359, 360, 17 Ann. Cas. 933. If such is the rule, there is no room for the exercise of a discretion by the trial judge to defer the taking of a deposition until there is a determination that the questions propounded are relevant to an issue which may be tried. The sole power of the trial court is to determine whether or not the proposed question is designed to elicit evidence which may be relevant or material to any possible issue which may arise within the legitimate scope of the pleadings in the case. And should the trial judge refuse to grant an application of the party to require a witness to answer questions which the party claims to be relevant and material, and mandamus is sought to compel the judge to grant such application, the question to be determined by the appellate court is whether or not the questions so propounded are relevant and material to any possible issue in the case. Under the rule announced in the last cited cases, I am of the opinion that the questions propounded to the plaintiff were relevant and material to possible issues which might be properly raised before the final determination of this case, and therefore the trial judge should have granted defendant's application to require plaintiff to answer said questions. In reaching this conclusion, I do not wish to be understood as holding that in my opinion the trial judge erroneously sustained plaintiff's demurrer to defendant's fourth, seventh and eighth separate defenses as I do not consider it the function of this court in a mandamus proceeding to pass on the rulings of the trial court in the settlement of the pleadings in an action. These rulings can only be reviewed on appeal from a final judgment. Bank of America v. Superior Court, 20 Cal.2d 697, 128 P.2d 357.

The majority opinion in the case at bar does not purport to hold that the trial judge abused his discretion in denying defendant's application to require plaintiff to answer the questions propounded to him. In my opinion the decision of the trial court in this case is in clear accord with the holding in the Hays and Patrick Farms, Inc. cases, and if the rule in those cases is sound, then the only basis upon which the trial court's decision in the case at bar can be annulled, is to hold that the trial judge abused his discretion in denying defendant's application to require plaintiff to answer the questions propounded to him. As stated above the majority opinion is not based upon this ground, but it holds that defendant as a matter of right was entitled to have plaintiff answer questions which were not in response to any issue in the case and that the trial court had no discretion in ruling on defendant's application but was required to grant the application even though the questions propounded to plaintiff sought to elicit evidence which was not responsive to any issue in the case in accordance with the pleadings as then settled.

The majority opinion erroneously states:

"The defendant is thus attempting to enforce its right to question plaintiff along the general lines indicated in the stipulation and, as will more clearly appear hereafter, *the problem presented is not limited to the materiality of specific questions* but involves the determination of the permissive scope of examination upon the taking of a deposition." This statement is clearly inaccurate as the petition for a writ of mandate herein sets forth in haec verba the thirteen questions which were propounded to plaintiff and which he refused to answer, and application was thereupon made to the trial court for an order directing plaintiff to answer said questions. As before stated, the trial court denied this application so far as it related to the first twelve questions but granted it as to a part of the thirteenth question. By this proceeding petitioner seeks to compel the trial court to order plaintiff to answer all of said questions and also as stated by counsel for defendant, to permit him "to interrogate the witness to find out to what extent, if at all, his net income and worth increased after he became district attorney, also if he did increase his net worth and income, by what means he did it and where his funds, money and assets came from." In disposing of petitioner's application the trial court said in part: "An order will be entered directing plaintiff to answer such interrogatories as are herein pointed out *as being admissible under the issues as settled by the pleadings,* including any surrounding circumstances at the time of the publication complained of. Plaintiff will not be required to answer questions 1 to 12, inclusive, and only that part of question 13th, as indicated above." It therefore appears that we are called upon in this proceeding to pass upon the relevancy and materiality of the evidence which counsel for defendant sought to elicit from plaintiff as was disclosed by the 13 questions propounded to him and the statement of counsel for defendant as to the scope of further inquiry which he desired to make by other questions to be propounded along the same general line.

In my opinion these questions were all relevant and material to the issues of truth of or justification for the published article on which the complaint is based, and therefore they are well within the realm of possible issues which can be inquired into by the taking of depositions even though the specific questions might be objectionable if they were propounded to the witness during the trial.

Of course, it is obvious that in the taking of a deposition it is not permissible to propound questions for the purpose of eliciting evidence which under any theory could not be relevant or material to any possible issue in the case.

Finally, I believe it may be said that there are two situations in which the acts of the trial court may come before this court on mandamus: (1) In allowing or refusing to allow the taking of the deposition in toto; (2) in refusing to compel the witness to answer the questions propounded on the taking of the deposition, where the taking of it has been allowed and there is no question as to the right to take such deposition. I believe that this case falls within the second class. It may be that in the first class the issue would arise as to materiality or relevancy of the issues *proposed* to be developed by the deposition. In such case the trial court has no discretion to refuse to allow the taking of a deposition covering possible issues, if their elimination from the case is not final, that is, as long as they may reenter the case because of a reversal on appeal or a change in ruling by the trial court. In the second class the issues of the relevancy and materiality are squarely presented, as the trial court is first called upon to determine whether the questions which the witness has refused to answer are designed to elicit evidence relevant to any possible issue in the case, and this court is then compelled to pass directly upon the propriety of the ruling of the trial court, because, if the issues raised are under no possibility relevant to the case, the trial court will not be compelled to command the witness to answer. It may be that the reason for a total lack of relevancy is the same as the basis for the ruling on the demurrer. That does not mean that this court is directly passing upon the ruling on the demurrer. It could not do that because there is as yet no final judgment and/or the court is not considering an *appeal* from a judgment. The proceeding is for a writ of mandate. This court in that proceeding must consider not only the basis for ruling on the demurrer as a reason for irrelevancy, but also, any other possibility in the whole case which bears upon the materiality of the questions propounded. The foregoing is clearly the holding of Goytan v. Deasy, 85 Cal.App. 454, 259 P. 488. There the witness refused to answer the questions and the trial court refused to compel him to do so. In a mandamus proceeding against the trial court, the petitioners were denied relief, the court stating at page 455 of 85 Cal. App., at page 488 of 259 P.:

"We have given careful consideration to the import of the questions petitioners seek to have said defendant answer, and are of the opinion that as to most of them said defendant was entitled to rely upon the privilege claimed by him that his answer thereto may tend to incriminate him in the courts of this state; *the remaining questions, we think, relate to immaterial matters. We conclude, therefore, that for the reasons stated, respondent was without legal power to compel said defendant to answer said questions, and consequently the application for the writ herein must be denied.*" (Emphasis added.)

The rule as to the scope of the court's inquiry is stated in Bennett v. Strodtman, Mo.App., 42 S.W.2d 43, 45:

"Undoubtedly the general rule is that it is not for the witness or his counsel to be the judge of what is relevant and material in the course of the former's examination, that it is his business to answer the questions propounded to him unless they invade his personal privilege as a witness, and that the question of the relevancy or propriety of the examination is for the special commissioner to determine in the first instance under the power vested in him by section 1759, Rev.St.1929 [Mo.R.S.A. § 1923.], and for the court itself ultimately to pass upon, if and when the deposition is sought to be made use of at the trial. * * *

"Of course there is the exception that, if the testimony desired could in no possible or conceivable event or contingency be read as evidence at the trial, or that if it be made clearly to appear that the testimony is sought to perpetrate a wrong, or to abuse the process of the court or the officer, or for what is obviously an unjustifiable purpose, then the witness may lawfully be protected in his refusal to answer, and the officer will not be sustained in his order of commitment for contempt." See also 6 Ann.Cas. 577; 26 C.J.S., Depositions, § 65a.

In my opinion the writ should issue commanding the trial court to make an order directing the plaintiff to answer the questions propounded and any other questions which may be relevant to any possible issue in the case.

26 Cal.2d 412

HOBART v. HOBART ESTATE CO. et al.

S. F. 17048.

Supreme Court of California.

May 29, 1945.

1. Fraud 🔑50

To establish a cause of action for fraud or deceit, plaintiff must prove that a material representation was made, that it was false, that defendants knew it to be untrue or did not have sufficient knowledge to warrant a belief that it was true, that it was made with intent to induce plaintiff to act in reliance thereon, that plaintiff reasonably believed it to be true, relied thereon, and suffered damage.

2. Appeal and error 🔑930(1)

In determining the sufficiency of the evidence to establish a cause of action for fraud or deceit, the Supreme Court must, in view of verdict for plaintiff, resolve all conflicts in plaintiff's favor and draw all permissible inferences necessary to support the judgment.

3. Evidence 🔑597

Unless, in the light of the circumstances, the testimony is so inherently improbable and impossible of belief as in effect to constitute no evidence at all, it may not be disregarded in determining sufficiency of evidence to support judgment.

4. Fraud 🔑64(1)

In action for damages for fraudulently inducing sale of stock, testimony of plaintiff's witnesses to effect that money received by plaintiff represented a certain sum for dismissal of will contest and balance was in payment of stock was not, as a matter of law, rendered so inherently improbable as to be unworthy of belief by documentary evidence indicating that the money received was solely for stock sold.

5. Fraud 🔑58(1)

In action for damages for fraudulently inducing the sale of plaintiff's stock to a third party, evidence that plaintiff received a certain amount for the stock and that balance of money received represented money paid in consideration of plaintiff's dismissal of will contest, but that the form of the transaction made it appear as if plaintiff received full value for his stock and nothing for dismissing will contest, did not show that plaintiff was in pari delicto with defendant which would deprive plaintiff from taking advantage of his own wrongdoing, where it was not shown that defendant, to plaintiff's knowledge, contemplated defrauding purchaser of stock.

6. Fraud 🔑11(1)

An expression of an opinion, to avoid an action for fraud and deceit, must be the expression of an opinion honestly entertained by the person making it.

7. Fraud 🔑58(1, 4)

In action for damages for fraudulently inducing plaintiff to sell corporate stock at less than its true value, evidence sustained jury's implied finding that defendants' statements as to value of stock were not mere expressions of opinion but rather statements of facts made for purpose of inducing plaintiff to rely thereon and that plaintiff did rely thereon.

8. Fraud 🔑11(2)

One of the factors to be considered in determining the character of statements of value and the right to rely thereon, so as to support action for fraud and deceit, is whether or not they are accompanied by other false representations.

9. Corporations ⟹316(3)

An officer and director of a corporation who had knowledge of special facts affecting the value of its stock which facts were unknown to stockholders, was under a duty to disclose such facts before making a purchase or sale of a stockholder's stock.

10. Corporations ⟹316(3)

Under the "special facts doctrine", which imposes upon a corporate officer a limited fiduciary duty in transactions with a shareholder involving the transfer of stock, the confidential relationship arises as a result of the officer's possession of special knowledge gained in his capacity as a corporate fiduciary.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Facts Doctrine".

11. Corporations ⟹316(3)

A corporate officer, in buying or selling to a shareholder, must inform him of those matters relating to the corporate business of which the officer has knowledge and which the shareholder has the right to know about, so that the latter may have the benefit of such information in judging the advantages of the deal.

12. Corporations ⟹316(3)

A corporate officer owes a duty of complete honesty in any disclosure which he makes, in buying corporate stock from or selling to a shareholder, regardless of whether his statements are classed as "facts" or "opinions".

13. Fraud ⟹11(1)

A false statement of opinion fraudulently made may form the basis of an action, where the party making it possesses superior knowledge or special information regarding the subject matter of the representation.

14. Corporations ⟹316(3)

Where corporate director and officer had superior knowledge of value of corporate stock, his fiduciary position with respect to stockholder in negotiating for purchase of the stock did not terminate when officer and stockholder became adversaries in a legal proceeding.

15. Fraud ⟹22(1)

A defrauded person is not barred from maintaining an action merely because he commenced an investigation if it was incomplete or abandoned before discovery of the falsity, particularly if defendant has a superior knowledge of the facts, or if it is difficult for plaintiff to ascertain all the facts or he is not competent to judge the facts without expert assistance.

16. Corporations ⟹316(5)

Where it was difficult to secure information necessary to form an accurate estimate of value of corporate stock, corporation officer had superior knowledge concerning such facts and stockholder, in disposing of his stock, did not make a complete investigation because of his reliance upon officer's representation as to value, stockholder was not barred from maintaining action against officer for damages for fraudulently inducing sale of stock at less than true value.

17. Corporations ⟹316(5)

Where corporation officer had superior knowledge as to the value of corporate stock, which plaintiff was induced to sell, corporation's balance sheets did not fairly represent the actual value of corporate assets, and plaintiff had been so informed, plaintiff was not, as a matter of law, prevented from accepting the representations of the officer as true because of the difference in value of the stock as shown by the books and as represented by officer.

18. Limitation of actions ⟹193

Provision tolling operation of statute of limitations until discovery of the fraud is treated as an exception, and, if an action is brought more than three years after commission of the fraud, plaintiff has the burden of pleading and proving that he did not make the discovery until within three years prior to filing of complaint. Code Civ.Proc. § 338, subd. 4.

19. Limitation of actions ⟹195(5)

Plaintiff must affirmatively excuse his failure to discover the fraud within three years after it took place, by establishing facts showing that he was not negligent in failing to make the discovery sooner and that he had no actual or presumptive knowledge of facts sufficient to put him on inquiry. Code Civ.Proc. § 338, subd. 4.

20. Limitation of actions ⟹100(11)

A person is not necessarily barred after three years by failure to pursue an available means of discovering possible fraud, since the statute commences to run only after one has knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud, thus putting him on inquiry. Civ.Code, § 19; Code Civ. Proc. § 338, subd. 4.

21. Limitation of actions 🔑100(13)

Where no duty is imposed upon a person to make inquiry and where, under the circumstances, a prudent man would not be put upon inquiry, the mere fact that means of knowledge are open to a plaintiff and he has not availed himself of them does not debar him from relief when thereafter he shall make actual discovery, but the circumstances must be such that the inquiry becomes a duty and the failure to make it a negligent omission.

22. Limitation of actions 🔑100(13)

As respects accrual of cause of action for fraud, means of knowledge are equivalent to knowledge only where there is a duty to inquire, as where plaintiff is aware of facts which would make a reasonably prudent person suspicious. Civ.Code, § 19; Code Civ.Proc. § 338, subd. 4.

23. Fraud 🔑36

Negligence by plaintiff would not be a defense to an action based upon intentional misrepresentation.

24. Limitation of actions 🔑199(2)

In action against corporation officer for damages for fraudulently inducing plaintiff to sell corporate stock at less than its true value, whether defendant's representations were of such a nature as to lull plaintiff into a sense of security, and whether the facts were such as to put plaintiff upon inquiry so as to bar the action not commenced until more than five years after the representations, were for jury. Civ. Code, § 19; Code Civ.Proc. § 338, subd. 4.

25. Limitation of actions 🔑100(11)

Although the general rule relating to pleading and proof of facts excusing a late discovery of fraud remain applicable, in cases involving a fiduciary relationship between the parties at time of the fraudulent representation, facts which would ordinarily require investigation may not excite suspicion and the same degree of diligence is not required. Civ.Code, § 19; Code Civ. Proc. § 338, subd. 4.

26. Corporations 🔑316(3)

Where confidential relationship existed between defendant officer and plaintiff stockholder at time of the alleged fraud of defendant in inducing plaintiff to sell his stock at less than real value, plaintiff was under no duty to make a complete search and re-examination of the entire transaction immediately after it took place merely because the fiduciary relationship between the parties was terminated when the sale was completed. Civ.Code, § 19; Code Civ. Proc. § 338, subd. 4.

27. Appeal and error 🔑996
Trial 🔑142

Where the facts are susceptible to opposing inferences, whether a party has notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and whether by prosecuting such inquiry he might have learned such fact, are themselves questions of fact to be determined by the jury or the trial court. Civ.Code, § 19; Code Civ.Proc. § 338, subd. 4.

28. Limitation of actions 🔑196(1)

Although plaintiff's absence from the locality would not toll the three-year statute of limitations on action for fraud, if it had already commenced to run, it was a relevant factor to be considered by jury in explanation of plaintiff's delay in discovering fraud of defendant in inducing plaintiff to sell his stock at less than its true value. Civ.Code, § 19; Code Civ.Proc. § 338, subd. 4.

29. Limitation of actions 🔑193

In addition to negativing notice of the fraud and excusing failure to discover it sooner, plaintiff must allege and prove facts showing the time and surrounding circumstances of the discovery and what the discovery was. Civ.Code, § 19; Code Civ. Proc. § 338, subd. 4.

30. Limitation of actions 🔑100(13)

Where there is a duty to investigate, plaintiff may be charged with knowledge of the facts which would have been disclosed by an investigation; but, where because of the fiduciary relations between the parties there is no prior duty to investigate, the statute of limitations in action for fraud does not run until plaintiff has notice or knowledge of facts sufficient to put a reasonable man on inquiry. Civ.Code, § 19; Code Civ.Proc. § 338, subd. 4.

31. Limitation of actions 🔑195(5)

The rule that plaintiff must show what information he has obtained so that the court may determine whether the facts leading to the discovery of the fraud existed for more than three years prior to commencement of suit and could have been discovered by the exercise of ordinary diligence is applicable only where plaintiff was under a duty to make a diligent inquiry and he seeks to excuse his failure to discover the fraud by showing that the true facts were not then available or that the inquiry he did make was diligent, though unsuccessful. Civ.Code, § 19; Code Civ. Proc. § 338, subd. 4.

32. Limitation of actions ⚷195(5)

In the absence of a duty to make inquiry, the statute of limitations does not run merely because the means of discovery of the alleged fraud were available, and plaintiff is not compelled to disprove that such means existed, but need only establish facts sufficient to show that he made an actual discovery of hitherto unknown information within three years before filing of the action. Civ.Code, § 19; Code Civ. Proc. § 338, subd. 4.

33. Limitation of actions ⚷179(2)

In action for damages for fraudulently inducing plaintiff to sell corporate stock at less than true value, allegations of the complaint were sufficient to show the times and circumstances under which the facts constituting the fraud were brought to plaintiff's knowledge, so as to enable the court to determine whether the discovery of the facts was within the time alleged. Civ. Code, § 19; Code Civ.Proc. § 338, subd. 4.

34. Limitation of actions ⚷100(11)

Where plaintiff's evidence showed that defendant's misrepresentations in 1936 induced plaintiff to sell his corporate stock at less than true value, that plaintiff had no notice or knowledge of any suspicious facts or circumstances prior to January 1941, and that within six months thereafter an investigation was made, the fraud discovered, and action for damages was commenced, action was not barred by limitation. Civ.Code, § 19; Code Civ.Proc. § 338, subd. 4.

35. Evidence ⚷314(5)
Limitation of actions ⚷196(1)

Evidence of the details of information received by plaintiff indicating that plaintiff had been defrauded in the sale of corporate stock by defendant's representations as to value was admissible to establish the fact that the information was received, but not for purpose of showing the truth of the statements made.

36. Corporations ⚷320(11½)

In action against corporation officer for damages for fraudulently inducing sale of stock at less than true value, an instruction that, in order to excuse himself, defendant had to "conclusively" establish that plaintiff had actual knowledge of the real facts and that he did not rely on and was not misled by defendant's misrepresentation was erroneous as imposing a burden of proof greater than required. Code Civ. Proc. §§ 1837, 1978.

37. Evidence ⚷596(1)

The use of the phrases "clear and convincing" or "satisfactory" evidence is not equivalent to a requirement of unanswerable evidence, and, whatever the proof necessary, it need not be "conclusive".

See Words and Phrases, Permanent Edition, for all other definitions of "Clear and Convincing" and "Satisfactory".

38. Trial ⚷296(8)

Error in instructions which required defendant's evidence to be "conclusive" was not overcome by general instructions relating to the burden of proof.

39. Corporations ⚷320(11½)

In action for damages for fraudulently inducing plaintiff to sell corporate stock at less than true value, an instruction, authorizing recovery if defendant's representations were of a nature calculated to induce plaintiff to sell his stock "for the sum of $25 per share, or any other sum", was erroneous and confusing.

40. Corporations ⚷320(11½)

In action against corporation officer for damages for fraudulently inducing sale of stock at less than its true value, an instruction that plaintiff had an "absolute right" to rely upon the express statements of fact by defendant was erroneous, since reliance upon such statements must be justifiable.

41. Appeal and error ⚷930(1)

In passing upon sufficiency of evidence to support the verdict all conflicts must be resolved in favor of the implied findings of the jury, since it is the sole judge of the credibility of witnesses and the weight of the evidence.

42. Appeal and error 🔑1170(9)

In determining whether a judgment must be reversed because of errors in instructions, the Supreme Court is required to examine entire cause including the evidence and decide whether the errors have resulted in a miscarriage of justice. Const. art. 6, § 4½.

43. Appeal and error 🔑1170(9)

In action for damages for fraudulently inducing plaintiff to sell corporate stock at less than its true value, errors in instructions placing greater burden of proof on defendant than law required were prejudicial error, where evidence was sharply conflicting and jury arrived at verdict after some difficulty. Const. art. 6, § 4½.

44. Corporations 🔑423

Corporation could not be held liable to stockholder for representations of corporation officer inducing sale of stock at less than true value, on theory that officer furnished information to inheritance tax appraiser which led to a false appraisement, and that by such misrepresentations the corporation committed a fraud on the public, which would give any member injured thereby a cause of action against corporation, where plaintiff did not rely on the valuation so fixed.

45. Principal and agent 🔑93, 99

Actual authority may be implied as well as express and the implied powers of a general agent or manager are broad, embracing authority to do all acts customarily connected with the business in which he is engaged.

46. Corporations 🔑423

In action for damages for fraudulent representations inducing plaintiff to sell corporate stock at less than true value, where the corporation manager who made the representation was not acting within the scope of his duties in negotiating the purchase of the stock, but was acting for another as purchaser, corporation could not be held liable for acts of the manager.

47. Corporations 🔑423

Any advantage to corporation derived from elimination of plaintiff as a stockholder did not render the corporation liable in damages for false representations of its manager in inducing plaintiff to sell his stock at less than true value, nor did the involuntary acceptance of any such benefits make the corporation liable on theory of ratification.

48. Corporations 🔑423

A corporation was not liable for fraudulent representations which induced plaintiff to sell his corporate stock at less than true value merely because the person making the representation was the president and general manager of the corporation.

49. Principal and agent 🔑156

Except where the position occupied by an agent enables him to perpetrate a fraud, a principal is subject to liability for the deceit of an agent only in connection with matters entrusted to him.

50. Corporations 🔑423

In action for damages for fraudulent representations inducing sale of corporate stock at less than its true value, corporation was not liable for the representations made by its vice president and manager, in transaction between plaintiff and a third person as purchaser of the stock, on theory that corporation had placed the manager in the position where he was the only person who had knowledge of the value of the stock. Civ.Code, § 2317, 2334.

51. Principal and agent 🔑99

A plaintiff cannot recover against a principal on the basis of ostensible authority without a showing of facts sufficient to raise an estoppel, the essential elements of such authority being representation by the principal, justifiable reliance thereon by the third party, and change of position or injury resulting from such reliance. Civ.Code, §§ 2317, 2334.

52. Corporations 🔑423

In actions for damages for fraudulent representation inducing plaintiff to sell corporate stock at less than its true value, where the evidence failed to show that plaintiff thought or believed that corporation manager who made the representation as to value was acting for the corporation, or that plaintiff relied on any such belief, the corporation could not be held liable to plaintiff under the doctrine of ostensible authority. Civ.Code, §§ 2317, 2334.

53. Corporations 🔑423

Liability of corporation to stockholder for fraudulent representations of its manager in inducing plaintiff to sell stock at less than its true value could not be predicated solely on the fact that manager was the only person who possessed knowledge of the value of the stock, without a showing that the manager was acting or purporting to act for the corporation. Civ. Code, §§ 2317, 2334.

54. Corporations ⚿423

That corporation manager had special knowledge of the affairs of the corporation and of the value of the stock and that stockholder was entitled to rely on his representation concerning value would not justify stockholder's believing that the manager was acting on behalf of corporation in making representations which induced plaintiff to sell stock at less than its true value, where stockholder understood that manager was acting for the purchaser of the stock.

◆

In Bank.

Appeal from the Superior Court of the City and County of San Francisco.

Action by Walter S. Hobart against Hobart Estate Company and A. Crawford Greene and others for damages for fraudulent representation inducing sale of corporate stock. From a judgment for plaintiff against Hobart Estate Company and A. Crawford Greene, the named defendants appeal.

Reversed.

For prior opinion see 148 P.2d 41.

Arthur B. Dunne, Dunne & Dunne, Sloss & Turner, Allan P. Matthew, Robert L. Lipman, and McCutchen, Thomas, Matthew, Griffith & Greene, all of San Francisco, for Appellants.

Vincent W. Hallinan and James Martin MacInnis, both of San Francisco, for Respondent.

GIBSON, Chief Justice.

This is an action for damages for loss resulting from alleged fraudulent representations through which plaintiff claims he was induced to sell 833⅓ shares of stock in the Hobart Estate Company at less than its true value. A verdict was rendered against defendants Greene and the Hobart Estate Company for actual damages, together with an award of exemplary damages against Greene. Defendants have appealed from the judgments entered on the verdict and from orders denying motions for judgment notwithstanding the verdict.

Walter S. Hobart, the grandfather of plaintiff, died in 1892, leaving his estate to his children, Walter S. Hobart (plaintiff's father), Alice Lester and Virginia Baldwin. The three children organized the Hobart Estate Company, a family corporation, transferring thereto substantially all the assets they had obtained from the estate. Prior to 1933 certain of the three original stockholders surrendered some of their stock to the company, leaving 38.010 shares outstanding. The law firm of McCutchen, Olney, Mannon and Greene, or its predecessors (hereinafter called the law firm), have represented the company since its inception.

In 1907 Alice Lester was declared incompetent and she has since been confined in an institution. E. J. McCutchen, a member of the law firm, was appointed guardian of her estate. Defendant Greene, a partner in the firm, subsequently became coguardian, and upon the death of McCutchen continued as sole guardian. The law firm has acted as attorney for the guardian. Since 1932 Greene has been president of the Hobart Estate Company, and he has also been its general manager and a director. He owned no stock other than one share to qualify him as a director.

In 1933 plaintiff's father, owing $240,000 to Alice Lester, settled the debt by selling 6,000 shares at $40 per share to the guardianship estate, which thereby obtained control of the company. As guardian, Greene had the right to vote the stock.

Upon the death of plaintiff's father in November, 1933, a trust of 2,500 shares of the stock terminated and 833⅓ shares were distributed to each of his three children, namely, plaintiff, Ruth Hobart Crocker, and Hannah Neil Prince. The shares that were then received by plaintiff are the shares principally involved in this action.

Plaintiff's father left an estate consisting in part of 3,289 shares in the Hobart Estate Company. The will of plaintiff's father, drawn by the law firm, practically disinherited plaintiff, bequeathing him only $100. Greene was named co-executor and was one of the trustees under trusts created by the will. Plaintiff contested the will and in order to finance the litigation pledged his 833⅓ shares of stock with Charles Crocker.

Plaintiff first engaged Ralph Lachmund as his attorney and later substituted George Harris. Eugene Aureguy was employed by plaintiff as an investigator. In the will contest, filed in June, 1934, it was alleged that the will was the result of undue influence exerted by the legatees and also the executors, one of whom was Greene. In the summer of 1935, Harris and Aureguy discussed a settlement of the contest with J. M. Mannon, Jr., a partner in the law firm. Subsequently Mannon left on a vacation and turned the matter over to Greene.

According to plaintiff, Greene insisted as a condition of the settlement of the will contest that plaintiff sell his stock and represented that it was worth no more than $25 per share, whereas in truth it was worth much more, and that in reliance thereon plaintiff agreed to sell his stock at this price to a buyer then undisclosed by Greene and to accept $25,000 in settlement of the will contest. Defendants deny that any such representation was made and assert that under the actual agreement plaintiff was to be paid $55 per share for the stock and nothing for settlement of the will contest.

Greene sought and obtained permission of the superior court in the guardianship proceedings to buy the stock on behalf of the guardianship estate at $55 per share. It does not appear, however, that plaintiff knew who the actual purchaser was when the transaction was completed, and the documents executed at that time referred to the purchaser as the "nominee" of the law firm. Plaintiff received a payment of $45,833.15, a sum approximately equivalent to $55 per share for the 833⅓ shares. The receipt of this sum is also consistent with plaintiff's claim that he was paid $25 per share plus a lump sum of $25,000 for settlement of the contest. The transaction was not completed until January 16, 1936. Plaintiff remained in California for about three months. Thereafter he went to Europe, returning to New York in January, 1941, where he testified, he received information from an unidentified person concerning the value of the holdings of the Hobart Estate Company. Two or three months later he came to San Francisco, consulted Aureguy and Harris, and obtained information which he testified was "excessively at variance" with the statements made to him by Greene relating to the value of the stock. The present action was filed in June, 1941.

Upon these appeals both defendants contend (1) that the evidence is insufficient to establish a cause of action for fraud, (2) that plaintiff as a matter of law is barred by the statute of limitations, (3) that the trial court committed prejudicial error in giving and refusing various instructions, and (4) that the verdict against Greene resulted from coercive pressure exerted by the trial court upon the jury. The Hobart Estate Company contends, further, that the evidence does not support an implied finding that Greene acted as its agent in making the alleged representations.

I. *Sufficiency of Evidence of Fraud.*

[1, 2] In general, to establish a cause of action for fraud or deceit plaintiff must prove that a material representation was made; that it was false; that defendants knew it to be untrue or did not have sufficient knowledge to warrant a belief that it was true; that it was made with an intent to induce plaintiff to act in reliance thereon; that plaintiff reasonably believed it to be true; that it was relied on by plaintiff; and that plaintiff suffered damage thereby. In determining the sufficiency of the evidence to meet these requirements we must, in view of the verdict, resolve all conflicts in plaintiff's favor and draw all permissible inferences necessary to support the judgment.

The alleged representations were made during a series of four conferences with Greene concerning settlement of the will contest. Plaintiff was present at the fourth conference only, and at the others was represented by Aureguy and Harris, or by Aureguy alone.

Aureguy testified that at the first of these discussions Greene stated that the family wanted plaintiff out of the corporation and that it was necessary that plaintiff sell his stock in the Hobart Estate Company as a condition precedent to the settlement of the will contest. The second meeting, according to Aureguy, was between Greene, Harris and himself. At this conference no representations were made with respect to the value of the stock and there was no discussion of the terms upon which a settlement could be made. Aureguy testified that at the third conference Greene stated that his clients were willing to pay $25,000 to settle the will contest contingent upon plaintiff's selling the stock at $25 a share. Aureguy said he suggested a price of $40 a share and the settlement of the will contest for $25,000, but that Greene stated that the stock could not be sold at $40 a share, that the book value of the stock was $25 a share and that was all it was worth. Aureguy testified that in reply to his inquiry as to what was meant by "book value" Greene said: "If all the assets of the corporation were sold, and the expenses paid and the money divided, why each share of stock would not net in excess of $25 a share * * * it might realize less than that," and that Greene also said that the company "was in a bad financial condition," that "we are in very trying times," and that "The corporation owes money on its various holdings, and if the loans were called, the corporation would be in very bad position. Whether we would be able to pay them or not, I don't know."

Plaintiff, Harris, Aureguy, and Greene were present at the fourth conference. Plaintiff had never before met Greene. With respect to this conference plaintiff and Aureguy testified in substance as follows: Aureguy started the conversation, saying that he had brought plaintiff to have Greene confirm what he had said at the prior conference. Aureguy asked Greene if it were essential that plaintiff part with his stock in order to settle the will contest. Greene replied: "Yes, most definitely." Plaintiff protested, saying he had wanted to establish a trust with the stock for his daughter. Greene, however, insisted there could be no settlement without the sale. Aureguy summarized what had been said at the prior conference with respect to the value of the stock, mentioning the figure given by Greene of $25,000 to settle the contest and the fact that Greene had a buyer who was willing to pay $25 per share, but no more, for the stock. Plaintiff stated that he had thought the stock worth $100 or more per share. He asked how it could be worth only $25 when a year or so before it had been appraised at $40 in his father's estate. Greene replied that the appraisal of $40 was based upon the prior sale at that price by plaintiff's father to the estate of Alice Lester; that plaintiff's father was paid more than the stock was worth; and that the appraisal did not, therefore, represent the value of the stock. Greene said, "The stock is not worth over $25 a share."

Plaintiff and Aureguy further testified that Greene explained that the Hobart Estate Company was a family corporation and its stock had no market value; that the company was in very bad financial condition and that its assets had been declining in value; that it owed a great deal of money and if it became necessary to liquidate any of the property to satisfy a loan or if there were a forced sale of all the stock, it might be worth even less than $25 a share; and that "due to the assets and liabilities approaching one another rapidly, the stock was in jeopardy and it was just as well to sell the stock." It was also testified that Greene said that there was nothing he did not know about the financial situation, the net assets or the liabilities of the company, that he knew more about the corporation than anybody else, that if Aureguy sought information anywhere, he would ultimately come to Greene for it, that Greene assured plaintiff that he had only the kindliest feelings toward him and that he wanted him to get all he possibly could out of the stock but that he could not in fairness suggest that anyone pay more than $25 a share for it.

Harris, called as a witness by plaintiff, testified that he had been employed by plaintiff in connection with the will contest, but not to sell the stock, and that the total sum of $45,833.15 received "was an over-all figure involving the settlement of all aspects of the case * * * there were two phases: the stock aspect and the will contest * * * and the contest could not be settled without the relinquishment of * * * [plaintiff's] right to the stock * * * the stock transaction was integrated with the will contest." With regard to the fourth conference, at which plaintiff was present, Harris testified that he could not recall all of the conversation, but said that Greene did discuss declining values, the depressed condition of things and painted a rather depressing picture of the affairs at that time. Harris had no recollection as to whether or not Greene gave any opinion of the value of the stock.

Plaintiff testified that Harris asked him if he wished to take Greene's word or investigate the matter further, and that plaintiff replied: "I am certain a man of Mr. Greene's integrity and position would never state anything in regard to it that was not so, and I will take his word."

Plaintiff also testified that he had heard Crocker say, in connection with the pledge transaction, that the stock was worth only about $24 per share; that he was doubtful of the statement then, but that from what

Greene said he "finally believed that the stock was only worth $25.00"; and that he sold it at $25 "because at the time Mr. Greene said it was worth that." He also testified that before his conversation with Greene he had not wanted to sell the stock but that Greene convinced him he should.

Greene testified that at the first conference the transaction was discussed on the basis of a prior talk by Harris and Aureguy with Mannon, in which, according to Mannon, plaintiff offered to settle if he could get $40 per share for the stock, together with something for the will contest, the total being about $48,333. Greene said that both the sale by plaintiff's father at $40 and the inheritance tax appraisal at that figure were discussed. He testified he told Aureguy that the figure of $40 had been given by the law firm to the inheritance tax appraiser because the only record of a sale of the stock was at $40 a share. He said the depression was one of the main topics of the conversations and admitted saying at the conferences that there was no market for the stock. He testified that such was the fact because in order to have a market there must be trading.

Greene denied that he represented the stock to be worth only $25 a share and denied saying that plaintiff must part with his stock in order to settle the will contest but admitted he had considered plaintiff a troublemaker and a storm center in the company and that he believed it to be in the best interests of the shareholders and the company to eliminate plaintiff as a stockholder. Greene testified that he did not represent that the company was in bad financial condition. He denied that there was any agreement to purchase the stock at $25 a share or to settle the will contest for $25,000.

Before discussing the sufficiency of the evidence to establish a cause of action for fraud, it should be noted that defendants do not dispute the actual falsity of the principal representations, if made. Greene alleged in his petition filed in the guardianship proceedings in January, 1936, that the stock was reasonably worth $55 per share and he testified in the present action that it was worth $55 at the time of the transaction and that he then believed it to be worth that amount. He said it was not a fact that the assets were very bad or that the assets and liabilities were closely approaching each other. There was testimony by several witnesses as to the actual value of the assets and stock of the company at those times, and it is not claimed that the *amount* of damages awarded by the jury (necessarily based upon this testimony) was excessive.

In arguing that the evidence is insufficient to establish fraud, and that plaintiff could not reasonably have relied upon Greene's statements, defendants assert that the testimony of plaintiff and Aureguy is so inherently improbable it cannot be believed; that the alleged representations, as qualified by Greene, were merely statements of opinion; that there was no fiduciary relationship between Greene and plaintiff and in the absence thereof plaintiff was not entitled to rely upon the representations; that plaintiff made an independent investigation of the value of the stock and relied upon such investigation and upon his advisers rather than upon Greene's representations; and that certain information concededly known to plaintiff or his agents put him on inquiry.

[3] In support of the argument that the testimony of plaintiff and Aureguy is incredible and their version of the transaction inherently improbable, defendants cite a number of instances in which plaintiff's evidence is assertedly inconsistent and unreasonable. Unless in the light of the circumstances the testimony is so inherently improbable and impossible of belief as in effect to constitute no evidence at all, it may not be disregarded in determining the sufficiency of the evidence to support the judgment.

Defendants insist that the testimony that the total sum paid consisted of $25,000 for the settlement of the will contest and only $25 per share for the stock is inconsistent with certain letters and documents prepared contemporaneously with the completion of the transaction and is therefore inherently improbable. They urge that these papers show beyond question that $55 was paid for the stock and nothing for the contest. The first of the letters was dated November 29, 1935, and was sent by plaintiff's attorney, Harris, to the attorney for Charles Crocker, pledgee of the stock, to inform Crocker of the proposed plan to sell the stock and settle the will contest. It read, in part: "* * * it was agreed that in consideration of our client dismissing with prejudice the pending will contest and tendering a full and complete release in and with respect to any rights and/or claimed rights in and to said estate, and in addition transferring to the nominee of the representatives of the estate eight hundred and thirty three and one-third (833-⅓) shares of stock of the Hobart Estate Company standing in the name of Walter S. Hobart, Jr., the representatives of the estate would pay therefor and in consideration thereof $55.00 a share for the said eight hundred and thirty three and one-third (833-⅓) shares. In short, the settlement contemplated not only a dismissal of the will contest but also a complete relinquishment of all the right, title and interest of our client in and with reference to said shares of stock."

The law firm prepared certain documents including (1) a dismissal and retraxit of the will contest, (2) a stock transfer and power of attorney, and (3) a release to be executed by both plaintiff and Crocker. These documents and others, including the stock certificates, were delivered in escrow. On January 14, 1936, Harris wrote a letter to the law firm reading as follows: "In accordance with our understanding for the purchase by you, or your nominee, of 833⅓ shares of the capital stock of the Hobart Estate Company, at the agreed price of $55.00 a share, together with a full and complete settlement of all of the interest of Walter S. Hobart, Jr., in the estate of his late father, I have deposited with Mr. Daniel J. Murphy, Vice President, Crocker First National Bank, this city, all of the documents which you have handed to me, properly executed, pursuant to your instructions. These papers have been deposited by me under appropriate instructions, and I trust that the only thing remaining to be done, to wit, the payment of $45,833.15 will be made forthwith."

The documents deposited by Harris in escrow included a letter of instructions, signed by plaintiff, with Aureguy and Harris as witnesses, reading in part: "The said certificate for 833⅓ shares I have agreed to sell to a purchaser represented by the law firm of McCutchen, Olney, Mannon & Greene, for the total of $45,833.15, representing 833⅓ shares at $55 per share."

[4] We cannot hold as a matter of law that the contemporaneous letters and documents relating to the form of the transaction compel a conclusion that the money plaintiff received was solely for the stock and that no part of it was paid in settlement of the will contest. The letter from Harris to Crocker's attorney stated that plaintiff was to receive $55 per share *in consideration of dismissing the will contest* as well as for transfer of the stock. The letter from Harris to the law firm on January 14, 1936, recited the contest settlement as a part of the transaction. The jury could have inferred from these papers, together with the other evidence in the case, that at least some portion of the sum paid was based upon dismissal of the contest, and, in any event, they are reconcilable with plaintiff's version of the transaction. Although the letter containing the escrow instructions referred to a purchase of stock alone without mention of settlement of the contest, it is undisputed that one of the documents placed in escrow for delivery to the proponents of the will, was a dismissal and retraxit of the contest that was prepared by the law firm and required of plaintiff by Greene as a condition essential to completion of the transaction.

Furthermore, the form of the transaction, that is, its repeated description as a sale of the stock at $55 per share, was explained by plaintiff, Aureguy, and Harris as a matter insisted upon by Greene. Plaintiff testified that Greene stated during the last conference that: "In selling the stock and the whole thing, of course, you realize that according to the trust that we drew up in your father's will it is absolutely impossible to pay you out of his estate. What we will do is this: I will contact my purchaser, and if he is willing to pay $25.00 a share, why, then, we will add to that $25,000 as settlement of the will contest, and we wish to make it in the form of a stock transaction which will then look as though you were being paid a nominal sum of $55.00 a share for your stock." According to Aureguy, Greene stated during one of the conversations that "to assuage the feelings of the family, and so there will be no scheming upon the fact with respect to the allegations" in the will contest, it would be necessary to pay the money in such a manner "that it will appear that the stock was sold for * * * $55 a share." When Harris was asked if he remembered "the arrangements under which the whole thing was made to appear as though it were $55 a share for the stock," he testified that "to the best of my recollection * * * the transaction could only be handled in that fashion * * * there was considerable feeling, as I recall, as between certain members of the family, certain warring factions between the Hobarts and the Crockers, and others, and my recollection is that the record under no condition could show or should show any payment directly in connection with this will contest. * * *" When asked if the amount of the will contest was added on to what was being paid for the stock, he replied: "One was integrated with the other," adding that he thought this fact was clearly shown in his letter of November 29, 1935, to Crocker's attorney. The jury, believing the testimony of plaintiff and Aureguy, could have inferred that Greene, in order to facilitate the transaction, insisted that it take the form of a sale of stock at $55 per share, although in fact $25 per share was paid for the stock and $25,000 for the settlement of the will contest.

[5] Defendants assert that if plaintiff's evidence relating to the form of the transaction is to be believed, plaintiff knowingly participated in a scheme which was calculated to enable an improper advantage to be taken of someone, in which event plaintiff would be in pari delicto with Greene and no court would aid plaintiff in escaping the consequences of his own wrongdoing. Cf. American T. Co. v. California, etc., Ins. Co., 15 Cal.2d 42, 66, 98 P.2d 497, 509, where this court stated it to be a general principle that "an *agreement to defraud third persons* is illegal and void." Defendants also argue that for this reason the testimony of plaintiff and Aureguy is unworthy of belief. To show that Aureguy was aware of such a scheme defendants point to his testimony that it was his opinion that if the transaction were made to appear to be a sale at $55 a share, that would be "indulging in a little duplicity." Defendants also refer to plaintiff's testimony that he thought it was rather extraordinary the purchasers wanted to arrange it that way, but that it was their affair. Defendants urge that if this testimony were true plaintiff was put on notice of an intent to deceive someone and that he cannot now complain if he was the one who was deceived. In the present case, however, there was no contract to defraud a third person within the meaning of the American Trust Company case, and it is not established that Greene, to plaintiff's knowledge, contemplated defrauding the purchaser of the stock.

We have considered other portions of the record which defendants assert show that the testimony of plaintiff and Aureguy is incredible and unworthy of belief but we cannot say as a matter of law that the testimony contains such evidentiary weakness or abnormality as to render it inherently improbable.

[6] Defendants next contend that all of the representations were expressions of opinion, rather than of fact, and therefore, are not actionable. This court has said, however, that "bearing in mind that an expression of an opinion, if honestly made, is an expression of what the speaker *believes to be* a fact, it becomes apparent that, by the expression of a dishonest opinion to one entitled to rely upon it, deceit is practiced, injury may be worked, and an action will lie." Edward Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 573, 126 P. 351, 356, 42 L.R.A.,N.S., 125; see, also, 23 Am.Jur. 789-791, and 37 C.J.S., Fraud, § 12, p. 237, stating that this view represents the weight of authority. In Neff v. Engler, 205 Cal. 484, 271 P. 744, and in Macdonald v. De Fremery, 168 Cal. 189, 142 P. 73, the rule was applied to false statements of value of corporate stock and financial condition. In the Macdonald case the court said (page 199 of 168 Cal., page 77 of 142 P.): "But an expression of an opinion, to avoid an action for deceit, must be the expression of an opinion honestly entertained by the person making it." In the Restatement, Torts, section 525, Comment b, it is said: "* * * A representation of the state of mind of the maker or of a third person is a misrepresentation if the state of mind in question is otherwise than as represented. Thus, a statement that a particular person, whether the maker of the statement or a third person, is of a particular opinion * * is a misrepresentation if the person in question does not hold the opinion * * * asserted." The principal false statement attributed to Greene was that the stock in the Hobart Estate Company was not worth more than $25 a share. Greene denied making any representation as to the value of the stock but admitted that, although he did not say so, he then believed it was worth $55 a share.

Defendants cite authorities for the proposition that a statement of value which is professedly given and received only as an opinion will not support a charge of fraud. See cases cited in 12 Cal.Jur. 726–729. They urge that the present case falls within this rule because, according to the testimony of plaintiff and Aureguy, certain qualifications were placed by Greene upon his statements of value which made it clear that they were mere expressions of opinion.

Most of the asserted qualifications were made during the second or third conference. They are as follows: Greene told Aureguy that the only figure he was able to furnish with respect to the value, in the absence of a piece by piece appraisal of the assets of the company, was the sale by plaintiff's father to the Lester estate at $40 per share. Greene explained, however, that the price at which this sale was made "represents a figure vastly in advance of what the stock is worth." Greene also said that he had no way of determining values except by actual sales; that he was unable to determine the value of the stock because the only figure he ever had was the sale by plaintiff's father; that he had no way of definitely knowing what it was worth; that the stock was not generally dealt in and was worth "just what any person will pay for it or * * * whatever Mr. Hobart can get for it"; that "the only way we can arrive at the value of a corporation of this character would be to sell the assets and divide the money." At the commencement of the fourth conference, which plaintiff attended, Aureguy repeated the substance of the prior conference with Greene, stating that Greene had informed him that to arrive at the value of the stock it would be necessary to sell all the assets.

[7] When the record is read as a whole it appears that the jury could properly have found that these statements, instead of being made as qualifications, were intended by Greene to show the difficulty of ascertaining the true value, thereby discouraging further investigation by plaintiff and inducing him to rely upon the representations of value. Moreover, there was testimony that, subsequent to the making of the qualifications, Greene made positive representations that the stock was worth no more than $25 a share and plaintiff expressed a willingness to take Greene's word as to its value.

Under some circumstances, at least, a positive representation of value may be treated as an assertion of an existing fact. In Willson v. Municipal Bond Co., 7 Cal.2d 144, 151, 59 P.2d 974, 977, the court said that "when a statement as to value is made as a positive affirmation of a fact, and is intended as such by the party making it, and such statement is false and is known to be false by the person making it, and such statement is relied upon by the person to whom it is made, then such false statement is actionable. The cases also indicate that where there is a reasonable doubt as to whether a particular statement is an expression of opinion or the affirmation of a fact, the determination rests with the trier of the facts." See, also, Bedell Engineering Co. v. Rouse, 57 Cal.App.2d 734, 135 P.2d 404; 37 C.J.S., Fraud, § 57, pp. 336-340; cf. Wells v. Lloyd, 6 Cal.2d 70, 87, 56 P.2d 517; Harris v. Miller 196 Cal. 8, 13, 14, 235 P. 981.

[8] One of the factors to be considered in determining the character of statements of value and the right to rely thereon is whether or not they are accompanied by other false representations. See Edmonds v. Wilcox, 178 Cal. 222, 224, 172 P. 1101; cf. Neff v. Engler, 205 Cal. 484, 271 P. 744. Here there is testimony that Greene made false statements with respect to the assets and liabilities of the company and its financial condition.

[9] There is a further reason why plaintiff was entitled to rely upon Greene's statements concerning the value of the corporation's stock. Plaintiff was a stockholder in a company of which Greene was a director, president and general manager. In addition, as guardian of the estate of Alice Lester, he held a majority of the shares and the voting control of the stock, giving him the right to select most if not all of the directors and indirectly the right to determine all company policy and practice. He had been connected with the company for many years; he had an intimate knowledge of the company's affairs, its assets, its prospects, and all other factors affecting the value of its stock. Moreover, and of particular importance, the company was a closely held family corporation, and as will appear hereinafter, the books of the company, to plaintiff's knowledge, contained inaccurate valuations of the company's assets so that it would have been impossible for plaintiff to have ascertained the true value of his stock from this source. The stock was not dealt in on the market and the judgment of its value had to be made not from published stock transactions but from the information of one familiar with the facts, and in this connection Aureguy testified that Greene told him that if he sought information any place, he would ultimately come to Greene for it as there was no other source from which it could be obtained. Plaintiff, on the other hand, testified that he was not familiar with the affairs of the corporation or with financial matters in general.

The foregoing circumstances are sufficient to bring this case within the rule that where an officer or a director of a corporation has knowledge of special facts affecting the value of its stock, he cannot deal with a stockholder at arm's length but is under a duty to disclose such facts before making a purchase or sale of the stock. This doctrine is explained in American T. Co. v. California, etc., Ins. Co., 15 Cal.2d 42, 57, 98 P.2d 497, where the conflicting views of the various jurisdictions on the existence of a fiduciary duty of a director toward stockholders are fully set forth. It was not necessary in that case to rely upon this doctrine, but its soundness is evident from the discussion therein. The contrary rule, which denies the existence of any fiduciary duty in the case of an officer having knowledge of special facts that enable him to profit at the expense of a shareholder by the use of information obtained in his official capacity, is not in accord with accepted principles of justice and must be rejected.

[10, 11] Under the "special facts" doctrine a corporate officer owes a limited fiduciary duty in transactions with a shareholder involving the transfer of stock. The confidential relationship arises as a result of the officer's possession of special knowledge gained in his capacity as a corporate fiduciary. An officer, in buying or selling to a shareholder, must inform him of those matters relating to the corporate business of which the officer has knowledge and which the shareholder has a right to know about, so that the latter may have the benefit of such information in judging the advantages of the deal. Once such disclosure is made, the officer has fulfilled his duty under this doctrine, and the resulting bargain is not subject to disaffirmance on the ground of unfairness to the shareholder. But without such disclosure the fiduciary duty of the officer in such a situation is not discharged.

[12] It would be illogical to impose liability for silence while excusing deliberate false representations, and it follows that the officer owes a duty of complete honesty in any disclosure which he makes, regardless of whether his statements are classed as "facts" or "opinions." Coming to the case at hand, Greene, as president of the corporation, had a duty to disclose to plaintiff any special facts, of which he had knowledge, affecting the value of the stock and, in representing what the shares were worth, to state what he honestly believed to be the fact. If Greene deliberately gave plaintiff false information concerning the financial condition of the company or if he told him the stock was not worth more than $25 a share when he believed its value to be $55 a share, then he violated the duty which he owed to plaintiff.

[13] On a further, though related, theory the statements attributed to Greene may be actionable. This court has held that a false statement of opinion fraudulently made may form the basis of an action where the party making it possesses superior knowledge or special information regarding the subject-matter of the representation. Union Flower Market v. Southern Cal. F. Market, 10 Cal.2d 671, 676, 76 P.2d 503; see 37 C.J.S., Fraud, § 57, pp. 336-340.

[14] Defendants contend that because of certain undisputed evidence, Greene could not possibly have occupied a fiduciary or confidential or superior position with respect to plaintiff. They also urge that the facts shown by this evidence destroyed plaintiff's right to rely upon any representations of Greene and, further, put him on notice of possible fraud. First, defendants point to the will contest then pending, wherein plaintiff charged the executors, including Greene, and the legatees with fraud and undue influence. The fiduciary position and superior knowledge of Greene existing prior to the filing of the will contest were not ipso facto terminated because plaintiff charged Greene with improper conduct toward a third person. Greene's superior knowledge obviously remained unchanged, and his duty of fair dealing toward plaintiff as a stockholder did not cease when he and plaintiff became adversaries in a legal proceeding. Nor can we say as a matter of law that the allegations made by plaintiff in the will contest evidenced a relationship of hostility and a lack of trust and confidence which deprived plaintiff of the right to rely upon representations made by Greene in subsequent negotiations. The meeting at which the representations were claimed to have been made by Greene occurred more than a year after the contest was filed. Plaintiff testified he then expressed his confidence in Greene's honesty and his willingness to take Greene's word as to the condition of the company and the value of the stock. The jury had a right to infer that any beliefs or doubts plaintiff may have had when the will contest was filed concerning Greene's integrity had been changed or entirely dispelled at the time the representations were made.

[15, 16] Defendants next claim that the evidence shows that plaintiff, Lachmund, and Aureguy made investigations of the value of the Hobart Estate Company's assets and stock, and they contend that one who has conducted an independent investigation must be deemed to have relied thereon rather than upon any representations made to him. Cf. Carpenter v. Hamilton, 18 Cal.App.2d 69, 62 P.2d 1397; Blumenthal v. Greenberg, 130 Cal. 384, 62 P. 599; Colton v. Stanford, 82 Cal. 351, 23 P. 16, 16 Am.St.Rep. 137. A defrauded person, however is not barred from maintaining an action merely because he commenced an investigation if it was incomplete or abandoned before discovery of the falsity, particularly if the defendant has a superior knowledge of the facts, or if it is difficult for the plaintiff to ascertain all the facts or he is not competent to judge the facts without expert assistance. See, for example, Shearer v. Cooper, 21 Cal.2d 695, 702, 704, 134 P.2d 764; French v. Freeman, 191 Cal. 579, 587, 588, 217 P. 515; Payne v. Clow, 114 Cal.App. 597, 600, 601, 300 P. 138; Willson v. Municipal Bond Co., 7 Cal.2d 144, 151, 152, 59 P.2d 974; 37 C.J.S., Fraud, §§ 37-39, pp. 286-288. Expert witnesses testified that in order to determine the value of the stock it would be necessary to make a complete examination and appraisal of all the assets of the company, which consisted of several city buildings, mining property, timber land, a public utility plant, and numerous other holdings. The evidence clearly shows that it was difficult to secure the information necessary to form an accurate estimate of the value, that Greene had superior knowledge concerning these facts, and that plaintiff was not competent without expert assistance to determine what the stock was worth. The evidence does not establish that Lachmund, Harris or Aureguy were qualified to give such assistance or that they attempted to advise plaintiff with respect thereto. Moreover, there was evidence that plaintiff did not make a complete investigation because of his reliance upon Greene's representations. See Shearer v. Cooper, supra, 21 Cal.2d 695, 704, 134 P.2d 764; Divani v. Donovan, 214 Cal. 447, 453, 6 P.2d 247.

[17] Defendants contend that certain facts known to plaintiff should have aroused his suspicions and precluded his reliance upon the representations assertedly made by Greene. It appears that the proponents in the will contest took the deposition of Howard G. Stevenson, secretary of the company, and that Lachmond was present as attorney for plaintiff and inquired of Stevenson concerning the value of the company's assets and examined copies of the balance sheets of the company for the years 1932, 1933, and 1934, which listed all the assets and liabilities of the company. Defendants argue that having acquired this information through his attorney, plaintiff could not rely upon Greene's representations of value. According to Stevenson's deposition, the valuations placed upon many of the principal corporate assets were carried on the books unchanged from as early as 1915 and did not reflect actual values or changes in value due to the depression. He said that some of the properties were worth the book value, some were worth only one-tenth of the book value and some were not worth anything. He further stated that a determination of the actual value would require reappraisal of the properties. There was testimony that Greene told Aureguy "that they were carrying on their books certain properties which were vastly in excess of the real value of the properties," and that during the conferences Greene pointed out that as a result of various factors such as the depression, the net worth was less than that shown by the financial statements of the company. According to the balance sheets, the book value of the stock was approximately $120 per share, whereas Greene testified he then believed the stock was worth but $55 a share. Greene further testified in substance that the assets were worth less than shown by the figures on the balance sheets. It is obvious that the balance sheets did not fairly represent the actual value of the corporate assets and that plaintiff had been so informed. It cannot therefore be said, as a matter of law, that plaintiff was prevented from accepting the representations of Greene as true because of the difference in the value of the stock as shown by the books and as represented by Greene.

In our opinion the evidence, when considered as a whole and construed most favorably to plaintiff, is sufficient to establish all of the essential requirements of a cause of action for damages for fraudulent representations.

II. Statute of Limitations.

Defendants contend that this action is barred by section 338 of the Code of Civil Procedure which provides a three-year period of limitations for commencement of: "An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." The conferences at which Greene is claimed to have made false representations were held in the latter part of 1935, and the transaction based thereon was completed in January, 1936. The present action, however, was not commenced until June, 1941, more than five years after the alleged fraud took place.

[18, 19] The provision tolling operation of the statute until discovery of the fraud has long been treated as an exception and, accordingly, this court has held that if an action is brought more than three years after commission of the fraud, plaintiff has the burden of pleading and proving that he did not make the discovery until within three years prior to the filing of his complaint. See Sublette v. Tinney, 1858, 9 Cal. 423; Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 P. 809; Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 16 P.2d 268; Knapp v. Knapp, 15 Cal.2d 237, 242, 100 P.2d 759. Further, although negligence by the person defrauded is not a defense to a promptly brought action based upon intentional misrepresentation (see Seeger v. Odell, 18 Cal.2d 409, 414, 115 P.2d 977, 136 A.L.R. 1291), the cases construing section 338, subdivision 4, supra, have held that plaintiff must affirmatively excuse his failure to discover the fraud within three years after it took place, by establishing facts showing that he was not negligent in failing to make the discovery sooner and that he had no actual or presumptive knowledge of facts sufficient to put him on inquiry. See Johnson v. Ehrgott, 1 Cal.2d 136, 137, 34 P.2d 144; Original Min. & Mill. Co. v. Casad, 210 Cal. 71, 74, 290 P. 456; Del Campo v. Camarillo, 154 Cal. 647, 657, 98 P. 1049.

[20-22] Defendants assert that in addition to these requirements plaintiff must show that he made a diligent inquiry to discover whether or not he had been defrauded, and they argue that plaintiff failed to prove that earlier inquiry would not have revealed the falsity of the alleged representations. It is not in every case, however, that a person is barred after three years by failure to pursue an available means of discovering possible fraud. The statute commences to run only after one has knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud, thus putting him on inquiry. Section 19 of the Civil Code provides: "Every person who has actual notice of circumstances *sufficient to put a prudent man upon inquiry* as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact." (Italics added.) Under this section it was held in Tarke v. Bingham, 123 Cal. 163, 55 P. 759, that the plaintiff was not barred by subdivision 4 of section 338 of the Code of Civil Procedure, since nothing had occurred "to excite his suspicion, or to put him upon inquiry." 123 Cal. at page 166, 55 P. at page 760. The court said: "Where no duty is imposed by law upon a person to make inquiry, and where, under the circumstances, 'a prudent man' would not be put upon inquiry, the mere fact that means of knowledge are open to a plaintiff, and he has not availed himself of them, does not debar him from relief when thereafter he shall make actual discovery. *The circumstances must be such that the inquiry becomes a duty, and the failure to make it a negligent omission.*" (Italics added.) Many other decisions have adopted this view. See Mary Pickford Co. v. Bayly Bros., Inc., 12 Cal.2d 501, 511, 86 P.2d 102; Original Min. & Mill. Co. v. Casad, 210 Cal. 71, 76, 290 P. 456; Prewitt v. Sunnymead Orchard Co., 189 Cal. 723, 730, 209 P. 995; Victor Oil Co. v. Drum, 184 Cal. 226, 241, 193 P. 243; Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 P. 809; West v. Great Western Power Co., 36 Cal.App.2d 403, 406 et seq., 97 P.2d 1014; Denson v. Pressey, 13 Cal.App.2d 472, 57 P.2d 522; Edwards v. Sergi, 137 Cal.App. 369, 30 P.2d 541; cf. Smith v. Martin, 135 Cal. 247, 254, 255, 67 P. 779. In many cases it has been said that means of knowledge are equivalent to knowledge. See Shain v. Sresovich, 104 Cal. 402, 405, 38 P. 51; People v. San Joaquin, etc., Assoc., 151 Cal. 797, 807, 91 P. 740; Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 701 et seq., 16 P.2d 268; Knapp v. Knapp, 15 Cal.2d 237, 242, 100 P.2d 759; Bainbridge v. Stoner, 16 Cal.2d 423, 430, 106 P.2d 423; Merrill v. Los Angeles Cotton Mills, Inc., 120 Cal.App. 149, 158, 7 P.2d 329; Daily Telegram Co. v. Long Beach Press Pub. Co., 133 Cal.App. 140, 143–147, 23 P.2d 833; Wheaton v. Nolan, 3 Cal.App.2d 401, 403,

39 P.2d 457; Haley v. Santa Fe Land Imp. Co., 5 Cal.App.2d 415, 420, 423, 42 P.2d 1078; Vertex Inv. Co. v. Schwabacher, 57 Cal.App.2d 406, 415–418, 134 P.2d 891; Bryan v. Nicolas, 67 Cal.App.2d —, 155 P.2d 835; cf. Truett v. Onderdonk, 120 Cal. 581, 589, 53 P. 26; Phelps v. Grady, 168 Cal. 73, 79, 80, 141 P. 926; Malone v. Clise, 18 Cal.App.2d 154, 157, 63 P. 2d 321. This is true, however, only where there is a duty to inquire, as where plaintiff is aware of facts which would make a reasonably prudent person suspicious. In the Lady Washington case, the court said (113 Cal. at page 487, 45 P. at page 810) that "as the means of knowledge are equivalent to knowledge, *if it appears that the plaintiff had notice or information of circumstances which would put him on an inquiry* which, if followed, would lead to knowledge, or that the facts were presumptively within his knowledge, he will be deemed to have had actual knowledge of these facts." (Italics added.)

The reason for the rule is well stated in Victor Oil Co. v. Drum, supra, 184 Cal. at page 241, 193 P. at page 249: "The courts will not lightly seize upon some small circumstance to deny relief to a party plainly shown to have been actually defrauded against those who defrauded him on the ground, forsooth, that he did not discover the fact that he had been cheated as soon as he might have done. It is only where the party defrauded should plainly have discovered the fraud except for his own inexcusable inattention that he will be charged with a discovery in advance of actual knowledge on his part." It follows that plaintiff is not barred because the means of discovery were available at an earlier date provided he has shown that he was not put on inquiry by any circumstances known to him or his agents at any time prior to the commencement of the three-year period ending June, 1941.

[23, 24] The record in this case contains a most complete presentation of all relevant circumstances that might have a bearing upon this question up to and including the completion of the transaction in January, 1936. Most of these factors have been discussed heretofore in connection with the sufficiency of the evidence to establish a cause of action for fraud. The problems there considered, however, did not directly concern ordinary negligence by plaintiff, since this would not be a defense to an action based upon intentional misrepresentation. See Seeger v. Odell, 18 Cal.2d 409, 414, 115 P.2d 977, 136 A.L.R. 1291. Accordingly, we must now determine whether plaintiff has brought himself within the exception to the statute of limitations. Plaintiff's evidence, if believed, disclosed certain factors that may have tended to discourage the making of an exhaustive independent investigation, and we cannot hold, as a matter of law, that any of the circumstances known to plaintiff should have put a reasonably prudent man upon inquiry. The jury could have found that Greene's representations were of such a nature as to lull plaintiff into a sense of security or state of inaction,—an important factor to be considered in determining whether or not plaintiff was negligent in failing to investigate. See, for example, Denson v. Pressey, 13 Cal.App.2d 472, 476, 57 P.2d 522; Edwards v. Sergi, 137 Cal. App. 369, 30 P.2d 541.

[25, 26] Another pertinent factor is that there was a fiduciary relationship between the parties at the time of the fraudulent representations. Although the general rules relating to pleading and proof of facts excusing a late discovery of fraud remain applicable, it is recognized that in cases involving such a relationship facts which would ordinarily require investigation may not excite suspicion, and that the same degree of diligence is not required. In Rutherford v. Rideout Bank, 11 Cal.2d 479. 486, 80 P.2d 978, 117 A.L.R. 383, it was said that because of such a relationship plaintiff could not be charged with lack of diligence even though an inquiry would have disclosed the true value of the property involved. See, also, Bainbridge v. Stoner, 16 Cal.2d 423, 430, 106 P.2d 423; Knapp v. Knapp, 15 Cal.2d 237, 242, 100 P.2d 759; Lataillade v. Orena, 91 Cal. 565, 27 P. 924, 25 Am.St.Rep. 219; Laraway v. First Nat. Bk. of La Verne, 39 Cal.App.2d 718, 104 P.2d 95; 12 Cal.Jur. 799; (1942) 30 Cal.L.Rev. 589, 591; cf. Marston v. Simpson, 54 Cal. 189; Edward Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 575–577, 126 P. 351, 42 L.R.A.,N.S., 125 Defendants argue that the fiduciary relationship terminated when the sale was completed and that plaintiff was no longer entitled to the benefit of the rule. The relationship, nevertheless, did exist at the time of the asserted fraud, and plaintiff was under no duty to make a complete search and reexamination of the entire transaction immediately after it took place merely be-

cause the fiduciary relationship between the parties was terminated thereby. Under these circumstances it was for the jury to determine whether it was negligence for plaintiff, after completion of the transaction, to continue to rely upon the representations that were made while he was a stockholder.

[27] Defendants contend, however, that certain facts indisputably known to plaintiff were sufficient to put him on inquiry. These contentions must be examined in the light of the rule announced in Northwestern Portland Cement Co. v. Atlantic P. C. Co., 174 Cal. 308, 312, 163 P. 47, 49. The court there said that when the facts are susceptible to opposing inferences, whether "a party has notice of 'circumstances sufficient to put a prudent man upon inquiry as to a particular fact,' and whether 'by prosecuting such inquiry, he might have learned such fact' (Civ.Code, § 19), are themselves questions of fact to be determined by the jury or the trial court." See, also, West v. Great Western Power Co., 36 Cal.App.2d 403, 411, 97 P.2d 1014; 20 Cal.Jur. 240. The facts mentioned by defendants have been discussed and analyzed heretofore in connection with the contention that the evidence is insufficient to establish either actionable misrepresentation or plaintiff's reasonable reliance thereon, and we shall not repeat them here. Although the jury could properly have concluded that knowledge of these facts and others urged by defendants should have put a prudent man on inquiry, we are satisfied that none of the matters admittedly known to plaintiff up to and including the time of completion of the transaction compelled such a conclusion as a matter of law.

[28] The evidence is clearly sufficient to support the implied finding of the jury that plaintiff learned nothing to arouse his suspicions during the period between the completion of the transaction and the alleged discovery of the fraud in 1941. The record shows that plaintiff went to Europe some time in 1936 and remained there until January of 1941, when he returned to New York. He testified that prior to that time he had no information, nor had anything come to his attention, that would make him suspect that he had been "overreached" in the transaction, or had not received the full value of his stock, or had been defrauded. Although absence from the locality would not toll the statute of limitations if it had already commenced to run (for example, if plaintiff had been put on inquiry by facts known to him prior to his trip to Europe), it was a relevant factor to be considered by the jury in explanation of the delay in discovery. See Seeger v. Odell, 18 Cal.2d 409, 418, 115 P.2d 977, 136 A.L.R. 1291; cf. Teats v. Caldwell, 28 Cal.App. 206, 210, 151 P. 973.

[29] Defendants contend, next, that plaintiff has not established sufficient facts relating to the claimed actual discovery of the fraud in 1941. In addition to negativing notice of the fraud and excusing failure to discover it sooner, plaintiff must allege and prove facts showing the time and surrounding circumstances of the discovery and what the discovery was. See Davis Rite-Lite Sales Co., 8 Cal.2d 675, 681, 67 P.2d 1039; Kelly v. Longan, 5 Cal.2d 274, 276, 277, 53 P.2d 971; Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 703, 16 P.2d 268; Original Min. & Mill. Co. v. Casad, 210 Cal. 71, 75, 290 P. 456; Victor Oil Co. v. Drum, 184 Cal. 226, 241, 193 P. 243.

[30-32] In applying this rule it is important to recognize the distinction between cases where the plaintiff is under a duty to inquire and those in which he is not obliged to make any investigation until he has notice or knowledge of the happening of some incident or of some fact or facts sufficient to arouse the suspicions of a reasonable person. Where there is a duty to investigate, the plaintiff may be charged with knowledge of the facts which would have been disclosed by an investigation; but where, as here, there is no prior duty to investigate, the statute does not run until he has notice or knowledge of facts sufficient to put a reasonable man on inquiry. The rule that the plaintiff must show what information he has obtained so that the court may determine whether or not the facts leading to the discovery of the fraud existed for more than three years prior to the commencement of the suit and could have been discovered by the exercise of ordinary diligence, is applicable only where the plaintiff was under a duty to make a diligent inquiry and he seeks to excuse his failure to discover the fraud by showing that the true facts were not then available or that the inquiry he did make was diligent, though unsuccessful. See Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 703, 704, 16 P.2d 268; cf. Phelps v. Grady, 168 Cal. 73, 77, 78, 141 P. 926; Wood v. Carpenter, 101 U.S. 135, 140, 25 L.Ed. 807. In the absence of a duty to make inquiry, as pointed out above, the

statute does not run merely because the means of discovery were available, and plaintiff is not compelled to disprove that such means existed. He need only establish facts sufficient to show that he made an actual discovery of hitherto unknown information within three years before the filing of the action. In the Scarborough case, supra, the plaintiff merely showed that, after a lapse of more than the statutory period, an investigation was made which led to discovery of the fraud, but there was no showing of the reasons which prompted the investigation. As the court there pointed out (216 Cal. at page 704, 16 P.2d 268), for all that appeared the plaintiff may have had prior knowledge of the suspicious facts, and there was no showing why an earlier investigation was not made. The requirement that plaintiff show what information he received or what suspicious facts came to his notice is imposed in order that the court may determine whether or not the discovery was made within the time alleged, that is, whether plaintiff actually learned something he did not know before. Lady Washington C. Co. v. Wood, 113 Cal. 482, 487, 45 P. 809; Victor Oil Co. v. Drum, 184 Cal. 226, 241, 193 P. 243; Galusha v. Fraser, 178 Cal. 653, 657, 174 P. 311. In the Lady Washington case, at page 487, of 113 Cal., at page 810 of 45 P., the court said that plaintiff must "show the times and the circumstances under which the facts constituting the fraud were brought to his knowledge, *so that the court may determine whether the discovery of these facts was within the time alleged.*" (Italics added.)

[33] The pleading on this point is sufficient. The amended complaint alleges that plaintiff had no prior knowledge that any fraud had been perpetrated; that in February, 1941, he had a conversation with a man in New York who informed him that after plaintiff had left for Europe in 1936, Charles Crocker had stated that in the settlement of the will contest Greene and Crocker's lawyer had gotten together and had given plaintiff a "fearful trimming," and that, as a part of the settlement of the contest, plaintiff had sold his stock to them for $25 a share when its actual value was at least $120 a share; that about two months thereafter he came to San Francisco and consulted with Aureguy, Harris and his present counsel; and that in the early part of May, 1941, his counsel "informed him that he had procured information that the Hobart Estate Company was and apparently had been for several years in excellent financial condition and owned numerous valuable properties which were unencumbered."

[34, 35] Although the supporting evidence is less detailed than the allegations, it is sufficient to bring plaintiff within the rule above stated. He testified, in substance, that upon his return to New York in January, 1941, he received "some information * * * or suggestion" from an unidentified person concerning the holdings of the Hobart Estate Company that was at variance with Greene's representations; that prior to that time he had no information, nor had anything come to his attention, that would make him suspicious that he had been defrauded; that as soon as he was able he came to San Francisco and consulted Aureguy, Harris and his present counsel; and that he then received information as to the nature and value of the company's holdings, and the status of encumbrances, that was excessively at variance with the statements made to him by Greene. Plaintiff offered no further evidence in support of the allegations regarding the conversation in New York, and it is obvious from the record that his counsel did not ask him to state the details of the information received, fearing that a recital of what plaintiff learned might be inadmissible hearsay.*

Plaintiff has thus shown that he had no notice or knowledge of any suspicious facts or circumstances prior to January, 1941, that at that time he was first put on notice of possible fraud, and that within six months thereafter he made an investigation, discovered the fraud, and commenced the action. It follows, therefore, that he has brought himself within the exception to subdivision 4 of section 338 of the Code of Civil Procedure and that he is not barred by the statute of limitations.

III. Instructions.

Defendants assert that prejudicial errors were committed in instructions to the jury resulting in a miscarriage of justice.

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* Such evidence would have been admissible, not for the purpose of showing the truth of the statements made, but to establish the fact that the information was received. Smith v. Whittier, 95 Cal. 279, 293, 294, 30 P. 529; see, Dunn v. Shamoon, 37 Cal.App.2d 486, 491, 99 P.2d 1113; Head v. Wilson, 36 Cal.App.2d 244, 251, 97 P.2d 509; 6 Wigmore on Evidence, (3d ed. 1940) § 1789, pp. 235, 236.

[36] The court instructed the jury that, "Where a representation is made of facts which are or may be assumed to be within the knowledge of the party making it, the knowledge of the receiving party concerning the real facts, which shall prevent his relying on and being misled by it, must be clearly and conclusively established by the evidence." The court then specifically applied the announced rule to the facts of the present case, stating: "Therefore, if you believe from the evidence that the defendant Greene did in fact make representations calculated to deceive the plaintiff and to induce him to part with his stock for less than its value, then he cannot excuse the deceit by showing that the plaintiff had opportunity to examine or sources of information which would have disclosed the true facts and the falsity of the representations, nor can he excuse himself by saying that the plaintiff had constructive notice of the true facts; but in order to so excuse himself it would have been necessary that the evidence clearly and conclusively establish that the plaintiff Hobart had actual knowledge of the real facts, which would prevent his relying on and being misled by any representations of the defendant Greene."

These instructions in effect placed upon defendants the obligation of establishing certain facts by *conclusive* evidence, thereby imposing a burden of proof greater than that required by law. Conclusive evidence is defined in section 1837, Code of Civil Procedure, as "that which the law does not permit to be contradicted." See, also, section 1978 of the Code of Civil Procedure which provides: "No evidence is by law made conclusive or unanswerable, unless so declared by this code." Webster defines "conclusive" as "Forming an end or termination. Putting an end to debate or question; involving a conclusion or decision; decisive; final; as, *conclusive* evidence; a *conclusive* presumption." As stated in Watkins v. Wallace, 19 Mich. 57, 76: "* * * a jury instructed to act only on conclusive evidence could hardly fail to suppose it must disregard all balancing of evidence, and require a case absolutely free from any doubt."

We find no California statute or decision which requires that knowledge of facts that would prevent reliance must be established by conclusive or unanswerable evidence, and the instructions that such evidence is necessary were erroneous. The language used in these instructions was apparently taken from 3 Pomeroy, Equity Jurisprudence, 5th Ed. 1941, § 895, and it was quoted in the cases of Teague v. Hall, 171 Cal. 668, 670, 671, 154 P. 851; French v. Freeman, 191 Cal. 579, 586, 587, 217 P. 515; McMahon v. Grimes, 206 Cal. 526, 536, 537, 275 P. 440; West v. Great Western Power Co., 36 Cal.App.2d 403, 413, 414, 97 P.2d 1014; and Hill v. Garvey, 56 Cal.App. 98, 105, 106, 205 P. 61. These decisions, however, were concerned with other principles of law set forth by Pomeroy, and the use of the word "conclusively" was not an issue and was not discussed. The cases, therefore, are not authority upon the question here involved, since it was not considered therein. Maguire v. Hibernia S. & L. Soc., 23 Cal.2d 719, 730, 146 P.2d 673, 151 A.L.R. 1062.

[37] Plaintiff cites numerous cases which hold that certain facts must be established by "clear and convincing" or "satisfactory" evidence. The use of these phrases, however, is not equivalent to a requirement of unanswerable evidence. This court has said upon two occasions that where a deed purports to convey land absolutely, oral testimony that it was intended to be something entirely different, such as a mortgage or trust, must be "clear, convincing, and conclusive." Sheehan v. Sullivan, 126 Cal. 189, 193, 58 P. 543, 544; Goodfellow v. Goodfellow, 219 Cal. 548, 554, 27 P.2d 898; see, also, Miller v. Miller, 55 Cal.App.2d 199, 205, 130 P.2d 438; Stevens v. Fetterman, 76 Cal.App. 741, 753, 246 P. 102; Smith v. Flynn, 64 Cal.App. 218, 220, 221 P. 384; McGehee v. Curran, 49 Cal.App. 186, 198, 193 P. 277; cf. Ford v. Ford, 44 Cal.App. 415, 418, 186 P. 164; 12 Cal.Jur. 834. Many other decisions, however, and in particular the more recent ones, have omitted the word "conclusive," employing instead such terms as "clear and convincing," "satisfactory," and "unequivocal," and it must now be regarded as settled that, whatever the proof necessary, it need not be "conclusive." See Beeler v. American Trust Co., 24 Cal.2d 1, 7, 8, 147 P.2d 583; Stromerson v. Averill, 22 Cal.2d 808, 815, 141 P.2d 732; Chard v. O'Connell, 7 Cal.2d 663, 665, 666, 62 P.2d 369; Carlson v. Robinson, 7 Cal.2d 235, 236, 60 P.2d 426; 12 Cal.Jur. 832; 17 Cal.Jur. 756, 757; 25 Cal.Jur. 247-249; and cases cited therein. Further, it should be noted that these decisions are concerned with certain

specific matters that are totally unrelated to the problem here presented, and they do not in any way indicate the type of evidence necessary to show that a person claiming to have been defrauded knew of facts which would prevent his relying upon the representations made to him.

[38] Plaintiff argues that the error was cured by certain instructions given at the request of defendants which contained general statements relating to the plaintiff's burden of proof in an action for fraud. The erroneous statements using the word "conclusively," however, were specifically directed to a narrow and important issue of the case, and it cannot be said that the error was overcome by general instructions relating to the burden of proof.

[39] The court also instructed the jury that: "If false representations were made to the plaintiff by the defendant Greene, and those representations were of a nature calculated to induce plaintiff to sell his stock for the sum of $25 per share, or any other sum, a presumption arises that the false representations induced him to do so, and that he relied upon them in making the sale of the stock." The words "or any other sum" in this instruction are confusing in that they may have led the jury to believe plaintiff was entitled to recover although the contract was not to sell at $25 as claimed by plaintiff but at $55 per share, as asserted by defendants, or at some other figure. Also, although an inference of reliance may be drawn from false representations of a nature calculated to induce a sale, it is not true that a "presumption" arises therefrom.

[40] The jury was instructed further that: "The plaintiff had an absolute right to rely upon the expressed statements of an existing fact by the defendant Greene, the truth of which was known to Greene and unknown to him, and he was under no obligation to investigate and verify statements, to the truth of which the defendant with full means of knowledge had deliberately pledged his faith." The instruction as given was erroneous in that plaintiff did not have "an absolute right to rely" upon Greene's statements. Reliance must be justifiable, and if the jury believed that the "conduct of the plaintiff in the light of his own intelligence and information was manifestly unreasonable" he should be denied a recovery. See Seeger v. Odell, 18 Cal.2d 409, 414, 415, 115 P.2d 977, 136 A. L.R. 1291.

[41-43] We are of the opinion that these errors require a reversal of the judgment. In passing upon the sufficiency of the evidence to support the verdict all conflicts must be resolved in favor of the implied findings of the jury, since it is the sole judge of the credibility of the witnesses and the weight of the evidence; but in determining whether a judgment must be reversed because of errors in instructions, we are required to examine the entire cause including the evidence and decide whether in our opinion the errors have resulted in a miscarriage of justice. Cal. Const., art. VI, § 4½. This is often a most difficult and perplexing task but in the present case the condition of the record is such that the prejudicial effect of the errors is apparent.

The testimony of plaintiff and his witnesses as to essential relevant matters is disputed by defendants and the evidence is subject to conflicting inferences. Plaintiff's whole case rests upon his assertion that he agreed to settle the will contest for $25,000 and sell his stock for $25 per share and that he was induced to enter into the transaction in reliance upon Greene's representation that the stock was not worth more than the agreed price of $25 a share. The evidence is conflicting both as to the terms of the agreement and as to whether the asserted representation was actually made. It is Greene's word against the word of plaintiff and Aureguy.

It is significant that Harris, who was then plaintiff's attorney and who was present when the terms were agreed upon and the representation was assertedly made, failed to corroborate plaintiff and Aureguy in these two vitally important particulars. The testimony of Harris is entirely silent with respect to plaintiff's story that the transaction was made upon the basis of the payment of $25,000 for settlement of the will contest and $25 per share for the stock. He testified merely that the settlement of the will contest was integrated with the sale of the stock and that this was shown by his letter to Crocker's attorney written shortly after the last conference with Greene. In this letter Harris stated it was agreed that in consideration of the dismissal of the will contest and the transfer of plaintiff's stock, the representatives of the estate would pay $55 a share for the 833⅓ shares. The written instruments used in carrying out the agreement of the parties were to the same general effect. Although, as we have pointed out heretofore, these writings were not necessarily inconsistent with plaintiff's version of the transaction, oral testimony was required to explain the apparent discrepancy between the contemporaneous written instruments and what plaintiff claims constituted the agreement. The testimony of plaintiff and Aureguy that a specified sum was paid for the settlement of the will contest and a further fixed amount for the purchase of the stock was not supported by Harris. Nor did Harris corroborate the testimony of plaintiff and Aureguy that Greene represented the stock to be worth not more than $25 a share. This representation is the very heart of plaintiff's case, and although the extended discussion with Greene concerning it, as related by plaintiff and Aureguy, assertedly occurred in the presence of Harris, the latter testified he had no recollection that Greene gave any opinion as to the value of the stock. Thus plaintiff's version of the transaction, disputed by Greene, is not fully supported either by the contemporaneous writings or by the testimony of his attorney.

Moreover, as shown by the record, the jury appears to have been reluctant to return any verdict against Greene. At 10:20 p. m., some hours after it had retired to deliberate, the jury brought in a verdict against the defendant corporation for actual damages of $32,175 but with no verdict for or against Greene. The court informed the jury that it could not return a verdict against the principal without a verdict against the agent and directed it to continue deliberating and return a verdict against the agent and the principal or in favor of the agent or the principal. About three hours later, at 1:35 in the morning, the jury brought back the same verdict against the corporation with a verdict against Greene for no actual damages but for exemplary damages only in the sum of $10,000. The court again refused to accept the verdict, explaining that no verdict could be found against a principal without a verdict against the agent in the same amount. In response to a request for additional clarifying instructions, the court stated: "I find that the more explaining there is, the more conclusion there is. I am not inclined to give much more in the way of instruction. I think they are fully informed and have been all along. They are confused but they have been completely instructed." At 2:02 a. m., approximately fifteen minutes after the jury had retired, it returned with the present verdict against both defendants for actual damages in the sum of $32,175, and against Greene for exemplary damages in the sum of $10,000.

It is obvious that the jury was confused in a close case in which the evidence was sharply conflicting. The errors in the instructions related to matters vital to defendants and, when considered together, must be regarded as prejudicial.

It appears that some instructions given at the request of plaintiff were outside the issues of the case and that there were certain errors in others. Since the judgments must be reversed, and as it is unlikely that the errors complained of will be repeated upon a retrial of the case, it is unnecessary to discuss them here.

IV. Liability of Hobart Estate Company as Principal of Greene.

Plaintiff seeks to hold defendant corporation on the theory that Greene was its agent. There is no claim that there was any express authority from the corporation to make the alleged misrepresentations, and there is no evidence that Greene purported to act for the corporation in the transaction or that plaintiff believed that he was so acting. Plaintiff contends however, that the corporation is nevertheless liable under the circumstances of this case.

[44] First, it is urged that Greene gave false information to an inheritance tax appraiser which led to a false appraisement of the stock in the estate of plaintiff's father at $40 per share; that the corporation was required by law to furnish the information; that Greene acted as its agent in so doing; that by such misrepresentations the corporation committed a fraud on the public; and that any member injured thereby had a cause of action against the corporation. Plaintiff's own testimony, however, shows that he did not act or rely on the appraisal. He testified that Greene told him that the value fixed by the appraiser was too high, and that he believed Greene was telling the truth in fixing the value at $25. If he did not act or rely on the $40 valuation, he was not injured by any misinformation given to the appraiser.

[45-49] Plaintiff next contends that Greene as general manager was charged with the conduct of the business of the corporation, that he desired to get rid of plaintiff as a stockholder because he was a troublemaker, and that, accordingly, by

facilitating the transaction, he acted in the interests of the corporation and hence within the scope of his agency. Actual authority may be implied as well as express and the implied powers of a general agent or manager are very broad, embracing authority to do all acts customarily connected with the business in which he is engaged. See Los Angeles L. Co. v. Los Angeles, 106 Cal. 156, 161, 39 P. 533; 1 Cal.Jur. 716; 2 Am.Jur. 70-73; (1934) 22 Cal.L. Rev. 392, 394; cf. Civ.Code, § 23119. It does not appear, however, that Greene was acting within the scope of his duties as general manager of the company in negotiating the purchase of the stock from plaintiff. The transaction was between two individual shareholders, namely, plaintiff and Greene's principal, Alice Lester. Ordinarily, a corporation is not interested in a sale of stock by one shareholder to another and, in the absence of special circumstances, such transactions are not within the implied authority of a general manager. See Bisbee v. Midland Linseed Products Co., 8 Cir., 19 F.2d 24, 27; cf. Rattray v. Wickersheim Implement Co., 36 Cal.App. 253, 256, 257, 171 P. 964. Any possible advantage to the corporation derived from elimination of plaintiff as a stockholder was but incidental to the sale between the two individual shareholders and does not render the corporation liable. It cannot be said that the involuntary acceptance of the benefit, if any, justified the imposition of liability on the corporation on the theory of ratification, since any benefit from the sale was of such a nature that the corporation could not have rejected it.

The company was not liable merely because Greene was its president and general manager. See Rest., Agency, § 258, Comment b., where it is said: "Statements not connected with agent's employment. Except where the position occupied by an agent enables him to perpetrate a fraud, a principal is subject to liability for the deceit of an agent only in connection with matters entrusted to him. Misrepresentations concerning matters which are beyond the range of what the agent is employed to handle are no more effective to create liability against the principal than are the agent's promises as to them."

[50, 51] Plaintiff contends, finally, that the corporation is liable because of the position in which it had placed Greene, who was apparently the only person who had knowledge and information as to the value of the stock and the factors on which the value depended. This contention is based on the doctrine of ostensible authority, which is defined as such authority "as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." Civ. Code, § 2317. Under this doctrine a principal is "bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof" Civ.Code, § 2334. The California cases hold that, under sections 2317 and 2334, a plaintiff cannot recover on the basis of ostensible authority without a showing of facts sufficient to raise an estoppel. Hansen v. Burford, 212 Cal. 100, 297 P. 908; Ernst v. Searle, 218 Cal. 233, 22 P.2d 715; Van Buren v. Green, 120 Cal. App. 461, 7 P.2d 1079; see, also, 22 Cal.L. Rev. 392, 395, 396. As said in Ernst v. Searle, 218 Cal., supra, at page 237, 22 P. 2d at page 716: "Its essential elements are representation by the principal, justifiable reliance thereon by the third party, and change of position or injury resulting from such reliance." See, also, Rest., Agency, § 265.

[52-54] The evidence does not permit a finding that these elements are present here. The record is devoid of any showing that plaintiff at the time of the transaction thought or believed that Greene was acting for the corporation, or that he relied on any such belief. His attorney, Harris, wrote to Crocker's attorney that plaintiff's stock was to be transferred to the nominee of the representatives of the estate and that they would make payment therefor. Unless it can be said that Greene was acting or purporting to act for the corporation, liability should not be predicated solely on the fact that he was the only person who possessed knowledge of the value of the stock. Although the fact that Greene had special knowledge of the affairs of the corporation entitled plaintiff to rely on Greene's representations concerning those facts, it would not justify plaintiff in believing that Greene was acting on behalf of the corporation when Greene did not purport to act in that capacity and plaintiff understood that he was acting as a representative of the estate and for the purchaser of the stock.

The case of Rutherford v. Rideout Bank, 11 Cal.2d 479, 80 P.2d 978, 117 A.L.R. 383, is clearly distinguishable in that there the bank manager who was guilty of the fraudulent representations purported to be acting for the bank, plaintiff believed he was so acting and was authorized to do so, and, in addition, it was customary for the manager to make statements to customers upon matters such as those embraced by the representations.

The judgments are reversed.

SHENK, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

SPENCE, Justice (concurring).

I concur in the reversal of the judgments upon the grounds stated but cannot subscribe to all that is said in the majority opinion. In my opinion, the judgments should be reversed upon the further grounds: (1) That the evidence, as a matter of law, was insufficient to establish actionable fraud and (2) that plaintiff's alleged cause of action, as a matter of law, was barred by the statute of limitations. I am of the view that the facts and the law relating to these further grounds for reversal were exhaustively and correctly discussed in the dissenting opinion written by Mr. Justice Knight at the time this cause was pending in the District Court of Appeal, to which dissenting opinion reference is hereby made. Hobart v. Hobart Estate Co., Cal.App., 148 P.2d 41, 59.

EDMONDS, J., concurred.

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69 Cal.App.2d 371

TAYLOR v. WRIGHT et al.

Civ. 12701.

District Court of Appeal, First District, Division 1, California.

May 29, 1945.

Rehearing Denied June 28, 1945.

Hearing Denied July 26, 1945.

1. Corporations 🔑316(1)

The "special facts rule," as respects a director's duty of disclosure when dealing with stockholders, is that where special circumstances or facts are present which make it inequitable for the director to withhold information from the stockholder, the duty to disclose arises, and concealment is fraud.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Facts Rule".

2. Corporations 🔑320(11)

Evidence that directors who knew real value of corporation's stock which was not sold or traded on any exchange purchased a stockholder's shares at less than actual value by concealing their identity as purchasers and by refusing to disclose the real value of the stock justified finding that directors were guilty of fraud, making them liable to stockholder in damages.

3. Limitation of actions 🔑100(13)

An action against corporation directors for damages for fraud in purchasing plaintiff's stock at less than actual value was not barred by limitations when brought within three years from time that plaintiff could reasonably have discovered the fraud. Code Civ.Proc. § 338, subd. 4.

4. Action 🔑27(5)
Corporations 🔑320(12)

An action against corporation directors for damages for fraud in purchasing plaintiff's stock at less than actual value did not arise out of contract, but out of tort, in which exemplary damages and interest were recoverable. Civ.Code, §§ 3288, 3294, 3343, 3357.

5. Appeal and error 🔑1011(1)

District Court of Appeal cannot disregard conflicts in the evidence.

◆

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Action by Emma Foy Taylor against Marie A. Wright and Allen J. Wright to recover damages for fraud alleged to have been committed by defendants in buying certain stock from plaintiff at less than its actual value. Verdict and judgment for plaintiff, and defendants appeal.

Affirmed.

Fitzgerald, Abbott & Beardsley, of Oakland, for appellants.

Robert E. Hatch, of San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff, Emma Foy Taylor, brought this action against Marie A. Wright and Allen J. Wright, mother and son, and others, to recover damages for fraud alleged to have been committed by defendants in buying 3,750 shares of stock owned by her in the Commonwealth Acceptance Corporation at less than its actual value. The jury returned a verdict for compensatory damages in the sum of $4,250, exemplary damages in the sum of $500, and interest in the sum of $1,912.50. From the judgment based on these verdicts the Wrights appeal.

This case has been tried twice. In the first trial plaintiff obtained a verdict of $6,462.50, and the trial judge added interest of $3,153.75. Defendants' motion for a new trial based on insufficiency of the evidence to sustain the verdict was granted.

Appellants' main contention on this appeal is that the evidence is insufficient, as a matter of law, to sustain the judgment. They urge that their motions for a nonsuit and directed verdict should have been granted, and request this court, under § 629 of the Code of Civil Procedure, to order judgment to be entered for them. It is also contended that the action is barred by the statute of limitations, and that it was error to instruct the jury that in its discretion it might award exemplary damages and interest in this action.

So far as the question of the sufficiency of the evidence is concerned, when the proper basis of liability is ascertained, we are presented with the usual fact case. As will be later pointed out, under the facts, the Wrights owed a duty of disclosure to the respondent. Mrs. Taylor produced evidence which if believed by the jury, as it was, shows that the Wrights violated that duty and that she was damaged thereby. The appellants produced evidence which if believed by the jury, which it was not, would have supported implied findings of honesty and fair dealing. In such a case it is for the jury, and the trial judge in passing on the motion for a new trial, to pass upon the credibility of the witnesses. It is not for the appellate court to determine where the truth lies. The appellate court has no power to weigh the evidence. The appellants, by emphasizing certain evidence, and by disregarding certain other evidence, particularly certain legitimate and reasonable inferences from the evidence which they characterize as mere "conjecture" and "surmise," make a quite persuasive argument that the evidence is insufficient to support the judgment. When the entire record is considered, however, we are convinced that the implied findings of the jury are supported by substantial evidence and by legitimate and reasonable inferences from that evidence.

Although the rules applicable to the power of the appellate courts in passing upon the sufficiency of the evidence are elementary and have been frequently stated, in view of the apparent sincerity with which appellants contend that the evidence is insufficient, it would appear proper to refer briefly to such rules before pointing out the evidence that supports the judgment. In Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183, 184, these rules are briefly stated as follows: "In reviewing the evidence on such an appeal, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." See, also, Albaugh v. Mt. Shasta Power Corp., 9 Cal.2d 751, 73 P.2d 217; Bellon v. Silver Gates Theatres, Inc., 4 Cal.2d 1, 47 P.2d 462; Raggio v. Mallory, 10 Cal.2d 723, 76 P.2d 660; Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689; Juchert v. California Water Service Co., 16 Cal.2d 500, 106 P.2d 886; Peri v. L. A. Junction Ry., 22 Cal.2d 111, 137 P.2d 441; Atherley v. Market St. Ry. Co., 42 Cal.App.2d 354, 108 P.2d 927; Estate of Pessagno, 58 Cal.App.2d 390, 136 P.2d 644; Laherty v. Connell, 64 Cal.App.2d 355, 148 P.2d 895.

Applying these well settled rules to the record before us, the following facts appear. The respondent is a widow, aged 77 years. She had purchased 3,750 shares of stock in the Commonwealth Acceptance Corporation in 1928 or 1929 for $15,000, from a Miss Cousins, who introduced her to Mr. Lester Johnson, president of the company. Johnson is a brother-in-law of appellant Allen Wright, and was president of the company during all times here pertinent. He was originally named as a defendant but was granted a nonsuit at the first trial. The trial court excluded evidence of the content of many conversations respondent had with Johnson relating to her stock, and relating to the transaction here challenged, but sufficient was admitted to show that respondent had implicit faith in Johnson and relied upon him for advice. It also appears that Johnson and appellant Allen Wright were the two executives of the company and actually ran the company. They frequently discussed the company affairs during all times here pertinent. Mrs. Wright was a large stockholder of the company. She was a director as was her son Allen Wright. Allen Wright was also a stockholder and an officer, being secretary. From 1933 through 1936 Mrs. Wright began to buy additional stock in the company, and by the end of 1936 she owned about half the issued stock.

The Commonwealth Acceptance Corporation is a Delaware company with its principal and only office in Oakland, California. The company was originally organized in 1925 to handle automobile financing. Later, and starting about 1931, it began to deal in stocks, and ultimately its greatest business was in the investment field. One of the securities it began to purchase in 1931 was Shell Union stock. By December of 1935 the Shell stock had appreciated in value over $80,000—that is, had the Shell stock been sold it would have brought in an $80,000 profit to the company.

The company through its board of directors, the two defendants and Johnson constituting a majority of the board, stopped paying dividends in 1931, the last dividend being paid in October of 1931. Each year, about March or April, the company issued to its stockholders a financial statement for the preceding year. The statement of 1933 showed a net profit of $86.35 for the year's operation. That for 1934, issued in March 1935, showed a net loss of $3,615.53. These various statements listed as an asset an item of "marketable securities" at "cost." The various stocks were not listed, but the cost price of the entire portfolio was set forth. This was admittedly one proper way to make up a financial statement. Such a statement is relatively valueless, however, because it does not give the present market value of the securities.

As already pointed out, respondent owned 3,750 shares of stock in the company, and in 1935 she was the fifth largest stockholder. She had incurred an indebtedness with the American Trust Company, First Berkeley Branch, and in 1931 pledged the 3,750 shares with that bank, together with other collateral, to secure the loan. The pledge agreement was in the usual form used in such transactions. By 1935 she had reduced the loan to $5,700. The loan, in that year, was what is known as a "distressed loan," that is the security was not sufficient to support the loan and respondent was apparently unable to make the called for payments. The bank had several times tried to ascertain the value of the Commonwealth stock. The stock was not listed on any exchange and there was no over-the-counter market. The bank's officers had several times called Johnson or appellant Allen Wright and had been told by them that there was no market or prospective purchasers for the stock.

During the fall of 1935 some of the stockholders of the company, not including respondent, became dissatisfied with the way Johnson and the Wrights were running the company. Some of the stockholders were particularly disturbed by a transaction whereby another corporation wholly owned by Johnson and the Wrights, and which owed Commonwealth over $26,000 became a "subsidiary" of Commonwealth, and by this means apparently the debt was extinguished.

This then was the background as it existed in November of 1935. A corporation which had been transformed into an investment company that was highly solvent and which could on very short notice have liquidated just one of its assets—the Shell stock—at a profit of over $80,000. No dividends had been paid for four years. The only way it could make a profit was to sell some of its stock. So far as the financial statements issued to the stockholders are concerned they showed that the company was being operated at a loss which was increasing year by year. Some stockholders were getting impatient with the management. Under these circumstances, and knowing exactly the financial condition of the company, appellant Allen Wright hired Ben T. Stowell as an agent for his mother. Wright testified that the main purpose of hiring Stowell was to have him ascertain the attitudes of the various groups of stockholders. It is admitted, however, that Wright also authorized Stowell to offer to buy the shares of dissatisfied stockholders who wished to sell. It is highly significant that Stowell's sole compensation for services rendered was to be a commission of twenty cents per share for each share of stock purchased. The jury could have reasonably disbelieved Wright's and Stowell's testimony that the main reason why Stowell was hired was to ascertain the attitude of dissenting stockholders. Both Wright and Stowell admitted that Stowell was instructed not to volunteer any information as to who his principal was, and it is admitted that Stowell told no one connected with the Taylor deal that he was actually acting on behalf of the Wrights. It is a legitimate and reasonable inference that Wright hired Stowell to buy the stock of stockholders and deliberately withheld from the prospective sellers the identity of the purchaser. It is also a legitimate and reasonable inference from the evidence that all this was done as part of a scheme conceived by Wright whereby he and his mother could secure the stock of this company at depressed values for lower than the real value of such stock.

The stock at this time had a liquidation value of at least $2.20 per share, and an actual value much higher. It should be here mentioned that the jury by its verdict fixed the value of the stock at $2.20, and thus allowed damages based on the lowest possible value appearing in the evidence. It was apparently Wright's desire to buy as much of the stock as possible at about $1 a share and thus not only make a handsome profit but also, through his mother, get control of the company. Wright had an intimate knowledge of the corporation's holdings. He followed the market daily, and although he testified he thought the liquidation value of the stock was about $1.50 per share, it is a legitimate and reasonable inference from the evidence that he actually knew it was at least $2.20. All during this period Wright was in frequent communication with Johnson about corporate affairs, but he testified he did not tell Johnson about the hiring of Stowell, although Johnson was president of the company and related by marriage to Wright. According to Wright, Johnson did not know anything about Stowell until after the Taylor deal was closed.

In order to get Stowell started Allen Wright gave him a list of some of the stockholders. Mrs. Taylor's name was not on the list. She had not aligned herself with any of the complaining stockholder groups. On the list furnished by Wright was the name of Mrs. Taylor's cousin. Stowell, according to his testimony, called on this cousin and from her learned of the stock holding of Mrs. Taylor. He called upon Mrs. Taylor at her hotel and learned from her that the stock was pledged with the American Trust Company. Stowell then told these facts to Wright who authorized Stowell to offer $1 a share for the stock. Wright knew the stock had been pledged with the bank and knew the general condition of the loan. Stowell called upon the officers of the bank and offered them $3,750, that is $1 a share, for the stock. As already pointed out, the liquidating value of the stock on this date was $2.20 a share, and there is evidence that the book value was $3.10, it being admitted by appellants that such book value was at least $2.79 per share. There is conflicting evidence as to whether Stowell furnished the bank with any computations. There is some evidence that the financial report of 1934 showing the company was being operated at a loss was furnished by Stowell to the bank's officers. At any rate the bank's officers got in touch with Mrs. Taylor. She refused the offer of $3,750 and went home. The bank officer then telephoned her and told her the offer had been raised to $4,000. Mrs. Taylor testified that she felt this price was too low but that she telephoned Johnson and after talking with him agreed to accept the offer. She was not permitted to testify as to what Johnson had told her. It was stipulated that Allen Wright was acting as agent for his mother in these various transactions.

On December 5, 1935, the bank closed the transaction, and the stock was sold to Stowell for $4,000, Stowell receiving a commission from Wright of $50. Although this transaction was completed December 5, 1935, Wright did not have the stock certificate changed into his mother's name on the books of the company until April 28, 1936.

Mrs. Taylor testified that she did not know Stowell was acting for a director, and that had she known that fact she would not have sold at such a price. It is this transaction that is challenged in this proceeding. The complaint was not filed until December 18, 1939. Mrs. Taylor testified that several months after the deal was closed she heard from a boarder at her home, a law student, rumors that her stock had been bought by an "insider." She immediately called Johnson, and after talking with him she did not believe the rumor that Stowell bought on behalf of a director.

Several years later the law student again came to her with this rumor, and she again called Johnson. Again, after calling him, she did not believe the rumor. It should be here mentioned that Johnson then knew Stowell had acted on behalf of the Wrights. It was not until she heard the rumor again in December, 1939, that she really became suspicious, and after investigation, filed this action.

On these facts, the first question of law to be determined is whether directors and officers of a company owe any duty at all to stockholders in relation to transactions whereby the officers and directors buy for themselves shares of stock from the stockholders. On this subject there are three rules—the so-called majority rule, the so-called "special facts" rule, and the so-called minority rule. These three rules were exhaustively discussed in the case of American Trust Co. v. California, etc., Ins. Co., 15 Cal.2d 42, 98 P.2d 497. The so-called majority rule is frequently stated to be that directors and officers owe no fiduciary duty at all to stockholders, but may deal with them at arm's length. No duty of disclosure of facts known to the director or officer exists. Nondisclosure cannot constitute constructive fraud. At page 56 of 15 Cal.2d, at page 504 of 98 P.2d in the American Trust case, supra, the court states the so-called majority rule to be "* * * that a corporation director owes no fiduciary obligation to the stockholder as such, but only to the corporation. Hence * * * nondisclosure * * * was not fraudulent because there was no duty to disclose.

"The doctrine upon which appellants rely, which is said to be the majority rule, is in substance that a director is a fiduciary with respect to the corporation as an entity, and not to the stockholders as individuals. Otherwise expressed, it is that in dealings with or for the corporation, the director is exercising a corporate function, and is subject to the usual fiduciary duty to disclose all material facts; but that in personal dealings with stockholders he is not exercising a corporate function, and is free to deal with them at arms' length. Nearly all of the cases applying the rule are concerned with transactions for the purchase of stock between director and stockholder, and they hold that the director need not disclose to the stockholder his special knowledge affecting the value of the shares."

The Supreme Court, in the American Trust case, supra, after thus referring to the so-called majority view, then stated (at page 56 of 15 Cal.2d, at page 504 of 98 P.2d): "In sharp contrast with this view is the so-called minority rule, which recognizes the director's obligation to the stockholders individually as well as collectively, and refuses to permit him to profit at the latters' expense by the use of information obtained as a result of his official position and duties. This view, while generally conceded to be in the numerical minority, is followed by able courts, and textwriters who have examined the subject," citing cases from Iowa, Georgia and Kansas, and referring to Ballantine, Private Corporations, § 125; Stevens on Corporations, § 145; 4 Pomeroy, Equity Jurisprudence, 5th Ed., § 1090; 19 Corn.L.Q. 103; 45 Harv.L.Rev. 1388; 39 Yale L.J. 582.

While it is true that a numerical majority of the decided cases have adopted the legalistic view that a director owes no duty at all to the stockholders, a substantial minority have adopted the more realistic view that such a duty exists because the stockholders have placed the directors in a strategic position where they can secure firsthand knowledge of important developments, and where they can make it appear the shares are much less valuable than they really are. The astonishing thing is that practically every legal writer in this field has approved the so-called minority view. In addition to the authorities cited by the Supreme Court, see Berle, Publicity of Accounts and Directors' Purchases of Stock, 25 Mich.L.Rev. 827; Laylin, The Duty of a Director Purchasing Shares of Stock, 27 Yale L.J. 731; Wilgus, Purchase of Shares of Corporation by a Director from a Shareholder, 8 Mich.L.Rev. 267; 3 Fletcher, Cyclopedia Corporations, Perm. Ed., §§ 848 and 1174; 32 Mich.L.Rev. 678; 14 Minn.L.Rev. 530; 11 Wis.L.Rev. 547; 29 Cal.L.Rev. 67; 54 Harv.L.Rev. 1191; but see Walker, The Duty of Disclosure by a Director Purchasing Stock from his Stockholders, 32 Yale L.J. 637.

The so-called majority rule is predicated on the theory that the corporation—the collective stockholders—is a separate and distinct legal entity, an artificial personality, to whom the director owes his duty. The legal writers above referred to and the more recent cases adopting the minority view, have pointed out the fallacy of this reasoning. These authorities logically point out that the detailed information a director has of corporate affairs is in a very real sense property of the corporation, and that no director should be permitted to use such information for his own benefit at the expense of his stockholders. The so-called majority rule permits a director to secure for himself profits rightfully belonging to all. Such a rule offends the moral sense, and is contrary to our modern concept of the duty of a director towards those he represents.

[1] Although the numerical weight of authority is in favor of the so-called majority rule, the harshness and obvious unfairness of that rule has lead many of the states that originally aligned themselves with the majority rule to adopt an exception to that rule to ameliorate its harshness. This exception is referred to as follows in the American Trust Company case, supra, 15 Cal.2d at page 57, 98 P.2d at page 504: "Conceding the absence of a fiduciary relationship in the ordinary case, they [some of the states that have adopted the so-called majority view] nevertheless hold that where special circumstances or facts are present which make it inequitable for the director to withhold information from the stockholder, the duty to disclose arises, and concealment is fraud." The leading case adopting this "special facts" exception to the so-called majority rule is Strong v. Repide, 213 U.S. 419, 29 S.Ct. 521, 53 L.Ed. 853. That case differs from the present one in many respects, but it is significant that the United States Supreme Court there held that, among other things there present, it was fraudulent for a director to buy from a shareholder without disclosing his identity. "Concealing his identity when procuring the purchase of the stock, by his agent, was in itself strong evidence of fraud." 213 U.S. at page 432, 29 S.Ct. at page 525, 53 L.Ed. 853.

The exact rule that exists in this state is somewhat uncertain. The cases of Ryder v. Bamberger, 172 Cal. 791, 158 P. 753; Robbins v. Pacific Eastern Corp., 8 Cal.2d 241, 65 P.2d 42; McCord v. Martin, 47 Cal.App. 717, 191 P. 89, and Bacon v. Soule, 19 Cal.App. 428, 126 P. 384, contain some language that supports the advocates of the so-called majority rule. These cases were analyzed at length by the Supreme Court in the American Trust Company case, supra. It was there held that what was said in these cases on the subject was dicta. At page 61 of 15 Cal.2d, at page 507 of 98 P.2d, the court concluded as follows: "In this connection, we may observe that the question is still open in this state as to whether we shall follow the majority rule, the majority rule as modified by the 'special facts' doctrine, or the minority rule; and a decision on this question would be immaterial here."

In the present case the trial court instructed on the so-called "special facts" doctrine, and no challenge is made as to the form of the instruction. Whether this rule, or the so-called minority rule, is ultimately to be adopted in this state need not now be decided. No reasonable argument can be advanced against the adoption of at least the "special facts" limitation to the majority rule. A fair reading of the American Trust Company case, supra, indicates that the Supreme Court, although not directly deciding the point, has indicated a disapproval of the so-called majority rule, and that when the point is directly presented to it, it will adopt either the "special facts" doctrine or the minority rule.

[2] Assuming that the "special facts" doctrine, at least, is applicable in this state, there can be no reasonable doubt but that the appellants, under the facts, owed respondent a duty, and violated that duty to her damage. The stock here involved was not sold or traded on any exchange. The appellants actively and successfully concealed their identity as the purchasers. The appellants, by reason of their position as directors, had full knowledge of the actual value of the stock. The appellants were active in inducing the sale. They sought out the respondent and made no effort to tell her the real value of her stock, but kept that knowledge, which they had acquired as directors, to themselves. Moreover, the appellants knew they were buying pledged stock, and that the loan for which the stock was pledged was "distressed." They knew that the bank's primary interest was to secure enough for the stock to put the loan in a sound condition. They knew that respondent would find it difficult to resist their offer should the bank deem it acceptable. Obviously, both the respondent and the bank would have been suspicious had they known who the true purchasers were. Under such circumstances the implied findings of the jury that appellants were guilty of fraud

within the meaning of the "special facts" rule are amply supported by the evidence.

Appellants make much of the fact that there is no legal requirement that they disclose the market value of the securities to the stockholders, and that setting forth security values at cost in the financial statements is an approved accounting practice. That is undoubtedly true, but we are here dealing with a corporation which was largely controlled by two men who had intimate and detailed knowledge of the market value of the company. They knew as practical men that none of the stockholders had that knowledge. When Wright actively solicited a sale from respondent he was, under the facts, under a duty to speak fully, fairly and honestly. This he did not do.

Appellants also point out that the books of the company disclosed the information as to the ownership of the Shell Union stock, and that such books were located at the Oakland office. Any stockholder, according to appellants, could have come to the office and ascertained the true facts for themselves. To state the point is to refute it. Such argument loses sight of the realities of the situation. A stockholder is not bound to anticipate fraud on the part of his trusted director. The legal right to look at the books, in view of the complexity of modern accounting practices, cannot preclude a stockholder from recovering from a fraudulent director.

Appellants also argue that they did not buy from respondent but bought from the bank at a pledgee sale. Just where this argument leads is not very clear. Under any theory respondent had an equity in the stock. There is substantial evidence that whatever the legal rights of the bank may have been the bank sought and secured respondent's consent to the sale before it was consummated. The bank purported to act and did act as her agent in completing the sale.

[3] The appellants also claim that the cause of action was barred as a matter of law by the statute of limitations contained in Sub. 4 of § 338, Code of Civil Procedure. That section requires actions based on fraud to be commenced within three years but "the cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." In the present case appellants do not attack the sufficiency of the pleading of respondent relating to the alleged fraud and the circumstances of its discovery, nor do they attack the correctness of the instructions given on this subject. What they argue is that the implied finding of the jury that respondent acted reasonably in not discovering the fraud sooner, as a matter of law, is unsupported. The point is without merit. The evidence shows that several months after the transaction respondent heard a rumor from a law student boarding at her home that an "insider" had in fact purchased her stock. She immediately telephoned Johnson, her trusted friend, and after talking to him did not believe the rumor. Several years later she again heard the same rumor and investigated again by telephoning Johnson. Again she was convinced the rumor was false. Johnson, at least at the time of the second conversation and probably at the time of the first, knew the true facts. Under the circumstances the question as to whether respondent acted reasonably in not discovering the fraud sooner was one of fact for the jury. Whether the evidence is sufficient to support the implied finding on this issue is a mixed question of law and fact. In Mitchell v. Towne, 31 Cal.App.2d 259, 262, 87 P.2d 908, 910, the proper rule is stated, quoting from Cullinan v. McColgan, 87 Cal.App. 684, 692, 263 P. 353, as follows: "'* * * where issue is joined on a plea of the statute and the evidence is conflicting as to when, with reference to the filing of the complaint, a cause of action accrued, the question is properly submitted to the jury as a mixed question of law and fact (Pacific Imp. Co. v. Maxwell, 26 Cal.App. 265, 146 P. 900; Towle v. Sweeney, supra [2 Cal.App. 29, 83 P. 74]; Crawford v. Duncan, 61 Cal.App. 647, 215 P. 573), and the case may not be taken from the jury where the plea of the statute is interposed and there is evidence to support the plea (Heilbron v. Heinlen, 72 Cal. 376, 14 P. 24.)'" See, also, cases collected 16 Cal.Jur. p. 629, § 221.

[4] Appellants' last contention is that it was error to instruct the jury that it, in its discretion, could make an award for exemplary damages and for interest. It is urged that in this action neither of these items are recoverable. The contention is based upon appellants' interpretation of several Code sections.

All of the pertinent Code sections appear in Division Fourth of the Civil Code.

In Title II, Chapter 1, Article II of that Division appears § 3288 which provides: "In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury."

In Article III of the same Title and Chapter appears § 3294 which provides: "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

In Chapter II of the same Title and Division, but in Article II, appears § 3343, added to the Civil Code in 1935. It provides:

"One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction.

"Nothing herein contained shall be deemed to deny to any person having a cause of action for fraud or deceit any legal or equitable remedies to which such person may be entitled."

In the same Chapter—Chapter II—but in Article IV, appears § 3357 which provides: "The damages prescribed by *this chapter* are exclusive of exemplary damages and interest, except where those are expressly mentioned." (Italics added.)

Appellants make two contentions in reference to these Code sections. They first urge that respondent may not recover interest and exemplary damages because by §§ 3288 and 3294, supra, such recovery is limited to cases "not arising from contract," and this action arose from contract. This contention is clearly without merit. This action is based on fraud and deceit. It did not arise out of a contract as those words are used in the sections in question. Those sections limit the right to recover exemplary damages and interest, in the discretion of the jury, to cases based on tort and exclude contract actions. The present action is one in tort, to recover for fraud. The contract was only the result of that fraud. The action arises out of tort and not out of contract.

The second contention of appellants is that, even if the action does not arise out of contract, respondent cannot recover exemplary damages and interest because of the provisions of § 3357, supra. It is urged that that section by its terms limits the right to recover exemplary damages and interest, even in tort actions, to cases where such allowance is expressly provided for in the same chapter of the Code in which § 3357 appears. It is urged that since §§ 3288 and 3294 appear in a different chapter of the Civil Code, they form no basis for the allowance in this case.

The fallacy in this argument is demonstrated when the provisions of § 3343 of the Civil Code are considered, which is in the same chapter of the Code as § 3357. The last portion of the first sentence of the section reads, "together with any additional damage arising from the particular transaction." The next sentence of the section expressly states that the section shall not "deny to any person having a cause of action for fraud or deceit any legal or equitable remedies to which such person may be entitled"—i. e., among other things, the remedies prescribed in §§ 3288 and 3294 of the Civil Code. It is at once apparent, even if the last sentence of the first paragraph above quoted refers only to special damage, that the last sentence quoted above refers to other remedies given by other sections of the Code, and that among such remedies are those provided in §§ 3288 and 3294. It was proper, therefore, to instruct the jury on these two issues. No point is made as to the form of the instructions or as to the amounts awarded.

The cases cited by appellants—Ellsworth v. Knowles, 8 Cal.App. 630, 97 P. 690, and Morrell v. San Tomas, etc., Packing Co., 13 Cal.App. 305, 109 P. 632—do not compel or suggest a different conclusion. The latest of these cases was decided in 1910, twenty-five years before § 3343 of the Civil Code was adopted. Both actions were for breach of contract and were not based on tort. What was said in those cases has no relevancy to the present case.

The judgment appealed from is affirmed.

KNIGHT, Justice (concurring).

I concur in the judgment of affirmance upon the ground that the evidence is sufficient to establish a case of fraud regardless of the question of the application of the so-called "special facts" doctrine.

However, in view of the majority decision this day rendered by the Supreme Court in the case of Hobart v. Hobart Estate Co., 159 P.2d 958, the "special facts" doctrine doubtless does apply and therefore plaintiff is entitled to the benefit thereof in further support of the judgment.

WARD, Justice (concurring).

On the question of the relationship of officers to stockholders in the purchase of stock, I adhere to the "special facts doctrine," which may be applied appropriately in this case. Upon this theory, I concur in the order affirming the judgment.

On Petition for Rehearing.

PETERS, Presiding Justice.

[5] Petitioner contends that the Court has omitted material facts from its opinion, has misstated other facts, and has failed to consider substantial legal issues raised by appellants. These contentions all lack merit. A reexamination of the opinion in the light of the record discloses that every material fact has been set forth in the opinion, and that every material fact set forth in the opinion is supported by substantial evidence or by reasonable inferences therefrom. The opinion disposes of every relevant legal issue raised on the appeal. The briefs of appellants and this petition cite the frequently relied upon but seldom followed case of Herbert v. Lankershim, 9 Cal.2d 409, 71 P.2d 220, and ask us to disregard conflicts in the evidence. This we cannot and should not do.

The petition for rehearing is denied.

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69 Cal.App.2d 667

CHAPMAN et al. v. SKY L'ONDA MUT. WATER CO. et al.

Civ. 12768.

District Court of Appeal, First District,
Division 1, California.
June 25, 1945.

1. Corporations 🔑1

Court was not compelled as matter of law to disregard corporate entity of mutual water company organized to supply water to owners of lots in subdivision who held stock in company as appurtenant to their lots so as to defeat company's claim to easement by prescription to maintain reservoirs, pumps, and pipe lines on other land retained by owner when land was conveyed for purpose of subdivision, on ground that promoters and directors of water company had recognized owner's superior rights and therefore company's possession was permissive and not adverse.

2. Waters and water courses 🔑193, 194

Conflicting evidence supported trial court's finding that mutual water company had acquired an easement to maintain and operate reservoirs, pumps, and water lines on land which it had used for that purpose for more than 9 years without objection by owner.

3. Adverse possession 🔑85(1)

Entry and possession of land by optionee, even where right to possession is not expressly given, is presumed not to be adverse, in absence of clear notice by optionee that he is holding adversely to optionor, since acceptance of option recognizes superior title of optionor.

4. Corporations 🔑1

A corporation cannot be held liable for acts of its promoters nor obligated by their conduct and contracts, toward or with others, in absence of adoption of such conduct or contracts by corporation after it comes into existence.

5. Corporations 🔑448(2)

Ratification by corporation of contracts made by its promoters will not be presumed, even where corporation has received the benefits, unless actual knowledge of the specific contract out of which the benefits arose is made to appear.

6. Corporations 🔑397

A corporation is responsible only for those acts of its officers or agents which have been done in its name and not for those done in individual names of officers or agents in their own interests.

7. Adverse possession 🔑106(1), 112

Prescriptive rights are stricti juris and will not be extended beyond the actual user, and claimant has the burden of proving all elements necessary to establish his claim, including open, notorious, uninterrupted, and hostile use, continuous for the statutory period under a claim of right.

8. Adverse possession 🔑85(1)

Where the circumstances of an entry are not explained and possession has been open, notorious, and uninterrupted for the prescriptive period, the law presumes that the holding was adverse and under a claim of right.

9. Easements 🔑36(1)

Where one claiming an easement by prescription offers satisfactory evidence that all the required elements exist, the burden of showing that the use was merely permissive shifts to owner.

10. Adverse possession 🔑33

Possession so open, visible, and notorious that it will raise the presumption of an adverse claim is the equivalent of actual knowledge, so that adverse claimant need not show that record owner had actual knowledge that he was asserting an adverse claim.

11. Waters and water courses 🔑193, 194

Where mutual water company, the nature of whose original entry was not explained, had openly and exclusively used land of another for more than 9 years maintaining reservoirs and distributing system thereon and exercising control and domination of the property, without recognizing record title owner's superior right to possession, adverse nature of claim and owner's notice thereof would be presumed.

12. Trial 🔑375

What trial judge saw when he visited premises in which mutual water company claimed an easement by prescription to maintain reservoirs and distributing system thereon was evidence.

13. Corporations 🔑428(9)

Knowledge gained by promoters and directors of corporation as individuals and not as agents for the corporation does not, as a matter of law, bind the corporation.

14. Appeal and error 🔑1071(5)

Where a judgment is amply supported by findings which are unobjectionable, findings on other issues become immaterial, and it is not ground for reversal that such other findings are unsupported by evidence.

15. Adverse possession 🔑117

Finding that corporation had title by adverse possession was not necessarily inconsistent with finding that record title owners were estopped from asserting their right by apparent acquiescence in expenditure by corporation of large sums of money in improving the land.

16. Waters and water courses 🔑160

Enlargement of dam within prescriptive period did not defeat the right to an easement by prescription to maintain reservoirs on land of another, in absence of evidence that burden on servient estate was increased by change in the dam, that any larger area was flooded, or that use was changed.

17. Easements 🔑36(1)

The party contesting title by adverse possession had the burden of showing that taxes had been assessed on claimed easement and that claimant thereof has not paid them.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action in ejectment by Frank F. Chapman against Sky L'Onda Mutual Water Company, a corporation, and others to oust defendant company from certain land used by it as reservoir sites, wherein defendants filed a cross-complaint. Upon death of plaintiff, William Chapman, executor, and Mary Klitgaard, executrix, of the estate of Frank F. Chapman, deceased, were substituted as plaintiffs. Judgment for defendant water company, and substituted plaintiffs appeal.

Judgment affirmed.

Carl William Anderson, of Burlingame, for appellants.

U. S. Webb and Hester Webb, both of San Francisco, for respondent Sky L'Onda Mut. Water Co.

PETERS, Presiding Justice.

This action in ejectment was instituted by plaintiff Frank F. Chapman, against the Sky L'Onda Mutual Water Company to oust that company from three acres of land in San Mateo County, used by the defendant for many years as reservoir sites. Subsequent to the trial Chapman died and his executor and executrix have been substituted as plaintiffs. The defendant claims an easement by adverse possession and also urges that, because of Chapman's conduct, plaintiffs are estopped to assert a right to possession. Chapman's legal title to the property was admitted by the pleadings. The trial court determined that the defendant water company has an easement by prescription to maintain reservoirs, pumps and pipe lines on the land in question, and that plaintiffs are estopped by reason of Chapman's conduct to assert any right to possession. From this judgment plaintiffs appeal, contending that the evidence shows, without contradiction, that the use by the corporation was permissive, and that the finding of estoppel is totally unsupported by the evidence.

Defendant is a mutual water company organized in 1931 to supply water to the lot owners near the reservoir site. Its stockholders are the one hundred and five lot owners in the area, each lot being entitled to one share of stock, which is appurtenant to the land. The corporation supplies its consumers with their only available water supply. The corporation filed its articles of incorporation in January, 1932, and immediately thereafter went into possession of the reservoirs, dams, pumps and pipe lines constituting the water system and including the three acres here involved. It hired a maintenance man. Consumers paid their bills to the corporation. It made extensive improvements to its system during the period 1936 to 1938 and enlarged and improved the dam. It cleaned out the lake in 1937. From January, 1932, until the filing of this action in July of 1941, it has been continuously in possession of the property in question, has maintained the water system, made necessary repairs and improvements thereto, and distributed the water to its consumers. It was stipulated that the lot owners have erected improvements valued at $100,000 on their properties. Chapman did not commence this action until nine and one-half years after the corporation was organized and took possession of the property.

Plaintiffs' contentions are mainly built around the argument that the acts of certain individuals were, in law, the acts of the corporation, and that, because these persons recognized the superior rights of Chapman, it necessarily follows that the possession of the corporation was permissive. As will be pointed out, this contention is without merit.

The record shows the following: For over fifty years prior to the commencement of this action Chapman had owned several hundred acres of land, including the three acres here involved, in San Mateo County. La Honda Creek runs through a portion of the lands, as do two highways, the Skyline Boulevard and the Woodside-La Honda Road. The land is useless for cultivation or grazing. Prior to 1929 the only income Chapman had received by reason of his ownership was a total of about $10,000, received from the sale of tan bark, and small sums received from campers and picnickers.

In 1929 one C. S. Crary determined to try to subdivide a portion of the area and to sell lots to those who desired to erect summer homes. In May of that year he entered into a contract to purchase from Chapman the portion of the Chapman lands lying east of the Woodside-La Honda Road. The three acres here involved lie west of that road. That contract has been lost, was not recorded, and its exact terms are not entirely clear. Under this contract the portion of the lands involved were subdivided and title to the area was escrowed with the California Pacific Title and Trust Company. This contract covered the tracts designated on a map introduced into evidence as Sky-L'Onda Tracts 1, 2, 3 and 4. As each lot was sold by Crary, Chapman was paid a portion of the purchase price, and a deed was given to each purchaser by the title company.

Shortly after the first contract was entered into a second contract was entered into by Crary and Chapman relating to another portion of the Chapman lands. This contract had also been lost and was not recorded. It granted to Crary an option to purchase the Chapman lands lying west of the Woodside-La Honda Road on certain terms and conditions. Included within the lands covered by the option are the three acres here involved.

In April, 1930, Chapman deeded to Crary the unsold portions of subdivisions 1 and 2 lying east of the Woodside-La Honda Road, and also a twelve and one-half acre strip on La Honda Creek lying west of the road and shown on the map as the Werner Schoop Strip. The three acres here involved were not included in the twelve and one-half acres. These deeds were executed so that Crary could negotiate a loan on the properties. Crary negotiated such a loan from a building and loan association and Chapman received $17,456.22 on the deal. Prior to October, 1931, Subdivisions 3 and 4 were likewise deeded to Crary. Everyone concerned knew that Crary intended to subdivide and that water was indispensable for such a project.

Shortly after starting the project Crary ran into difficulties in supplying his purchasers with adequate water. It was originally contemplated by both Crary and Chapman that Crary could secure an adequate supply from the creek as it ran through the twelve and one-half acre strip deeded to Crary as above-mentioned. In the dry seasons of 1929 and 1930 this source of supply proved to be insufficient and Crary was forced to pump water to the lot owners from another tract owned by him east of Skyline Boulevard.

In 1930 or 1931 Crary, without Chapman's consent, entered on the land owned by Chapman west of the Woodside-La Honda Road and which was covered by the option, and cleared the trees and stumps from the sites where the reservoirs are now located. He constructed two dams in the area. It is these reservoir sites that are the subject of this action. The original entry by Crary was clearly without the knowledge or consent of Chapman.

In December, 1931, the defendant corporation was organized as a mutual water company with Crary, his son, and one Watt as the first board of directors. In January, 1932, its articles of incorporation were filed. Thereafter, the corporation entered into possession of the entire water system, operated and maintained it, and undertook the duty of supplying water to its stockholders. It is the contention of the defendant that its entry took place at that time and that its possession of the reservoirs and others facilities was then and still is adverse to Chapman. This theory is amply supported by the record.

In an attempt to show that defendant's possession was permissive and not adverse, plaintiffs rely on certain evidence that indicates that Crary and Watt recognized the superior title and rights of Chapman. There can be little doubt that, were this an action between Crary or Watt on the one hand and Chapman on the other, Chapman would probably prevail. The evidence shows that in July, 1932, Chapman and Crary entered into a modification of the May, 1929, agreement by which the time of payment was extended to June 1, 1935, and which provided that Chapman "shall not be required to deed or release to Crary any land comprising the normal bed of La Honda Creek unless and until Crary has fully paid all sums, both of principal and interest, due or to become due under the terms of said agreement of May 1, 1929, as modified by this agreement * * *." The parties did not record this modifying contract. Thereafter, Crary defaulted on his contracts. In 1932 or 1933, with Chapman's consent, all of Crary's contracts were assigned to Watt. In July of 1933 Chapman deeded to Watt the balance of the lots in tract five, and in November of 1933 quit claimed to Watt all of the water rights in that tract. That tract lies east of the La Honda-Woodside Road. Watt and the title company immediately conveyed these water rights to the defendant corporation.

In March of 1935 Chapman conveyed to Watt certain of the other lands involved, but not including the three acres here involved. In fact, this deed specifically excepted the reservoir sites and excepted a ten-foot strip on either side of the creek. These excepted areas, according to the contract, were conveyed to the title company under an agreement providing that title thereto was to be conveyed to Watt only after the remainder of the tract was paid for. Chapman took back a deed of trust. Watt attempted to carry on but finally defaulted. A foreclosure sale was had and Chapman became the purchaser, receiving a trustee's deed in November, 1938. This action was thereafter commenced by Chapman in July of 1941.

[1, 2] This evidence supports the contention of plaintiffs that Crary and Watt recognized the superior title and right of Chapman, and it is upon this evidence that the main reliance is had to compel a reversal. However, the corporation defendant is a legal entity separate and distinct from Crary and Watt, and, under the circumstances, we do not think we are compelled, as a matter of law, to disregard the corporate entity. We think the evidence supports the trial court's conclusion that the corporation has gained an easement to operate its facilities on the area in question.

All concerned with this appeal admit that plaintiffs have legal title to the area which is the subject of this litigation. At the trial the defendant water company proved that since 1932 it has had exclusive possession of its facilities located thereon, and that since that date it has operated the pumps and maintained and improved the reservoirs without interruption or protest by Chapman. Crary was dead at the time of trial, and Watt could not be located. Chapman was called on behalf of both plaintiffs and defendants. His testimony is most significant. He testified that he had never consented to the building of the dams or reservoirs; that he knew the corporation was operating the system; that he knew

Watt, Crary and Crary's son; that he did not know who the first directors of the corporation were. None of the contracts with Crary or Watt was made in the name of the corporation, and it is quite significant that Chapman did not testify that he even thought that he was dealing with the corporation. At one time he testified that he always objected to the dams and reservoirs, and, at another, that he permitted their maintenance. But there is not one word of testimony that he ever expressed such permission to the corporation.

[3-5] Plaintiffs point out that Crary's original possession was acquired while he had an option to purchase, and urge that possession so secured is not adverse. With this contention we are inclined to agree. It is true that Crary's option did not give him a right to possession of the property, and that the original entry was without the knowledge of Chapman, he being in Mexico at the time. But we think it is the law that in the absence of clear notice by the optionee that he is holding adverse to the optioner such possession should be presumed not to be adverse. It is the law that possession under a contract of purchase is not usually adverse to the title holder. Kerns v. Dean, 77 Cal. 555, 19 P. 817; Woodard v. Hennegan, 128 Cal. 293, 60 P. 769. While it is true that Crary did not enter under a contract to purchase, but while merely holding an option to purchase, the same principles would seem to be applicable. There seems to be remarkably few authorities on this subject. In the only case we have found involving a claim to title by adverse possession where the entry was made under an option, the option gave the right of possession to the optionee. Harison v. Caswell, 17 App.Div. 252, 45 N.Y.S. 560. However, on principle, it would seem that entry and possession by an optionee, even where the right to possession is not expressly given, would be an entry by one who had, by accepting the option, recognized the superior title of the optionor. Hence, it would seem clear that, in the absence of clear notice to the optioner that the optionee was claiming adversely, it would be presumed such possession was not adverse. But this discussion of the nature of Crary's possession is beside the point. If it be conceded that the option contract was a recognition by Crary of Chapman's right, there is no evidence at all that Crary or Chapman intended to bind the corporation by that contract or by any of the others. The option contract, and the other contracts above mentioned, were not made in the name of the corporation, but were entered into by Crary and in his name for his own private purposes. It must be remembered that promoters are not the corporation, and that their contracts do not necessarily bind the corporation even though, after the subsequent organization of the corporation, they become the sole directors or officers. The rule, amply supported by authorities, is stated as follows in 6A Cal.Jur. 300, § 156:

> "A corporation cannot be held liable for the acts of its promoters nor be obligated by their conduct and contracts towards or with others in the absence of * * * adoption of such conduct or contracts by the corporation after it comes into existence. The reason for this rule is that the promoters are not the corporation and their contracts cannot be its contracts, and this is so, even though the promoters become, upon the creation of the corporation, its sole stockholders, directors and officers * * *
>
> "Ratification will not be presumed even where the corporation has received the benefits, unless actual knowledge of the specific contract out of which the benefits arose is made to appear."

[6] It must be remembered that Crary's option contract, upon which such reliance is had by plaintiffs, was not made for the benefit of the corporation nor was it ever accepted by it. Assuming, as was probably the fact, that Crary's entry was under the option and not based on a claim of right, there is not one word of evidence that the corporation's entry was made under any recognition of either Crary's or Chapman's rights. Chapman dealt with Crary in his private capacity and as a buyer and subdivider of real property, and not as a promoter or future director of a corporation. Under these circumstances the corporate entity should not be disregarded, in the absence of fraud, and certainly not as a matter of law, where the corporation is a mutual water company whose stockholders hold the stock as appurtenant to their lots. The rights of those stockholders must be considered, as well as the rights of plaintiffs. Certainly Chapman did not deal with Crary as a director of the corporation. He testified that although he knew the corporation was operating the reservoirs that he did not know who the first directors of that corporation were. It is elementary law that

a corporation is responsible only for those acts of its officers or agents which have been done in its name and not for those done in the individual names of its officers or agents in their own interest. See cases collected 13 Am.Jur., 1034, § 1107.

The above comments apply with even greater force to the Chapman-Watt contracts. These contracts were not made in the name, or for the benefit, of the corporation. Chapman, in entering into them, did not believe he was dealing with an agent of the corporation. In fact, there is a complete absence of evidence that Watt was even a director at the time the contracts were entered into. At least one new director—Cipperly—had taken office in 1934, or prior thereto, and the inference is that a new board was elected that year. While there was testimony that Watt was manager of the corporation at that time, the evidence also is to the effect that by "manager" was meant a mere maintenance man whose duty it was to "take care of the system, repair leaks, see that the pumps are in order, * * * that the tanks are at the proper level. He reads the meters, and that is about all."

Just as in the case of the Crary contracts the evidence is clear that Watt was acting for himself in executing his contracts, and that neither of the contracting parties had any intent to bind the corporation. It follows, of course, that, assuming that Watt recognized the superior right of Chapman, such recognition was not recognition by the corporation.

Plaintiffs contend that the evidence shows that Chapman paid the construction company's claim for labor and material in building the dams, and urge that this demonstrates that the use was permissive. The record shows that Chapman, Crary and Watt were defendants in an action instituted by the construction company to recover for such costs and to impose a mechanic's lien on the premises. The defendant corporation was not a party to the action. Crary died in 1933. The trial court sustained the demurrer of Chapman and Watt. The complaint alleged that Crary and Watt acted as co-owners and agents for all the owners (including Chapman) of the property in constructing the dams. The Supreme Court, on September 27, 1935, reversed the judgment (Sibley Grading, etc., Co. Ltd. v. Crary, 4 Cal.2d 375, 49 P.2d 823), holding simply that the complaint stated a cause of action for labor and material furnished against all the defendants, and refrained from deciding whether it stated a cause of action to impose a lien. It is obvious, therefore, that up to September, 1935, Crary had not paid for the costs involved. Chapman did testify that he had to pay for the dam. But it is quite significant that not only was the defendant corporation not a party to this action, but it elected a new board of directors in 1935, and in the fall of that year that board sent Chapman a bill for water served him in the past, and, when he refused to pay, cut off his water supply. This would seem to indicate that the corporation did not regard the payment by Chapman of such costs, assuming it had notice of it, which does not appear, as a recognition that its possession was permissive, or that Chapman had a superior right of possession. In fact, this cutting off of Chapman's water supply in 1935, would seem to be clear evidence that the corporation was claiming not only the water but the means of distribution. Even if it be assumed, contrary to the evidence, that the corporation's original possession was permissive, this act of the corporation was an unequivocal repudiation of the permission and a claim of right to possession.

[7-10] The plaintiffs urge that the evidence is insufficient to show all the elements of a title by prescription. It is undoubtedly the law that the claimant of a prescriptive right must prove all elements necessary to establish his claim, that prescriptive rights are stricti juris, and that such right will not be extended beyond the actual user. Moore v. California Oregon Power Co., 22 Cal.2d 725, 140 P.2d 798. The burden of proof is on the one claiming by adverse possession. Nelson v. Robinson, 47 Cal.App.2d 520, 118 P.2d 350. It is his burden to prove an open, notorious, uninterrupted, and hostile use, continuous for the statutory period, under a claim of right. In our opinion the defendant corporation sustained this burden. The exact circumstances and the legal basis of the defendant's entry were not fully explained. Where the circumstances of an entry are not explained, and where, as here, possession has been open, notorious and uninterrupted for the prescriptive period, the law presumes that the holding was adverse and under a claim of right. Pacific Gas & E. Co. v. Crockett L. & C. Co., 70 Cal.App. 283, 233 P. 370; Franz v. Mendonca, 131 Cal. 205, 63 P. 361; Fleming v. Howard, 150 Cal. 28, 87 P. 908;

Clarke v. Clarke, 133 Cal. 667, 66 P. 10. Moreover, it is the law that, when one who claims an easement by prescription offers satisfactory evidence that all the required elements existed, the burden of showing that the use was merely permissive shifts to the owner of the land. Matthiessen v. Grand, 92 Cal.App. 504, 268 P. 675. Where the claimant shows exclusive, open and notorious possession, and acts evidencing domination and control throughout the statutory period, the inference arises that the use was adverse and under a claim of right. The rule was clearly stated in Wallace v. Whitmore, 47 Cal.App.2d 369, 372, 117 P.2d 926, 928, as follows:

"But clear and satisfactory evidence of the use of the road in that manner creates a prima facie title to the easement by prescription. Such evidence raises a presumption that the road is used with an adverse claim of right to do so, and in the absence of evidence of mere permissive use of the road, it will be sufficient upon which to sustain a judgment quieting title to the easement therein. In the case of Ricioli v. Lynch, 65 Cal.App. 53, 223 P. 88, 90, the court quotes with approval from the case of Fleming v. Howard, 150 Cal. 28, 30, 87 P. 908, language supporting the previous statement of principle, as follows:

"'"Under these circumstances it will be presumed that the use was under a claim of right and adverse, and a prima facie title by prescription is thereby established. * * 'A presumption that the use was under a claim of right and adverse arises from an undisputed use of an easement for the established period of prescription; and the burden is upon the party alleging that the use has been by virtue of a license or permission, to prove that fact by affirmative evidence. * * * Where an open and uninterrupted use of an easement for a sufficient length of time to create the presumption of a grant is shown, if the other party relies on the fact that these acts or any part of them were permissive, it is incumbent on such party, by sufficient proof, to rebut such presumption of a non-appearing grant; otherwise the presumption stands as sufficient proof, and establishes the right.' Jones on Easements, § 186."'"

Many cases are cited to support the rule. It is not an indispensable requirement that the adverse claimant show that the record owner had actual knowledge that the claimant was asserting an adverse claim. Possession so open, visible and notorious that it will raise the presumption of an adverse claim is the equivalent of actual knowledge. Wood v. Davidson, 62 Cal.App.2d 885, 145 P.2d 659.

[11, 12] The evidence here meets the tests thus set forth. The defendant corporation was in open, notorious and uninterrupted possession of the reservoir sites, and using them for almost ten years before Chapman ever objected. There is not one word of evidence that the corporation ever recognized a superior right of possession during that period in Chapman. During the entire period the corporation exercised acts of domination and control over the reservoirs and the distributing system. Chapman admitted that during this time he knew the corporation was operating the system. He also testified that since 1929 he quit pumping from the creek to his own property and thereafter had no use of the creek; that thereafter "they" took out his pipes and used them in "their" system. Moreover, the trial judge visited the premises. What he saw was, of course, evidence. He undoubtedly observed that the use of the land for reservoirs was exclusive and open. Under such circumstances, to say the least, the question as to whether or not the use was adverse and under a claim of right, or was a mere permissive use, was a question of fact, and the determination of the trier of the fact based on conflicting evidence or upon reasonable inferences from the evidence, is conclusive. McMorris v. Pagano, 63 Cal.App.2d 446, 146 P.2d 944; Redemeyer v. Carroll, 21 Cal.App.2d 217, 68 P.2d 739; Matthiessen v. Grand, 92 Cal. App. 504, 268 P. 675; Alper v. Tormey, 7 Cal.App. 8, 93 P. 402; Diamond Match Co. v. Savercool, 218 Cal. 665, 24 P.2d 783. This rule is not in conflict with the rule that a claimant of a prescriptive right must prove all the elements to establish his claim. Where, as here, the claim does not originate under a written instrument, the only proof of the adverse nature of the claim of the possessor would ordinarily be proof of the nature of the occupancy and use. Where, as here, the use is open and exclusive, and the claimant has exercised control and domination of the property, and where, as here, there is no direct evidence as to the nature of the original entry, the adverse nature of the claim and the record title owner's notice of such claim will and should be presumed. The finding of the trial court based on such presumption cannot and should not be overturned on appeal unless

the evidence shows conclusively that the use was permissive. As already pointed out, the present record falls far short of so showing. There is evidence, much of it elicited by leading questions, and much of it quite vague and inconclusive, that perhaps would have sustained a finding that the use was permissive had such a finding been made. But most of this evidence related to the acts of Crary and Watt. As already pointed out, there is no evidence that either of these gentlemen purported to act on behalf of the corporation in executing the various contracts that recognized Chapman's superior rights, and there is no evidence that even Chapman considered these contracts as binding on the corporation. There is no evidence that the corporation adopted or ratified the contracts. There is no evidence that the corporation ever recognized a superior right in Chapman; in fact, the evidence and the reasonable inferences therefrom, are to the contrary. The original entry by Crary was admittedly without Chapman's consent. When Crary and Chapman executed the July, 1932, contract the corporation was already in possession and Chapman knew it. Under such circumstance plaintiffs have failed to sustain the burden of showing the use was permissive and the finding that it was not is amply supported.

[13, 14] Independently of the holding that the corporation has title to the described easement by prescription the trial court found that plaintiffs were estopped, under the facts, from asserting their title. The plaintiffs challenge these findings of estoppel as being unsupported. Their entire argument is predicated upon the evidence that Crary and Watt were aware of the facts, and it is urged that, inasmuch as they were agents of the corporation, their knowledge is imputable to the corporation. The knowledge that Crary and Watt gained as individuals and not as agents for the corporation does not, as a matter of law, bind the corporation. Here the corporation expended large sums of money in improving its system, and Chapman stood by, knowing such sums were being expended, and made no objection. Whether, under such circumstances, Chapman was under a duty to speak, and whether his failure to do so estops him from asserting his title, would seem to be questions of fact. However, we do not find it necessary to decide whether the finding of estoppel is supported. It is elementary law that "if a judgment is amply supported by findings which are unobjectionable, findings on other issues become immaterial, and it is not ground for reversal that such other findings are unsupported by evidence." 2 Cal.Jur. p. 1028, § 612, citing many cases.

[15] Nor can it successfully be contended that the finding that the corporation has title by adverse possession is necessarily inconsistent with the finding that plaintiffs are estopped from asserting their rights, if any they have. The corporation may properly assert a claim based on adverse possession, and at the same time assert that in making expenditures on the property they were relying on the owner's apparent acquiescence. It has been held that a finding of legal title and a finding of title by adverse possession, and that a finding of irrevocable license and a finding of easement by prescription are not inconsistent. Irrigated Valleys L. Co. v. Altman, 57 Cal.App. 413, 207 P. 401.

[16] Plaintiffs also urge that the evidence that the dam was enlarged in 1936 or 1937 defeats the right to an easement by prescription. There is no evidence that the burden on the servient estate was increased by the change in the dam, that any larger area was flooded, or that the use was changed. The point is, therefore, without merit. Burris v. People's Ditch Co., 104 Cal. 248, 37 P. 922; Gallaher v. Montecito, etc., W. Co., 101 Cal. 242, 35 P. 770.

[17] No question about payment of taxes is here presented. There is no evidence that the easement was assessed separately from the fee. The burden is, of course, on the party contesting the title by adverse possession to show that taxes have been assessed on the easement and that the claimant has not paid them. Redemeyer v. Carroll, 21 Cal.App.2d 217, 68 P.2d 739; McMorris v. Pagano, 63 Cal.App.2d 446, 146 P.2d 944. No such showing was here made. The other points raised by plaintiffs are without merit and need not be discussed.

The judgment appealed from is affirmed.

WARD, J., and DOOLING, Justice pro tem., concur.

PEOPLE v. TALLMAN.*

Cr. 3827.

District Court of Appeal, Second District, Division 1, California.

June 13, 1945.

Hearing Granted July 12, 1945.

1. Indictment and Information ⚷122(1)

Purpose of statutory provision that information cannot be amended so as to charge offense not shown by evidence taken at preliminary examination is to guarantee accused a preliminary hearing before committing magistrate, and preclude district attorney from forcing one accused of crime to trial before jury upon amended information charging offense not shown by evidence taken at preliminary examination. Pen.Code, §§ 809, 872, 1008; Const. art. 1, § 8.

2. Assault and battery ⚷55

A crime is committed under section 245 relating to assault with force likely to produce great bodily injury, as distinguished from misdemeanors defined by sections 240 and 242 relating to assault and battery, when it is shown that there is likelihood of great bodily injury as result of force used or attempted to be used. Pen.Code, §§ 240, 242, 245.

3. Indictment and Information ⚷122(2)

Evidence taken at preliminary examination to effect that defendant grabbed one girl between legs and touched leg of another girl did not justify filing of counts of amended information charging assault with force likely to produce great bodily injury, and hence amended information did not confer jurisdiction upon trial court to try defendant or to impose judgment after conviction thereon. Pen.Code, § 245.

4. Indictment and Information ⚷137(5)

In statute relating to causes for which information must be set aside, the phrases "legally committed" and "committed" refer to examination by the magistrate and holding the defendant to answer by the magistrate. Pen.Code, § 995.

5. Indictment and Information ⚷122(1)

Statutory provisions permitting the filing of an amended information to charge only offense as shown by evidence taken at preliminary evidence are mandatory. Pen. Code, § 1008.

6. Criminal law ⚷1044

Indictment and Information ⚷198

Defendant not attacking amended information by motion to set aside was not estopped from objecting to court's jurisdiction over subject matter of amended information on ground evidence taken at preliminary hearing did not justify counts thereof at the trial under plea of not guilty, after the trial by motion in arrest of judgment, or upon appeal. Pen.Code, §§ 995, 996, 1008.

7. Criminal law ⚷1023(11, 12)

Attempted appeals from order denying motion in arrest of judgment and from the sentence were dismissed. Pen.Code, § 1237.

YORK, P. J., dissents.

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Frank E. Tallman was convicted of simple assault, a misdemeanor, and from the judgment, order denying new trial, sentence, and the order denying the motion in arrest of judgment, defendant appeals.

Attempted appeals from order denying motion in arrest of judgment and from sentence dismissed, and judgment and order denying motion for new trial reversed.

Forrest A. Betts, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Carl S. Kegley, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an amended information filed by the District Attorney of Los Angeles County, containing six counts, the defendant was accused in counts 1 and 4 of the offense of assault with intent to commit rape; counts 2 and 5 charged the crime of attempted rape; while counts 3 and 6 alleged that the defendant committed the crime of assault by means of force likely to produce great bodily injury. Following the entry of not guilty pleas to all counts of the information, trial before a jury resulted in the acquittal of defendant as to all of the offenses charged, but he was convicted of two counts of simple assault, a misdemeanor, lesser but necessarily included offenses in the crimes charged in counts three and six of the information. Motions for a new trial and in arrest of judgment were made and denied, followed by the pronouncement of judgment. From the judgment, order denying new trial, sentence, and the order denying the motion in arrest of judgment, defendant prosecutes this appeal.

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* Subsequent opinion 163 P.2d 857.

An epitome of the evidence revealed by the record shows that, at about 9 o'clock on the morning of November 8, 1943, the prosecutrix named in counts 1, 2 and 3, a high school student, fourteen years of age, on her way to class, alighted from a bus and walked in a westerly direction along the north side of Wilshire Boulevard in the City of Los Angeles to a point where there was an opening into the southeast corner of the school grounds between the end of a hedge, which parallels the south line of the school area on Wilshire Boulevard, and an iron fence that runs along the east line of the school grounds, and which opening was commonly referred to by the students as "the hole in the hedge", opening into what was commonly known as the bicycle path. As she was walking along Wilshire Boulevard, the prosecutrix observed a man, later identified by her as the defendant, walking in a westerly direction about ten feet ahead of her; as he "was on top of the hump between the hedge and the fence, he turned and looked towards me"; he thereupon continued on through the opening into the grounds. The prosecutrix walked through the opening and passed the defendant. He caught up with her and "grabbed" her. She testified that he put his left hand around in front of her, up underneath her skirt, and with his right hand he reached up under her skirt from the back, placing his hands both on her body and her private parts underneath her skirt and on the outside of her underpants. According to the testimony of the prosecutrix, the defendant moved his fingers in a "clawing" manner and "sort of kept going" and "did not stop", was mumbling to himself and saying "come on". The prosecutrix pulled herself away and started to run. She testified the episode lasted about one second. She did not see the man again and did not know where he went. A boy passed her on a bicycle after she had gone about 20 feet from the scene. She did not scream at any time and did not drop her books or her lunch, which she was carrying in her hands. The girl testified that the visibility was good on that day, that the defendant was wearing a blue striped sport coat, blue slacks and was hatless. Later on in the day, the prosecutrix telephoned her mother and made complaint of the occurrence.

On the following morning, at about the same hour of 9 o'clock, two other school girls were walking together on their way to the same school and while crossing in the safety cross walk to the north side of Wilshire Boulevard, an automobile which was driven south on June Street turned west on Wilshire. Immediately thereafter the driver of this automobile parked the same on the north side of Wilshire Boulevard a little to the west of the "hole in the hedge", the driver got out and went through the "hole in the hedge" about four feet ahead of the aforesaid two girls. The driver of this car was also later identified as the defendant. He stood about three feet inside the hedge and by a tree near the entrance to the grounds. As the girls proceeded through the school grounds, the defendant walked up to one of them, placed his left hand on her leg, and, to use her language in testifying, "he used his hand and started running it up my leg, so I pushed him away with my books and I started to scream, and I backed away and he went away from me and started toward Phyllis, and Phyllis ran back and I did not see what happened". The girl who was accosted by the defendant screamed very loudly and testified she heard him "mumbling to himself, sort of like 'come with me, young lady' ". She testified she got a good look at the defendant and when he placed his hand on her left leg about half way up above her knee she pushed him very hard, kicked at him and thereby freed his hand from her leg. Thereupon the defendant ran over to the girl's companion, did not touch the latter, but, according to the prosecutrix, he "very calmly walked out". The companion of the prosecutrix went over to the hedge to observe where the defendant was going, saw him get into an automobile, noticed the license number and repeated the same numerous times in a loud tone of voice while the prosecutrix wrote it down on the cover of her science book. In this connection it might here be noted that there was testimony in behalf of the defendant with reference to the thickness of the hedge and the difficulty in reading a license number under the circumstances testified to by the girl who obtained it. There was also testimony that the license plate on the defendant's car was so bent as to make reading of the last number on the same difficult. While the prosecutrix testified that the license plate was in the center of the automobile which she observed, there was testimony showing that the license plate on the defendant's car was located on the left hand side thereof. The two girls aforesaid then went to school where they related their experience to their teachers, the latter of whom reported the matter to the police. Two of the girls' school teachers corroborated their testimony to the effect that they made complaint of what had happened to them and, with reference to their appearance at the time of making such complaint immediately upon their arrival at the school, one of the teachers testified, "Well, their eyes were staring and I noticed particularly Phyllis, her breath and her eyes were excited, and they were talking very, very fast and seemed to be in a great state of perturbation, so much so that I was forced to stop and see what was the matter with them". The vice-principal of the school described one of the girls as "pale and tense" and the other as being "eager to talk about the occurrence".

Fortified with information given them at the school by the three girls herein referred to, police officers arrested the defendant and on November 11th the girls in question appeared at the police station at which time the defendant was lined up with three other men and the girls were asked to identify, if they could, any of the four men as the one whom they had previously seen on the school grounds. Upon this occasion, the three girls identified the defendant, and two of them identified his automobile as the vehicle he was driving on the morning of November 8th.

The defendant testified that he had never been on the school grounds prior to November 11th; that he had never been near the hedge or the "hole in the hedge"; that he appeared in the so-called "police line up", was placed at the end of the line and that the other three men were police officers. As to both the mornings of November 8th and 9th, the defendant produced a service station operator who testified that the former was at his service station at approximately 8:45 a.m. to get oil and gas and that the defendant stayed there for some time before leaving. As to the morning of November 8th, another witness who was a customer at the service station corroborated the attendant's testimony in regard to the defendant's presence at the station. This witness had never known or seen the defendant prior to this time. An employee of the postoffice testified that the defendant called there between 9 and 9:30 a.m. on November 8th to send a parcel to Canada. This witness also testified that the defendant had to stand in line for a considerable length of time in order to make arrangements for custom payments. Defendant's employer testified that on the morning in question he had given the defendant a package to be taken to the postoffice for mailing to Canada, and further testified that on the morning of November 8th, defendant arrived at his place of employment between 9:25 and 9:40 a.m., and that on November 9th, the defendant arrived inside the building where he was employed at 9:02 a.m., having already parked his car. The place of defendant's employment was located on Sunset Boulevard, some distance away from the scene of the events which gave rise to this prosecution. The evidence was in conflict as to the time it would require to travel the distance set out in the defendant's alibi, but the most rapid time was 14 minutes as testified to by police officers who had driven over the route taken by the defendant according to his testimony. With reference to the condition of the license plate on the rear of the defendant's automobile, his wife testified the same was bent and had been ever since they purchased the car, while the former owner of the vehicle also testified that it was necessary to bend the license plate in order to get to the gas cap and fill the gas tank.

As a first ground of appeal it is urged that reversible error was committed by the trial court when the defendant was compelled to plead to the amended information. In that regard, the record discloses that, following a preliminary examination wherein the defendant was held to answer on two counts of assault with intent to commit rape, the District Attorney, on December 8, 1943, filed in the Superior Court an information charging the commission by the defendant of said offenses. Upon his arraignment on December 10th, the defendant pleaded not guilty to both counts and trial thereon was set for February 7, 1944. At a later date the trial was continued to March 27th. On the last mentioned date and before the commencement of the trial, the District Attorney announced that he was filing an amended information. With leave of court and over the objection of the defendant, the amended information was filed, containing the six counts hereinbefore set forth; and the defendant entered his plea of not guilty to all counts, at the same time denying the truth of the prior conviction of a felony as charged in the amended pleading, but which denial was later withdrawn and the prior conviction admitted. Upon affidavit that defendant's counsel was engaged in another court the trial was continued to the next day, at which time a jury was impaneled, sworn, and the cause proceeded to trial. Following his conviction, the defendant made a motion for a new trial and in arrest of judgment on the ground "that the court is without jurisdiction, in that the code permits an amendment of the information only to the extent that such an amendment charges an offense within the evidence at the preliminary examination". Thereupon the court asked for and received a transcript of the testimony adduced at the preliminary examination, which was on motion of the defendant received in evidence and marked as "an exhibit produced on motion for new trial". Both motions were submitted and on the day following the court announced: "I have read the transcript of the preliminary hearing, and I now deny the motion for arrest of judgment and deny the motion for new trial."

[1] In view of the fact that the defendant was acquitted on counts 2 and 4 of the amended information he was not prejudiced by the amendments therein contained, and we shall concern ourselves only with the legality of counts 3 and 6 of the amended pleading, upon which counts the defendant was convicted on two counts of simple assault, lesser but necessarily included offenses. The defendant's rights in a case of this kind are statutory. Section 8, Article I, of the Constitution of California, provides that offenses "shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment * * *". In 1911, section 1008 of the Penal Code, which defines the right and power of the District Attorney to file an amended information in a pending criminal proceeding, was amended by addition of the proviso that an information could not be amended so as to charge an offense not shown by the evidence taken at the preliminary examination. The clear purpose and intent of these Code provisions is to guarantee the accused a preliminary hearing before a committing magistrate, and to preclude the District Attorney from forcing one accused of crime to trial before a jury upon an amended information which charges an offense "not shown by the evidence taken at the preliminary examination." People v. Wright, 26 Cal.App.2d 197, 209, 79 P.2d 102; People v. Shutler, 15 Cal.App.2d 704, 706, 59 P.2d 1050; Mitchell v. Superior Court, 76 Cal.App. 734, 736, 245 P. 1109. Section 809 of the Penal Code, which enjoins upon the District Attorney the duty of filing an information within fifteen days after the defendant has been examined and committed as provided in Section 872 of the same Code, specifically limits the power of the District Attorney to charge only the offense or offenses named in the order of commitment, or any other offense or offenses "shown by the evidence taken before the magistrate to have been committed". It therefore follows that, if by counts 3 and 6 of the amended information herein the District Attorney sought to charge offenses not shown by the evidence taken at the preliminary examination, the court was without jurisdiction to try the defendant thereon because the unauthorized amended information operated to arrest the power of the trial court to proceed to trial. Note, 101 A.L.R. p. 1259. The question presented for determination is whether a violation of section 245 of the Penal Code was "shown by the evidence taken at the preliminary examination".

As to count 3, the testimony of the complaining witness at the preliminary examination was as follows:

"Q. Did anything unusual occur about that time? A. Yes. I got off the bus at June, and I was walking towards that bike entrance, and I saw a man turn in this entrance, I think he was going the same direction I was, and just sort of turned in. As he went up on the hump there he turned, looking towards me. I just looked at him, and I thought he was going to ask me something, because when I went into the yard, it comes down on a level, and he was right on the level, and he turned to me, sort of hesitant, and I thought he was going to ask me something.

"Q. That person is here in the court room, is he? A. Yes.

"Q. Which one is he? A. Right there (pointing).

"Q. Pointing to the second one at the counsel table, the defendant in this case? A. Yes.

"Q. How far was he from you when he hesitated, and you thought he was going to ask you something? A. I was just coming over the hump, and he was maybe ten feet down on to the level; but I was in a hurry, because I was going to be late, and I went on up the fence here on that slope where that path is, and I was hurrying along the path there, and I got maybe twenty feet along the path, and he came up on to the path behind me, quite a ways, but he came up on the hump that leads to the fence here, and he was walking fast, and I was too, I thought I was going to be late. And he took two running steps, I thought he was just in a hurry, and all of a sudden he just caught up with me.

"Q. What did he do when he caught up to you? A. I don't know, he came up behind me, and he grabbed me.

"Q. Where did he grab you? A. Well, he came up behind me, and he put his arm around this way (indicating), and the other one around back of me, and sort of grabbed me there.

"Q. Will you tell us just where he grabbed you? A. Right between my legs.

"Q. And which hand did he place there? A. He had both. I am not sure which hand came around in front, but he had both; one in front and one in the back. He was sort of at the side like this (indicating), and I guess it was this left hand, I am not sure.

"Q. He put both hands between your legs? A. Yes.

"Q. What did he do when he had his hands there, if anything? A. He seemed to be going like this (indicating).

"Q. Indicating kind of a clawing motion with the right hand. How long did he keep his hands in that position? A. Well, when he caught me I didn't even know what was happening, and by the time I sort of turned then, it wasn't very long before I broke away, it seems, at the same time he did, and I ran down the hump there, and I guess he went out again.

"Q. You didn't see him after that? A. No, I didn't even look back.

"Q. Did he say anything? A. He was sort of mumbling while he was doing it. The only thing I could ever understand was 'Come on.'

"Q. Did you say anything to him? A. Well, after he asked me, I didn't even know what was happening, and by the time I turned around I sort of said, 'What?' I was so startled I didn't know what was happening."

Concerning count 6, the material testimony of the prosecutrix at the preliminary examination reads:

"Q. Tell us what happened. A. The defendant came up to me and he put his hand on my leg, on my left leg and started to run his hand up my leg.

"Q. Which hand did he start to run up your leg? A. His left hand.

"Q. And where was his right hand at this time, do you know? A. Just by his side.

"Q. Did he say anything to you? A. Well, from what I gathered, I started to scream right away, but he said something on the order of 'Come on with me.'

"Q. And what did you do? A. Well, I exerted force and pushed him away and screamed.

"Q. And what force did you exert? Just what did you do exactly? A. Well, I sort of kicked him and pushed, and stepped back.

"Q. And what did he do then? A. Well, as soon as I stepped back from him, he ran towards this other girl I was with.

"Q. Ran towards her? A. Yes.

"Q. And where was she in relation to you at that time? A. She was about five feet to the left of me.

"Q. And what did she do when he started to run towards her? A. I didn't notice.

"Q. Did he touch her? A. I didn't notice.

"Q. Were you looking at that time? What were you doing at the time he was running towards her? A. I was sort of looking at him, but I was not thinking of what he was doing, I was just looking at him, I wasn't watching him.

"Q. What happened from then on? A. Then I noticed that he just very calmly walked out."

[2, 3] That the conduct just detailed constituted an assault or battery, as defined by Sections 240 and 242 of the Penal Code, cannot be questioned, but every assault does not constitute a violation of Section 245 of the Penal Code. To hold otherwise would completely emasculate the provisions of Sections 240 and 242, and certainly such was not the intention of the Legislature in enacting Section 245. We have read many cases involving the construction of Section 245 of the Penal Code, including People v.

Hinshaw, 194 Cal. 1, 227 P. 156; People v. Kimmerle, 90 Cal.App. 186, 265 P. 525; People v. Nude, 38 Cal.App.2d 381, 101 P.2d 162; People v. Bumbaugh, 48 Cal.App.2d 791, 120 P.2d 703; and People v. McIlvain, 55 Cal.App.2d 322, 130 P.2d 131. While undoubtedly it is the law that Section 245 of the Penal Code may be violated by an assault committed with the hands or fists, nevertheless, in all of the cases upholding a conviction under Section 245 when the attack was made with the hands or fists the assault or battery proven was of such a violent nature that either much physical suffering ensued therefrom or it could reasonably be assumed from the manner of, as well as the means used to perpetrate the attack, that a felonious assault within the meaning of Section 245 of the Penal Code was committed. While it is not necessary in order to complete the offense to show that the defendant actually injured his intended victim, there must, nevertheless, have been an attempt to strike with or to use a deadly weapon or other means likely to produce great bodily injury. We deem it a fair statement of the law to say that a crime is committed under Section 245 of the Penal Code, as distinguished from the misdemeanors defined by Sections 240 and 242 of the same Code, when it is shown by the evidence that there is likelihood of great bodily injury as a result of the force used or attempted to be used. It is the manner in which the force is used that is important and not so much the degree thereof, because, as was said in People v. McIlvain, supra, 55 Cal.App.2d at page 331, 130 P.2d 136, "A slight blow on the eye might be far more injurious than a severe blow in the back". From the manner in which the force was used in the instant case, we are persuaded that it cannot be held that the same was "likely to produce great bodily injury." We are not unmindful of respondent's contention that the evidence before a committing magistrate at a preliminary examination need not be such as would require a conviction and that only "reasonable and probable cause" to believe that a crime has been committed and that the accused is guilty thereof will suffice, but in the instant case we find no evidence produced at the preliminary examination of facts that would "lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused", People v. Nagle, 25 Cal.2d —, 153 P.2d 344, 347, of a violation of Section 245 of the Penal Code, or any other assault of which the Superior Court had jurisdiction. Therefore, in filing counts 3 and 6 of the amended information the District Attorney was attempting to charge offenses not shown by the evidence taken at the preliminary examination. This he cannot do, and his attempt in that regard does not confer upon the trial court any jurisdiction to try the defendant upon such a pleading, or to impose a judgment after conviction thereon. As was said in People v. Fyfe, 102 Cal.App. 549, 555, 283 P. 378, 380: "The procedure followed in this case is concrete evidence of the purpose and wisdom of the provisions of section 1008, Penal Code, which expressly prohibit an amendment to an information which would prejudice the substantial rights of the defendant. In declaring that an information 'cannot' be amended so as to charge an offense not shown by the evidence taken at the preliminary examination the terms of the section are mandatory. They are in whole harmony with the provisions of section 8 of article 1 of the Constitution requiring an examination and commitment by a magistrate as a prerequisite to the filing of an information by the district attorney."

[4-6] Respondent contends, however, that, because appellant failed to attack the amended information by motion as provided for in Section 995 of the Penal Code, he is estopped from raising the issue at this stage of the proceeding by reason of the provisions of Section 996 of the same Code. Subdivision 2 of Section 995, provides that an information must be set aside by the court in which the defendant is arraigned upon his motion if "the defendant had been committed without reasonable or probable cause", while Section 996 provides in substance that if the foregoing motion to set aside the information is not made "the defendant is precluded from afterwards taking the objections mentioned in the last section". But, in the case at bar, we are not concerned with the original information, but with two counts of an amended information, upon which there never was any preliminary examination or commitment by a magistrate. Manifestly, it was impossible for the defendant to avail himself of the provisions of Section 995, because the phrases "legally committed" and "committed" refer to the examination by the magistrate and holding the defendant to answer by the magistrate. People v. Beach, 122

Cal. 37, 38, 54 P. 369. Moreover, as heretofore pointed out, the provisions of section 1008 of the Penal Code permitting the filing of an amended information to charge only offenses shown by the evidence taken at the preliminary examination are mandatory. It therefore follows that the error committed by the trial court in allowing the amended information to be filed over the objection and exception of the defendant was jurisdictional in character. Although a defendant who fails to make a motion to set aside the information (Penal Code, § 995) is precluded from afterwards raising the objection which may be so taken (Penal Code, § 996), he may, nevertheless, assert his objection to the jurisdiction of the court over the subject of the information or to the sufficiency of the facts to constitute a public offense, at the trial under his plea of not guilty, after the trial by motion in arrest of judgment, or upon appeal. 14 Cal. Jur. §§ 66, 87; People v. Kinsley, 118 Cal. App. 593, 596, 5 P.2d 938. We are not here confronted with a question of the sufficiency of the pleading to charge a public offense against the defendant, but the sole question upon which we pass is whether the amended information pleaded offenses not shown by the evidence adduced at the preliminary examination; was filed contrary to the provisions of the Code, and that there was therefore no information before the court upon which the defendant could be tried. Having determined that question adversely to respondent's contentions, it follows that the judgment rendered cannot stand.

The foregoing conclusion at which we have arrived renders it unnecessary to consider other grounds urged by appellant for a reversal.

[7] The attempted appeal from the order denying the motion in arrest of judgment is dismissed (Penal Code, § 1237), as is the attempted appeal from the sentence. The judgment and the order denying defendant's motion for a new trial are and each is reversed.

DORAN, J., concurs.

YORK, P. J., dissents.

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26 Cal.2d 616

PEOPLE v. JACKSON.

Cr. 4642.

Supreme Court of California.

June 27, 1945.

Homicide 🔑253(1)

Evidence supported conviction of first degree murder and imposition of death penalty.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Louie Jackson was convicted of first degree murder, and an automatic appeal was taken under statute.

Affirmed.

Gerald Kenny, Public Defender, and Stephen M. White, Asst. Public Defender, both of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and Edmund G. Brown, Dist. Atty., and Thomas C. Lynch, Asst. Dist. Atty., both of San Francisco, for respondent.

PER CURIAM.

This is an automatic appeal from a judgment of conviction of first-degree murder imposing the death penalty on the defendant. See Pen.Code, § 1239.

On January 4, 1945, defendant, a Negro, 53 years of age, shot and killed Winifred Cecil. The victim, a young woman, was shot in a bus which she operated for the Pacific Greyhound Lines. The evidence reveals that she entered the bus in a parking lot at Seventh and Irwin Streets, San Francisco, at approximately 5:40 a.m. on the day of the homicide, preparatory to driving it on its regular run to the Mare Island Navy Yard. Defendant followed her into the bus with drawn gun and ordered her to drive out of the parking lot. After she had done so, defendant drove the bus to a point several blocks away and shot the deceased. Her body was found shortly thereafter in the aisle of the bus. The lower front portion of her uniform and undergarments were torn and disarranged and there was medical evidence indicating a sexual attack. Approximately two and one-half months later defendant was taken into custody. In a statement made to representatives of the district attorney's office and to members of the police department, he freely and voluntarily narrated the circumstances surrounding the commission of the homicide and admitted shooting the deceased. An information was filed charging him with murder and upon his arraignment he pleaded guilty.

The statement made by defendant was corroborated by evidence that personal property belonging to the deceased was found in defendant's hotel room and by the testimony of a ballistics expert that the bullet taken from her body had been fired from a gun found in defendant's room. Two alienists testified that defendant was sane.

The foregoing evidence supports the judgment.

Judgment affirmed.

26 Cal.2d 590

SMITH et al. v. BEAR VALLEY MILLING & LUMBER CO. et al.

L. A. 18820.

Supreme Court of California.

June 26, 1945.

1. Dismissal and nonsuit 🔑60(6)

A stipulation, made in writing in compliance with statute, to extend the time of trial beyond the five-year period, waives the right of the parties to dismissal of the action under statute, and also precludes the court from granting a dismissal of its own motion. Code Civ.Proc. § 583.

2. Dismissal and nonsuit ⚷60(6)

Where within five years after filing complaint attorneys stipulated that action might be tried on a certain date beyond the five-year period or on first available date thereafter, and court fixed trial date for a date which was not acceptable, and attorneys orally agreed that time of trial be extended to a subsequent date, which oral stipulation was evidenced by separate writings of the attorneys on file, the parties had "stipulated in writing" that time be extended within meaning of statute, thereby waiving right to dismissal of action because of delay, and precluded court from granting a dismissal of its own motion. Code Civ. Proc. § 583.

3. Attorney and client ⚷76(2)

Attorney's authority to represent client did not extend beyond client's lifetime.

4. Dismissal and nonsuit ⚷65

Where plaintiff fails to bring action to trial within five years after filing complaint, the manner in which the delay is brought to the court's attention is immaterial and, when the court becomes aware of the facts, it must dismiss the action. Code Civ.Proc. § 583.

5. Dismissal and nonsuit ⚷60(3)

The five-year period within which action must be brought to trial in absence of written stipulation extending time is not interrupted by death of a party. Code Civ. Proc. § 583.

6. Appeal and error ⚷1170(1)

Where plaintiff had knowledge of the death of a defendant and made no effort to substitute administrator as party defendant, and did not bring case to trial within five years after filing complaint, fact that action was dismissed on motion of administrator who had not been made a party was not prejudicial to plaintiff, since even if substitution had been made the court would have had no alternative, in the absence of stipulation extending time, but to thereafter dismiss action for failure to prosecute. Code Civ.Proc. §§ 385, 583; Const. art. 6, § 4½.

7. Appeal and error ⚷790(3)

Upon reversal of order dismissing action for lack of prosecution, appeal from order denying motion to vacate the dismissal became moot. Code Civ.Proc. § 583.

◆

In Bank.

Appeals from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by Ralph B. Smith and others against Bear Valley Milling & Lumber Company and others. From orders dismissing the action as to some defendants and refusing to vacate the order of dismissal, plaintiffs appeal.

Affirmed in part and reversed in part.

Prior opinion 152 P.2d 473.

A. V. Falcone, of Los Angeles, and Martin C. Casey, of San Bernardino, for appellants.

Charles A. Bank, of Los Angeles, for respondents.

Surr & Hellyer, of San Bernardino, amici curiae on behalf of respondents.

SCHAUER, Justice.

The pivotal issue on this appeal is the legal sufficiency of the evidence to support an order of the trial court dismissing plaintiffs' action as against all except one of the defendants. The defendants who were named in the complaint and who appeared are Bear Valley Milling & Lumber Co., a corporation (hereinafter termed Bear Valley Co.); Big Bear Land and Water Co., Inc., a corporation (hereinafter termed Big Bear Co.); Guy S. Maltby (now deceased); and Security Title Insurance and Guarantee Company, a corporation (hereinafter termed the title company).

The order of dismissal, from which the prevailing appeal is taken,[1] is based upon the second sentence of section 583 of the Code of Civil Procedure, which reads: "Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, *except where the parties have stipulated in writing that the time may be extended.*" (Italics added.)

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[1] Plaintiffs also appeal from an order denying their motion to vacate the order of dismissal, as hereinafter noted.

There is no question that the action was not tried within five years after it was filed. The controversy centers upon the factual question as to whether, in respect to the particular delay which is the basis of the dismissal, the parties "stipulated *in writing* that the time may be extended." The words "in writing" are italicized in the foregoing sentence in order more clearly to indicate the real issue. It is established by the affidavits of both of the participating attorneys that a stipulation extending time to include the delay in question was in fact entered into by and between one of the attorneys for the plaintiffs and the attorney for the defendants Bear Valley Co. and Big Bear Co., and the disputed issue lies only in the question as to whether such stipulation is "in writing" within the meaning of the above quoted language from section 583 of the Code of Civil Procedure.

Examination of the record discloses that the action was commenced on November 8, 1937; that the five years expired on November 8, 1942; that the parties did stipulate in writing (on October 28, 1942) that the time of trial should be extended for a specified (or ascertainable) term beyond the five-year period; i.e., "that the above action may be tried on December 10, 1942, or if said date is not convenient for the calendar of the above Court upon the first available date thereafter"; that under such stipulation the court set March 10, 1943, as the trial date; that prior to the expiration of such extension (on February 10, 1943) it was orally agreed by and between one of the attorneys for the plaintiffs and counsel for the defendants Bear Valley Co. and Big Bear Co., at the solicitation of the latter, that the date of March 10th was not available to them (because of previously made engagements of their own) as the trial date and that the time of trial should be further extended to "any time after April 15th." Although this oral agreement was not reduced to one writing denominated "stipulation" and signed by both counsel for plaintiffs and counsel for the participating defendants, and although the contracting attorney for the defendants subsequently endeavored ex parte to inject into the agreement a disavowal of its most important element—waiver of otherwise accruing rights under section 583 of the Code of Civil Procedure—the fact of the making of the agreement and the substance of its essential terms are evidenced by two writings (affidavits) which, although separate (one is signed by the attorney for the plaintiffs and the other is signed by the attorney for the participating defendants), incontrovertibly establish the meeting of the minds of the contracting attorneys in their agreement to extend the time for trial of the action. These writings were before the trial court both at the time the postponement was ordered and at the time the motion to dismiss was heard. In the light of the facts established thereby, and for the reasons hereinafter more fully expressed, we feel impelled to hold that it was error to dismiss the action as to the defendants Bear Valley Co. and Big Bear Co.

Chronology of Material Facts

The complete chronology of material events leading up to the order of dismissal is as follows:

November 8, 1937. Original Complaint filed.

May 9, 1940. Third Amended Complaint filed.

May 18, 1940. Defendant title company filed answer to Third Amended Complaint.

April 21, 1941. Defendant Bear Valley Co. filed answer to Third Amended Complaint.

April 25, 1941. Written stipulation (dated April 18, 1941) filed, to effect that above mentioned answer be deemed the answer also of defendants Big Bear Co. and Guy S. Maltby.

October 4, 1941. Defendant Maltby died.

October 27, 1942. Plaintiffs learned of death of defendant Maltby.

November 4, 1942. Written stipulation (dated October 28, 1942) between plaintiffs and defendants Bear Valley Co. and Big Bear Co. filed; provides "that the above action may be tried on December 10, 1942, or if said date is not convenient for the calendar of the above Court upon the first available date thereafter."

November 8, 1942. Five years elapsed from filing of action.

November 9, 1942. Written stipulation (dated November 2, 1942) between plaintiffs and defendant title company filed; provides same as stipulation filed November 4, 1942.

February 1, 1943. Court set case for trial on March 10, 1943.

February 10, 1943. Oral agreement (evidenced by subsequent writings) made by and between attorney for plaintiffs and attorney for defendants Bear Valley Co. and Big Bear Co., at request of latter attorney, that trial scheduled for March 10th should be continued to "any time after April 15th," provided that "Approval for continuance from the attorney of record for codefendant Security Title Insurance and Guarantee Company" should be secured.

March 8, 1943. Written stipulation (dated March 4, 1943) between plaintiffs and defendant title company, as agreed upon in the oral stipulation above set forth, filed; provides "that the trial of the above action may be continued from the date now set therefor, March 10, 1943, to the earliest date convenient to the calendar of the above Court after April 15, 1943."

March 8, 1943 (continued). Written document denominated "stipulation" (dated March 4, 1943) signed by attorney on behalf of defendant Big Bear Co. only, filed; provides "that the above case need not be tried on the 10th day of March, 1943, as now scheduled; that the said Charles A. Bank, Esq. [attorney for both the defendant Bear Valley Co. and the defendant Big Bear Co.], has no conflicting engagements subsequent to April 15th, 1943, which would prevent him from appearing in any trial of the above case; That this stipulation is given upon the express understanding: * * * *That by the foregoing Stipulation, no rights or privileges of any kind accruing to said defendant, Big Bear Land and Water Co., Inc., under and pursuant to the provisions of Section 583 of the Code of Civil Procedure, are affected, waived or prejudiced; and that same shall not be construed; or that the foregoing Stipulation constitutes or shall be construed as a Stipulation that time of trial may be extended.*" (Italics added.) This proposed stipulation was on March 4th, submitted to, but was not accepted by, plaintiffs for the reason that, admittedly, as appears from the affidavits of both the participating attorneys there had been gratuitously injected into it the italicized matter, stating a material condition which had not been included in, and was directly contrary to the spirit and purpose of, the earlier oral agreement.

March 8, 1943 (continued). Plaintiffs filed "Notice of Motion for Continuance of Trial" from the date set therefor (March 10, 1943) "to the earliest date available therefor after April 15, 1943," together with supporting affidavit. In such supporting affidavit plaintiffs' attorney averred, among other things, "That the above action has been set for trial on March 10, 1943. That on February 10, 1943, Charles A. Bank, counsel of record for Defendants, Bear Valley Milling & Lumber Co., a Corporation; Big Bear Land and Water Company, a corporation; and Guy S. Maltby, telephoned affiant and stated that he had been advised that the above action had been set for trial on March 10, 1943 [this was pursuant to the prior written stipulation], but that he could not try the case until sometime after April 15, 1943, and that any date thereafter would be agreeable to him and requested a continuance of said trial. That affiant advised him that he would not object to a continuance if a stipulation were obtained from counsel for Security Title Insurance and Guarantee Company, a corporation, another Defendant in the above action. That Bank then advised affiant that he would procure such a stipulation and communicate with affiant immediately." In an "Answering Affidavit re Motion for Continuance of Trial," the attorney for defendants Bear Valley Co. and Big Bear Co. (who originally represented also defendant Maltby) stated substantially the same material facts in the following language: "That in the early part of February, 1943, affiant received through the mail, copy of printed trial calendar issued out of the above court, in which it appeared that the above case was set to be tried on March 10th, 1943 [as previously noted this was the date set by the trial court under the first written stipulation extending the time of trial beyond the five-year period]; thereupon affiant called the said Falcone [counsel for plaintiffs] on the telephone, stating that he had received such notice, and further stating that if the case was to be tried, affiant's trial calendar was such that he *could not try it on the scheduled date, but that any time after April 15th was agreeable to affiant as and for a trial date;* At the time of the conversation, the said Falcone apparently had not learned of said scheduled trial date, and stated that such date likewise was inconvenient for him; that he could see no objection to a continuance of the trial date provided affiant would secure approval for continuance from the attorney of record for codefendant Security Title Insurance and Guarantee Company, a corporation, which affiant stated he would attempt to do; * * *. That at no time has affiant opposed any continuance, sought or desired by plaintiffs; *that affiant is not endeavoring to force said case on for trial on March*

10th and is not opposing the continuance sought by plaintiffs. * * *" (Italics added.) The stipulation from the attorney for the codefendant title company, which provided "that the trial * * * may be continued from the date now set therefor, March 10, 1943, to the earliest date convenient to the calendar of the above Court after April 15, 1943," was procured and filed, as hereinabove noted.

March 10, 1943 (date for which court, on February 1, 1943, set case for trial). Minute order of court recites that the parties were present by their respective attorneys, and that plaintiffs' attorney "on behalf of plaintiffs, moves the Court for order continuing said action for trial. Motion is granted, and the action is ordered restored to the civil active list."

May 3, 1943. Court set case for trial on June 9, 1943.

May 10, 1943. Notice of motion (and acknowledgment by plaintiffs' attorney of receipt of copy thereof) filed by administrator with the will annexed of the estate of defendant Maltby. Such notice recites that on May 17, 1943, the administrator "will move the * * * court, first, that * * * [this] action be dismissed, and, second, that said action be dismissed as to the defendant Guy S. Maltby. Said motions will be made upon the ground that said action has not been brought to trial within five years after it was filed. * * *"

May 17, 1943, at 2:00 p. m. Court granted motion to dismiss. The parties present were plaintiffs "by Attorney Martin Casey and the Defendant [administrator] * * * by Attorney John B. Surr."

May 19, 1943. Court's written order of dismissal as to all defendants except the title company filed; recites that such dismissal was ordered upon the motion of Maltby's administrator "and upon this Court's own motion."

June 1, 1943. Plaintiffs presented to court (and court denied) their motion to vacate the order of dismissal (of May 17, 1943) on the ground, in substance, among others, that the record showed that the parties had in fact stipulated in writing to an extension of time beyond April 15, 1943.

NEW MATTER OFFERED IN SUPPORT OF MOTION TO VACATE ORDER OF DISMISSAL.

In addition to the matters and records which were before the trial court at the time the motion to dismiss was heard, it was shown on the hearing of the motion to vacate such order of dismissal that on the same day that the court ordered the action dismissed (May 17, 1943), the attorney for defendant Big Bear Co. mailed to plaintiffs' attorneys a "Notice of Motion for Leave to File Amended Answer and Supplemental Answer" on behalf of such defendant, together with a copy of an affidavit of the attorney for such defendant in support of the motion and a copy of each of the proposed new pleadings. The originals of the affidavit and of the proposed pleadings were filed in court on May 24, 1943; the date of filing of the original of the notice does not appear in the record. The copies mailed to plaintiffs' attorneys were received by them on May 18, 1943; on the same day the attorney for defendant Big Bear Co. received a copy of the court order dismissing the action as to all defendants except the title company In the affidavit in support of the motion for leave to file the additional pleadings it is recited "that the above cause is at issue under plaintiffs' Third Amended Complaint; * * * that the above case is now scheduled to be tried on June 9th, 1943."

THE DISMISSAL AS TO DEFENDANTS BEAR VALLEY CO. AND BIG BEAR CO.

The parties agree that the stipulation filed November 4, 1942, to the effect "that the above action may be tried on December 10, 1942, or if said date is not convenient for the calendar of the above Court upon the first available date thereafter" operated to extend the five-year period specified by section 583 of the Code of Civil Procedure to the date (March 10, 1943) which the court pursuant to such stipulation set for the trial. Such stipulation, however, probably did not, in and by itself, effect a waiver of the right of defendants to (or preclude the court on its own motion from ordering) a dismissal if the case did not go to trial upon the date set. (See City of Los Angeles v. Superior Court, 1921, 185 Cal. 405, 409-410, 197 P. 79; Miller & Lux Inc. v. Superior Court, 1923, 192 Cal. 333, 337, 338, 219 P. 1006; Mercantile Invest. Co. v. Superior Court, 1933, 218 Cal. 770, 773, 25 P.2d 12.) Although it seems apparent that the attorneys were, in effect, proceeding under the stipulation of November 4, 1942, in trying to secure a trial date which was acceptable or "available" under their own schedules as well as convenient to the court's calendar, we shall assume that unless there was a stipulation in writing for a further extension of the five-year period it was mandatory upon the court to dismiss the action either on motion of a defendant, after due notice to the plaintiffs, or upon its own motion. (See Miller & Lux, Inc. v. Superior Court, 1923, supra, page 338 of 192 Cal., page 1008 of 219 P. and cases there cited.)

[1] That there was, however, a further stipulation "in writing," within the reasonable meaning of section 583, seems to be incontrovertibly established. All of the negotiations of the parties through their attorneys and the various writings signed by them, severally or jointly, were before the trial court. And such negotiations and writings having been had and made by the attorneys in the light of, and in reference to, the stipulation of November 4, 1942, we must bear that stipulation in mind in construing the mentioned acts and writings. Such stipulation is dated October 28, 1942 (filed November 4, 1942); it is signed by the attorney for the plaintiffs and by the attorney for the defendants Bear Valley Co. and Big Bear Co.; therein, as previously stated, it was agreed "that the above action may be tried on December 10, 1942, or if said date is not convenient for the calendar of the above Court *upon the first available date thereafter.*" (Italics added.) The attorney for the defendants signed his name above the description "Attorney for defendants Bear Valley Milling & Lumber Co., a corporation and Big Bear Land & Water Company, a corporation." The court's records show that pursuant to such stipulation the trial date was set as March 10, 1943. There were before such trial court, at the time the postponement for the date subsequent to March 10, was ordered, the sworn statements of both the attorney for the plaintiffs and the attorney for the two last mentioned defendants, hereinabove quoted in material parts, establishing without question the fact that on or about February 10, 1943, such attorneys had orally stipulated, at the request of the attorney for the defendants, because his "trial calendar was such that he could not try it on the scheduled date," that the trial date should be continued to "any time after April 15th," provided that "approval for continuance from the attorney of record for co-defendant Security Title Insurance and Guarantee Company" should be secured; there was also before the court the original record showing that the approval of the attorney of record for the defendant title company had in fact been procured—the written stipulation on behalf of that defendant was on file—and there was also on file the unilateral "stipulation" signed by the attorney for Bear Valley Co. and Big Bear Co. in which, although he was in fact the attorney of record for both Bear Valley Co. and Big Bear Co., he attempted to limit his appearance to a representation of only the defendant Big Bear Co., and, while agreeing "that the above case need not be tried on the 10th day of March, 1943, as now scheduled" and stating that he "has no conflicting engagements subsequent to April 15th, 1943, which would prevent him from appearing in any trial of the above case," he for the first time endeavored to inject into the stipulation a condition which his own affidavit shows had not been included in the oral agreement made at his request and which new condition was so completely contrary to the most material object of the oral stipulation (and the legitimate object of the proffered written stipulation) as to substantially destroy it if accepted. A stipulation to extend the time of trial beyond the five-year period necessarily waives the right to a dismissal of the action under section 583 which would otherwise accrue because of such delay. Such a stipulation is basically inconsistent with a reservation of such rights. If the stipulation in writing is made, in compliance with the statute, not only do the parties thereto waive their rights to a dismissal based on the agreed postponement but they preclude the court from granting of its own motion a dismissal based on the agreed delay.

In Miller & Lux Inc. v. Superior Court, 1923, supra, 192 Cal. 333, page 338, 219 P. page 1008, it is said that "An examination of the cases construing section 583, supra, discloses that no case decided by this court has held that anything short of a written stipulation extending in express terms the time of trial to a date beyond the 5 year period, or expressly waiving the right to a dismissal under that section, will suffice to toll the running of the statutory time. * * * [page 340 of 192 Cal., page 1008 of 219 P.] The provision that a written stipulation be entered into was intended to preclude all disputes, with their attendant charges and countercharges of overreaching and unethical conduct, by a requirement that clear and uncontrovertible evidence be presented to the court that the statutory time was deliberately intended to be extended by both parties."

[2] The case before us is unique in that while the attorneys for the parties (plaintiffs, and defendants Bear Valley Co. and Big Bear Co.) did not actually join in signing a document bearing the label "stipulation" and covering the precise postponement which is made the basis of the dismissal, it does appear by "uncontrovertible evidence"—the stipulations and affidavits of such attorneys, which affidavits are not in dispute on the essential facts—that such attorneys did in fact agree that the trial date set by the court under the first written stipulation was not available to them, because of their own previous engagements, and that the time of trial should be extended to a date subsequent to April 15. Although such agreement was originally oral its essential terms were, in effect, prior to the postponement, reduced to writing, in that they were evidenced without substantial dispute by separate writings signed by the respective contracting attorneys and filed with the court to be considered together in passing on the motion. Such oral stipulation so evidenced by the writings was, as above indicated, inherently related to the prior stipulation which was in writing and on file and to the procurement of a date for the trial which would be convenient or "available" to the attorneys in respect to their own calendars as well as one which would be convenient to and available from the court, in place of the date originally set by the court under the first stipulation, which first set date was not available to such attorneys because of their own engagements. The later stipulation was conditioned upon, and only upon, the procurement of a written stipulation for the proposed postponement from another defendant appearing separately, and that written stipulation from such other defendant was procured and filed. The attorney for the defendants, whose action initiated the proceedings for the postponement, after the terms of his proposed and accepted stipulation were admittedly fully met, endeavored ex parte to inject into the agreement, when reducing it to a writing of conventional stipulation form, a condition or reservation which would have substantially destroyed a principal object of the stipulation, and to that end he filed the document denominated "stipulation," which on its face purported to be a unilateral consent on behalf of one defendant to an extension of the time for trial but which also purported to reserve the very rights which were intended to be waived by the stipulation originally agreed upon. Yet contemporaneously with the filing of such unilateral "stipulation" he made the terms of the actual agreement and its relationship to the first written and admittedly valid stipulation appear by his own affidavit. And it is noteworthy that such "affidavit" not only alleges the facts as to the prior oral stipulation but avers as of the time of filing it "that affiant is not endeavoring to force said case on for trial on March 10th and is not opposing the continuance sought by plaintiffs"—sought by plaintiffs, it will be remembered, at the request of the attorney for the defendants and in reliance upon his agreement.

There is nothing particularly sacrosanct in the word "stipulation" which distinguishes it from any other contract or agreement. Here the agreement was made in fact; it relates, as above set forth, to the admittedly valid first stipulation; and it is evidenced by writings signed by both the contracting attorneys. Under such circumstances it would belie the substance of truth and ravage justice to say that the extension of time was not stipulated to or that such stipulation is not "in writing" within the reasonable contemplation of section 583 of the Code of Civil Procedure. Hence it was error to dismiss the action as to the defendants Bear Valley Co. and Big Bear Co.

THE DISMISSAL AS TO DEFENDANT MALTBY AND HIS ADMINISTRATOR.

[3-5] As stated hereinabove, defendant Maltby died on October 4, 1941, and approximately one year later, plaintiffs learned of his death. During his lifetime Maltby had been represented in the litigation by the same attorney who appeared for the defendants Bear Valley Co. and Big Bear Co. but the authority to represent Maltby did not extend beyond his lifetime. (Deiter v. Kiser, 1910, 158 Cal. 259, 262, 110 P. 921; Swartfager v. Wells, 1942, 53 Cal.App.2d 522, 528, 128 P.2d 128.) No action was ever taken either by plaintiffs or by any other person to substitute Maltby's administrator as a party defendant (see Code Civ.Proc., § 385). It was upon the motion of such personal representative that the matter of dismissal of the action pursuant to the provisions of section 583 of the Code of Civil Procedure was first brought to the attention of the court. Although plaintiffs make no claim that a stipulation, written or otherwise, was ever executed by either Maltby or his administrator which would operate to extend the five-

year period specified by section 583, plaintiffs do assert that inasmuch as the personal representative had not been made a party to the action he could not properly move that it be dismissed. However, the manner in which the matter is brought to the attention of the court is immaterial; when the court becomes aware of the facts it must, if they come within the purview of the statute, dismiss the action. (Miller & Lux Inc. v. Superior Court, 1923, supra, 192 Cal. 333, 338-339, 219 P. 1006; Pacific States Corp. v. Grant, 1927, 87 Cal.App. 108, 261 P. 1100; Turnbull v. Superior Court, 1932, 126 Cal.App. 141, 142-143, 14 P.2d 540.) And it is established law that the five-year period is not interrupted by defendant's death. (Larkin v. Superior Court, 1916, 171 Cal. 719, 724, 154 P. 841, Ann.Cas.1917D, 670.)

[6, 7] Plaintiffs argue further, however, that the court lacked authority to render a judgment either for or against Maltby in view of the fact of his death and the absense of substitution of his personal representative. Without entering into an extended consideration of the cases which discuss the propriety and effect of judgments rendered under such circumstances (see, e. g., Phelan v. Tyler, 1883, 64 Cal. 86, 28 P. 114; Wallace v. Center, 1885, 67 Cal. 133, 7 P. 441; Maxon v. Avery, 1939, 32 Cal.App.2d 300, 302, 89 P.2d 684; Boyd v. Lancaster, 1939, 32 Cal.App.2d 574, 580, 90 P.2d 317), it is apparent that no prejudice has resulted to plaintiffs from the failure to order the substitution. Even had the substitution been made, the court would have had no alternative (in the absence of a written stipulation executed by the personal representative or his attorney) but to thereafter dismiss the action as to the substituted defendant. There is no suggestion that the personal representative would have executed or authorized such a stipulation. Consequently a reversal of the judgment as to defendant Maltby will not be ordered. (Cal.Const., art. VI, § 4½.)

For the reasons hereinabove stated the order of dismissal is reversed as to the defendants Bear Valley Milling & Lumber Co., a corporation, and Big Bear Land and Water Co., Inc., a corporation, and affirmed as to the defendant Guy S. Maltby. Plaintiffs have also appealed from the order denying their motion to vacate the dismissal. Such appeal has become moot as to the defendants Bear Valley Milling & Lumber Co. and Big Bear Land and Water Co., Inc., by reason of our reversal of the order of dismissal, and, consequently, is dismissed as to them. The new matter adduced upon the presentation of such motion to vacate does not in any way alter the case as to the defendant Maltby and hence, as to him, for the same reasons which require affirmance of the order of dismissal, the order denying the motion to vacate such order of dismissal must be and is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concurred.

EDMONDS, Justice (concurring).

I agree that the term "stipulated in writing" as used in section 583 of the Code of Civil Procedure should not be so narrowly construed as to exclude consents to a continuance contemporaneously executed by each attorney in an action. But the record in the present case shows facts from which it conclusively appears that no written stipulation for a continuance was ever signed by counsel for the three defendants, and before the lapse of the five-year period, as extended by written stipulation, he refused to agree to any continuance as to two of them, and as representing the other, only agreed to an extension of time upon the condition that it should be without prejudice to the rights of his client to move for a dismissal of the action. Under these circumstances I see no basis for the conclusion that there was a stipulation satisfying the statutory requirement.

The affidavit of A. V. Falcone, representing the plaintiffs, which was filed on March 8th in support of his motion for a continuance subsequent to March 10th, the trial date fixed by stipulation of the parties, does not charge that Charles A. Bank, counsel for the defendants, at any time unqualifiedly agreed to a postponement. Falcone related a conversation with Bank which occurred on February 10th when Bank requested a continuance. At that time according to the affidavit, Falcone agreed to the postponement upon condition that a stipulation extending the time was also signed by counsel for the defendant title company and Bank agreed to procure its consent.

Following this conversation, Falcone sent Bank a stipulation in the ordinary form which the latter refused to sign, stating, in a letter received by Falcone on March 3d, a week before the date of trial as previously extended in writing by the parties, that he had no authority to do so. In a telephone conversation with Falcone on that day, Bank explained his statement by saying that he expected other attorneys would be substituted for him as counsel for two of the three defendants whom he then represented, but on behalf of Big Bear Land and Water Company only, he would sign the stipulation sent by Falcone.

As the promised stipulation was not received on the following day, March 4th, the affidavit continues, Falcone again telephoned to Bank "and asked him why he had not kept his word and Bank told affiant that he was changing the language of said stipulation and would not sign it in the form in which it had been submitted; * * * that Bank's secretary read what was supposed to be Bank's dictated form of stipulation. * * *"

The affidavit of Bank states the facts almost exactly as they are related by Falcone. As the story is told in this affidavit, in a telephone conversation with Falcone on March 3d, Falcone requested him to sign the tendered stipulation on behalf of Big Bear Land and Water Company, "which affiant promised to do; on the same date affiant dictated * * * stipulation for continuance on behalf of" that defendant only which recited that the extension of time was given "upon the express understanding: * * * That * * * no rights or privileges * * * under and pursuant to the provisions of Section 583 of the Code of Civil Procedure, are affected, waived or prejudiced; and that same shall not be construed * * * as a Stipulation that time of trial may be extended."

Accepting as true each statement made by Falcone, it appears that Bank never agreed to sign a stipulation for a continuance on behalf of the three defendants whom he then represented but that he promised to do so as the attorney for one of them. However, this promise was repudiated six days before March 10th, the date upon which the case was then set for trial, and Falcone was then informed by Bank that only a conditional stipulation would be signed. Otherwise stated, the facts show that six days before the date of the trial which was within the five-year period, as extended in writing by the parties, Falcone knew that Bank would not join in any stipulation for two of the defendants and that, on behalf of the other, he consented to a continuance specifically reserving the right to move for a dismissal of the action.

Under these circumstances, I see no basis whatever for the conclusion of Justice Schauer that the essential terms of the oral agreement "were, in effect, prior to the postponement reduced to writing, in that they were evidenced without substantial dispute by separate writings signed by the respective contracting attorneys." On the contrary, they show, at the most, an oral promise for a continuance which was repudiated at least six days before the expiration of the five years, as extended in writing by the parties, within which the action was required to be tried. And even if it may be said that in their telephone conversation of February 10th, the attorneys reached an agreement for a continuance, this was an oral understanding not meeting the requirements of the statute and according to Falcone's statements of the later occurrences, expressly disavowed by Bank a few days later.

For these reasons, in my opinion, the order made by the trial judge upon the hearing of the motion to dismiss should be affirmed. Certainly the uncontradicted facts, as stated in the affidavits, do not justify a reversal of that determination.

26 Cal.2d 565

LINDENBAUM v. STATE BAR.

L. A. 19177.

Supreme Court of California.

June 22, 1945.

1. Attorney and client 🔑53(2)

In a disciplinary proceeding against an attorney, attorney's contradiction of a witness merely created a conflict in the evidence which the fact-finding body had to resolve.

2. Attorney and client 🔑57

In a disciplinary proceeding against an attorney, findings of a fact-finding body are not binding on the Supreme Court but are entitled to great weight.

3. Attorney and client 🔑53(2)

In a disciplinary proceeding, evidence supported findings that attorney made threats of action injurious to client and his wife to force payment of attorney's bill.

and that attorney's motive was punitive in writing to immigration authorities to incite an investigation of client's wife as a supposed alien. St.1939, p. 357, §§ 6103, 6106.

4. Attorney and client ⟹58

Where attorney made threats of action injurious to client and his wife to force payment of attorney's bill after client had filed bankruptcy petition, and attorney with a punitive motive wrote to immigration authorities to incite an investigation of client's wife as a supposed alien, attorney committed an action involving "moral turpitude" warranting suspension from the practice of law for six months, notwithstanding money may have been justly due the attorney. St. 1939, p. 357, §§ 6103, 6106; Pen.Code, §§ 518, 664.

See Words and Phrases, Permanent Edition, for all other definitions of "Moral Turpitude".

5. Attorney and client ⟹57

On attorney's petition to Supreme Court to review the Board of Governors' recommendation that attorney be temporarily suspended from the practice of law, attorney has burden of showing wherein board's determination was erroneous or unlawful.

◆

In Bank.

Petition by Isidore Lindenbaum to review the recommendation of the Board of Governors of the State Bar that petitioner be suspended for six months from the practice of law.

Petitioner suspended from the practice of law for six months.

Isaac Pacht and Harry J. Miller, both of Los Angeles, for petitioner.

Paul Nourse and Clarence B. Runkle, both of Los Angeles, for respondent.

PER CURIAM.

This is a proceeding to review the recommendation of the Board of Governors of The State Bar that petitioner be suspended for the period of six months.

Petitioner was charged with the violation of his oath and duties as an attorney and the commission of acts involving moral turpitude within the meaning of sections 6103 and 6106 of the Business and Professions Code, St.1939, p. 357. He made answer to the charges and at the hearings before the local administrative committee, both the complainants and the petitioner testified. From the evidence, both oral and documentary, introduced at its hearings, the local committee found that petitioner had violated his oath and duties as an attorney, but that he had not committed acts involving moral turpitude. Accordingly, it recommended that petitioner be disciplined by public reprimand. Following an examination of the record and the hearing of supplemental testimony from petitioner, the Board of Governors adopted the local committee's findings, made certain additions thereto, and expressly concluded upon the amplified findings that petitioner had been guilty of conduct involving moral turpitude as well as a violation of his oath and duties as an attorney. Accordingly, the Board of Governors recommended an increase in the measure of discipline to a six months' suspension from the practice of law. Petitioner seeks to have this recommendation disapproved on the ground that it is excessive and not supported by the evidence.

It appears that for some time prior to January 6, 1941, petitioner had acted in several matters as attorney for Ross Lansing, one of the complaining witnesses. On that date Frances Lansing filed against said Ross Lansing a complaint for separate maintenance, on the grounds of adultery and extreme cruelty. In said complaint, Alice Shelton was named as corespondent. Petitioner represented Ross Lansing in the defense of this action, and on his behalf filed a demurrer to the complaint on January 15, 1941. Petitioner referred Alice Shelton to another attorney, who, after consultation with petitioner, filed for her on January 16, 1941, a verified answer which denied specifically the acts of adultery charged in the complaint. On January 27, 1941, a first amended complaint for separate maintenance, setting forth more explicitly the previous charges of adultery, was filed. It was thereupon stipulated between counsel for plaintiff and counsel for the corespondent that the latter's answer to the original complaint as theretofore filed might be deemed an answer to the first amended complaint. On February 7, 1941, petitioner filed his client's verified answer to the first amended complaint, which answer made specific denial of all the adultery charges. On April 3, 1941, following a property settlement agreement, plaintiff filed a second amended complaint, wherein she alleged only extreme cruelty, eliminated all reference to the previous adultery charges and to Alice Shelton as corespondent in connection therewith, and prayed for a divorce. Petitioner then filed his client's verified answer denying the allegations of extreme cruelty as contained in said second amended complaint. On April 11, 1941, the action was called for trial upon the issue of extreme cruelty. Petitioner did not appear at the trial until after the completion of all the testimony by plaintiff and her corroborating witness. Neither Ross Lansing nor Alice Shelton was present at the trial; there was no cross-examination and there was no testimony offered on their behalf. Findings of fact and conclusions of law were waived by counsel and an interlocutory decree of divorce was granted to plaintiff. That decree became final on April 15, 1942.

Thereafter Ross Lansing and Alice Shelton, the other complaining witness here, were married. In October, 1943, Ross Lansing filed a voluntary petition in bankruptcy, and petitioner's claim for legal services was listed therein. Lansing was represented by another attorney in the bankruptcy proceeding. Petitioner received notice of the first meeting of creditors to be held on November 3, 1943, and attended it. He left the hearing during the course of Lansing's testimony, and as he was walking along the hall on the way to make a telephone call, he met the bankrupt's wife, Alice Shelton Lansing. In the course of conversation he told her that he was still Lansing's attorney of record in a number of pending actions, that her husband should have certain information about those matters, and that he would discuss them with her if she would call at his office. A few days later she did visit petitioner in his office; and, while he did advise her with respect to certain matters in which he was representing Lansing, he further stated on that occasion that he didn't think that her husband was treating him fairly in including his claim along with those of "merchandise creditors" in the bankruptcy schedule. Further testimony relating to their conversation will be hereinafter discussed.

A few days after said visit and on November 12, 1943, petitioner addressed a letter to the Bureau of Immigration and Naturalization in the Federal Building at Los Angeles, reading as follows:

"In the event an application is made for the naturalization of Alice Lansing, formerly Alice Shelton, may I refer to the case of Lansing v. Lansing, L. A. Superior Court Case No. D201,044, as a matter in which the former wife of Ross Lansing sued him for divorce and named said Alice Shelton as a corespondent. The complaint indicates certain matters which may involve moral turpitude.

"If I can be of any further service to you within the limitations of professional proprieties, you may feel free to call upon me."

At the time this letter was written Alice Shelton Lansing had already been admitted to citizenship, but petitioner did not know that fact. He apparently believed she was planning to make application. Within a few days petitioner, in response to his letter, received a telephone call from an official of the Bureau of Immigration and Naturalization asking for further details as to the adultery charges in the Lansing divorce proceedings before reopening the citizenship matter in question. Thereafter, and on November 29, 1943, petitioner again wrote to the bureau, advising that the former wife of Ross Lansing had commenced her action against him on January 6, 1941 (the date of the filing of the original complaint for separate maintenance), naming Alice Shelton as corespondent. In said letter petitioner then quoted in full that portion of the superseded first amended complaint containing the allegations of adultery, and further stated that, as he recollected, "testimony * * * along these lines was given by witnesses at the time of the hearing of divorce, which went without opposition on the part of either Ross Lansing or Alice Shelton." Petitioner sent a copy of this letter of November 29th to Ross Lansing.

Petitioner's conduct in his dealings with Alice Shelton Lansing and his subsequent communications with the Bureau of Immigration and Naturalization led to the present disciplinary proceeding against him.

[1, 2] At the hearing before the local administrative committee Alice Shelton Lansing recounted at some length the conversation had with the petitioner in his office a few days following the first meeting of creditors on her husband's bankruptcy petition. Thus, she testified that on the occasion of her visit petitioner "pointed out that he was very much disappointed because Mr. Lansing had included him in the bankruptcy and he didn't think it was a fair thing to do after all the work he had done for him"; that she expressed her regret that her

husband found it necessary to follow such procedure, but added they "had both been working very hard for a government project in Utah and had not been able to clear up all of Mr. Lansing's financial obligations and he had to go through bankruptcy"; that petitioner thereupon remarked, " 'The fact that you get along with Mr. Lansing now, sometimes the picture changes but *an attorney can always leave himself a few aces in the hole and I intend to use those when the time comes*' "; and that she then said, " 'Well, what is it, I would like to know how I stand,' " but he merely responded, " '*I am sorry I can't tell you because it would sound like a threat.*' " She further testified with reference to this same occasion that petitioner said *"there were things which he intended to use against both of us, Mr. Lansing and me, and which would hurt both of us, not only personally but in business too,* and I asked him again what it was and he said he couldn't tell me." Petitioner directly contradicted the above italicized portion of Alice Shelton Lansing's account of their conversation, but his denial merely created a conflict in the evidence which the fact-finding body had to resolve. Aydelotte v. State Bar, 209 Cal. 737, 739, 290 P. 41. And while the findings of the fact-finding body are not binding on this court, they "should be accorded persuasive force" and "should be entitled to great weight" in this proceeding. Light v. State Bar, 14 Cal.2d 328, 336, 337, 94 P.2d 35, 40.

Petitioner's claim that his sole purpose in having Alice Shelton Lansing come to his office was to advise her with respect to the status of pending matters in which her husband was interested is not convincing under the circumstances. While he did so inform her as to such unfinished matters, and particularly as to the effect of the bankruptcy on the discharge of these claims, it would seem more reasonable to conclude that if petitioner felt he "had [a] certain responsibility there," he would have communicated directly with his client, rather than the client's wife, or that he would have called his client's bankruptcy attorney, whom he knew. Petitioner argues that he had no ulterior motive in establishing his contact with Alice Shelton Lansing because though he felt that he had been "badly treated," he told her that since her husband had seen fit to list him as a creditor on the bankruptcy schedule, "that would have to be the way it was and [he] was writing it off"; and that in response to her statement, " 'I am sorry, I would like to do something for you but I am just working on a salary,' " he said, " 'There is no reason why you should pay anybody else's bill.' " But these statements by petitioner are not of themselves inconsistent with Alice Shelton Lansing's version of their conversation as embracing veiled threats of action against her and her husband if his claim for legal services was not paid. In fact, if neither she nor her husband paid his bill or acknowledged the indebtedness, he would have no alternative but to "write it off," for that would be the effect of Lansing's discharge in bankruptcy; and his remark that he did not consider it her financial obligation is readily susceptible of interpretation as a protective comment in the event that their conversation should be related to others.

Petitioner's conduct following his conversation with Alice Shelton Lansing places him in a still more unfavorable light, and this admitted conduct bears out her version of their conversation rather than his. Thus, within a week thereafter he undertook the above-recited correspondence with the Bureau of Immigration and Naturalization, indicating his knowledge of "certain matters which may involve moral turpitude." In his talk with Alice Shelton Lansing he had learned that she and her husband were working together on a government project. He did not then know her citizenship status, but it is reasonable to assume that he recognized the serious import of an investigation concerning the character of an alien while so employed. When he so wrote to the bureau, he knew that his quoted charges of adultery, as made in the superseded first amended complaint, had been denied under oath by both his client Ross Lansing and the named correspondent, Alice Shelton. He also knew that the Lansing divorce action was tried on the single issue of extreme cruelty, that the corespondent was not at the time of trial a party to the action, and that there was therefore no occasion for her to appear in court in answer to the eliminated adultery charges. Yet he implied in his correspondence with the bureau that the adultery charges were tacitly admitted because the divorce "went without opposition on the part of Ross Lansing or Alice Shelton." He further stated in writing to the bureau that it was his recollection that testimony along the lines of the allegations of adultery was given at the hearing in the Lansing divorce matter, although he knew that he was not present when the witnesses testified and now admits that he only had a brief summary of the testimony given him by plaintiff's counsel in that case. Moreover, the record of the evidence produced in that divorce hearing discloses that the only reference therein made to Alice Shelton was the statement that she had been seen in public with Ross Lansing. There was no testimony that would establish that they had committed adultery. Yet petitioner made such insinuations as would incite an investigation of charges that he had no reason to believe were true.

Petitioner maintains that his correspondence with the bureau is not censurable because it only related to matters of public record in its reference to the pleadings in the Lansing divorce action and in its recommendation of an examination of the reporter's notes to verify the evidence at the trial. But such observation does not deflect from the reprehensible nature of petitioner's conduct for the correspondence, by reason of its implications and deliberate omission of salient facts, was obviously designed to provoke, without justification, an inquiry which would result perhaps in injury, and certainly in embarrassment, to petitioner's client and his client's wife. The conclusion seems inescapable that the correspondence was engendered by the petitioner's admitted ill feeling toward Lansing because of the bankruptcy matter. Petitioner argues that he was only prompted by a patriotic duty to impart to the immigration authorities information which might affect the propriety of granting citizenship to an alien. If such was his motive in undertaking the correspondence with the bureau, it seems strange that he should have waited some two and one-half years before having this estimable urge, and that the correspondence should have followed so closely his conversation with Alice Shelton Lansing concerning the listing of his claim in her husband's bankruptcy petition. But even if it could be said that petitioner was merely performing a civic duty in making such report to the bureau, he nevertheless would have had the correlative obligation of fairly and honestly stating all the facts to the end that the letters would not have provoked an investigation that might not have been undertaken if the facts had been fully and truly stated. Furthermore, when cross-examined as to his purpose in writing the first letter to the bureau, petitioner testified as follows:

"* * * In other words, I suppose I felt that I had been grossly misused, and in that connection I presume I wrote that letter.

"Q. In other words, you wrote the letter to get even? A. It is hard for me to answer that. Possibly, as I look back at it now that might have had something to do with my writing that letter."

As evidence that his two letters to the bureau were sent openly and in good faith, petitioner refers to the fact that a copy of the second, detailing the abandoned adultery charge and suggesting further inquiry by the bureau, was forwarded to Lansing to keep him informed. But this circumstance seems rather to suggest that petitioner, after failing to provoke some arrangement for payment of his bill following his private conference with Alice Shelton Lansing, was keeping Lansing "informed" as to the consequences. Petitioner testified that he sent this copy to Lansing because "I wanted to make a disclosure of everything that I might be doing that affected him in any way at all." But reference to other portions of the record does not sustain petitioner's explanation. Thus, petitioner stated that following the Lansing bankruptcy hearing, he closed several files of pending cases involving Lansing and he advised the attorneys on two of the claims listed in the bankruptcy schedule that he "would no longer be responsible for Lansing," although he admittedly remained "the attorney of record" in those matters. Purportedly feeling an obligation to disclose to Lansing everything "that affected him in any way at all," petitioner nevertheless failed to give Lansing any notice of his abandonment of those cases.

[3, 4] Review of the record herein shows that the preponderance of substantial evidence supports the findings of the Board of Governors to the effect that petitioner, in his private conference with Alice Shelton Lansing, made threats of action injurious to her and to his client, Ross Lansing, in an attempt to force through fear the payment of his bill for legal services, and that failing in this endeavor, his motive was punitive in writing, without justification, to the immigration authorities in an effort to incite an investigation of a supposed alien through a misrepresentation of facts. These findings justified the determination that petitioner had "violated his oath and duties as an attorney" and had "committed acts involving moral turpitude." While the

term "moral turpitude" has been defined in various ways, petitioner's acts involved moral turpitude under any of the approved definitions of that term. Herron v. State Bar, 24 Cal.2d 53, 59, 60, 147 P.2d 543; In re Craig, 12 Cal.2d 93, 97, 82 P.2d 442; Jacobs v. State Bar, 219 Cal. 59, 64, 25 P.2d 401; Lantz v. State Bar, 212 Cal. 213, 218, 298 P. 497; In re O'Connell, 184 Cal. 584, 587, 194 P. 1010. It is only necessary to point out that among the above-enumerated acts of petitioner were acts constituting the crime of attempted extortion. Pen.Code, §§ 518 and 664. It is immaterial that the money which petitioner sought to obtain through threats may have been justly due him. People v. Beggs, 178 Cal. 79, 172 P. 152.

[5] It therefore appears that petitioner has not met the burden of showing wherein the determination of the Board of Governors is erroneous or unlawful. Aydelotte v. State Bar, 209 Cal. 737, 740, 290 P. 41; Light v. State Bar, 14 Cal.2d 328, 336, 337, 94 P.2d 35; Gaffney v. State Bar, 20 Cal. 2d 735, 739, 740, 128 P.2d 516, While "charges of unprofessional conduct on the part of an attorney should be sustained by convincing proof and to a reasonable certainty, and any reasonable doubts should be resolved in favor of the accused" (Hildebrand v. State Bar, 18 Cal.2d 816, 834, 117 P.2d 860, 869), the record in this proceeding fully justifies the findings and the disciplinary recommendation here under review. Aydelotte v. State Bar, supra; Ring v. State Bar, 218 Cal. 747, 750, 24 P.2d 821. In fact, the disciplinary recommendation of suspension for a period as short as six months appears to be justified only by the evidence showing that petitioner had never been previously charged with professional misconduct since his admission to practice in 1930, and by the character evidence showing that he had previously borne a good reputation.

It is therefore ordered that the petitioner be suspended from the practice of law for a period of six months commencing thirty days after the filing of this decision.

CARTER, Justice (concurring).

I concur in the conclusion reached, but upon the sole ground that there is sufficient evidence from which an inference can be drawn that petitioner's motive in talking with Alice Shelton Lansing after the creditors' meeting was to attempt, by a veiled threat at least, to induce her to pay him the amount her husband owed him. His conduct in this regard bordered on attempted extortion and was reprehensible, justifying the discipline administered.

I do not, however, agree that petitioner should be disciplined for writing the letters to the Bureau of Immigration, as I think that he had a legal and moral right to do what he did in this regard. If he had such right, his motive in exercising it is immaterial. J. F. Parkinson Co. v. Bldg. Trades Council, 154 Cal. 581, 98 P. 1027, 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165; Fisher v. Feige, 137 Cal. 39, 69 P. 618, 59 L.R.A. 333, 92 Am.St.Rep. 77; Union Labor Hosp. Ass'n v. Vance R. Lumber Co., 158 Cal. 551, 112 P. 886, 33 L.R.A.,N.S., 1034; Couley on Torts (vol. 2), p. 1505; 1 Cal. Jur. 336; 1 Am.Jur. 420. While I do not consider his conduct in writing the letters in question, under the circumstances disclosed by the record, as being at all commendable, I can see nothing in connection therewith which savors of moral turpitude or which would justify discipline. It is obvious that his only purpose in writing the letters was to cause an investigation to be made as to the moral character of Alice Shelton Lansing. In making this investigation the bureau would be required to examine the record and interview witnesses having knowledge of the facts. If the investigation disclosed that she was an unfit person to become a citizen of the United States, the disclosure would certainly have been in the public interest. On the other hand, if she was found to be of good moral character, she would suffer no ill effects therefrom. Certainly, if petitioner had done nothing more than write the letters in question, it could hardly be said that he violated any duty he owed to either Ross Lansing, his former client, or his wife, Alice Shelton Lansing.

In my opinion the conduct of the petitioner in the case at bar in indicating to Alice Shelton Lansing that unless he received the money due him from her husband he intended to use things against them which would be detrimental to them personally and in their business, comes within any accepted definition of moral turpitude and justifies the discipline recommended in this case.

EDMONDS, Justice (concurring).

I concur in the conclusion that the evidence amply supports the findings against the petitioner and fully justifies the imposition of discipline for unprofessional conduct. But I cannot reconcile with those findings the very slight penalty fixed by the Board of Governors and adopted by the court. My associates agree that Lindenbaum committed acts of moral turpitude constituting the crime of attempted extortion. Many attorneys have been disbarred for a breach of professional duty of much less gravity.

* * *

26 Cal.2d 605

HOUGH v. HOUGH.

L. A. 19234.

Supreme Court of California.

June 26, 1945.

1. **Divorce** 🔑236

Where spouses' separation agreement is presented to court for adjudication in wife's divorce suit and agreement or part thereof is incorporated in and made part of decree granting wife divorce, part so incorporated is merged in decree.

2. **Divorce** 🔑236

Generally, action on claim for money, resulting in equity decree, such as divorce decree, for payment of money, is merged in decree, and no action thereafter lies on claim, but plaintiff must rely on decree.

3. **Divorce** 🔑236

The basis for alimony award to wife arises out of husband's legal obligation to support wife, rather than contract, but, where spouses agree to payment of specified amount of alimony and such agreement is presented to court in wife's divorce suit, it becomes part of issues litigated therein.

4. **Husband and wife** 🔑280

A property settlement agreement, incorporated in and made operative part of decree granting wife divorce and alimony, cannot be enforced independently of decree, especially in view of court's retained power to modify decree on showing of changed circumstances. Civ.Code, § 139.

5. **Divorce** 🔑254

Payments under spouses' property settlement agreements may not be modified, though such agreements are incorporated in decree granting wife divorce. Civ.Code, § 139.

6. **Divorce** 🔑245(1), 254

Support allowances to wife by divorce decree should be subject to court's discretion as justice may require; whereas, settlement of spouses' property rights by agreement should be final in order to secure stability of titles. Civ.Code, § 139.

7. **Husband and wife** 🔑278(1)

A husband and wife may contract with each other respecting wife's support and spouses' property rights. Civ.Code, §§ 158, 159.

8. **Divorce** 🔑245(1)

An award of alimony to wife in divorce decree may be modified under appropriate circumstances, and incorporation in decree of husband's agreement to make payments for wife's support does not prevent modification of decree so long as such agreement is not a property settlement agreement. Civ.Code, § 139.

9. **Husband and wife** 🔑280

A divorced wife had no right of action against divorced husband on portions of their property settlement agreement incorporated in and made operative part of divorce decree, but her remedy was on the decree, including such aids as execution, contempt, and other enforcement process of court, together with action on decree.

10. **Divorce** 🔑245(4)

A divorced wife, bringing action against divorced husband for monthly support payments due under their property settlement agreement, incorporated in divorce decree, is not entitled to have order modifying decree by reducing amount of payments annulled or set aside after expiration of time for appeal therefrom on theory that court had no jurisdiction to modify decree based on property settlement agreement. Civ.Code, § 139.

11. **Divorce** 🔑245(1)

While divorce court generally has no jurisdiction to modify divorce decree based on spouses' property settlement agreement, court has jurisdiction, on application for modification of decree, to decide whether it is based on such an agreement, and hence is not subject to modification, or is based on alimony or support allowance covenants and hence subject to modification. Civ. Code, § 139.

12. Divorce ⚷245(4)

An order modifying divorce decree by reducing monthly payments for wife's support was "res judicata" on issue in wife's subsequent action against husband on their property settlement agreement, incorporated in decree, as to whether provision in agreement for wife's support was alimony or part of property settlement. Civ.Code, § 139.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Hazel M. Hough against James V. Hough for the amount due plaintiff under a property settlement agreement incorporated in a decree granting plaintiff a divorce from defendant. Judgment for plaintiff, and defendant appeals.

Reversed.

Prior opinion, Cal.App., 152 P.2d 17.

Holbrook & Tarr and Leslie R. Tarr, all of Los Angeles, for appellant.

Sullivan & Lane, of Los Angeles, for respondent.

CARTER, Justice.

On January 25, 1927, plaintiff commenced an action for divorce against her husband, the defendant herein. Thereafter, in August, 1927, plaintiff and defendant entered into an agreement providing for the settlement of their property rights. The community property, consisting principally of a going concern, was valued at $75,000. The agreement provided that defendant would pay plaintiff $35,000 and transfer to her other items of community property. The agreement further provided that plaintiff was to have the custody of the two minor children of the parties; that defendant would pay plaintiff $200 per month for her support "during her life unless she re-marries, and if she re-marries the said monthly alimony payments to cease; * * *." He also agreed to pay $50 and $75 per month for the support of the children.

Although no mention was made in the divorce complaint of the agreement, the waiver of answer filed by defendant recites that the agreement had been made and it was introduced in the divorce proceeding as plaintiff's exhibit. The interlocutory decree of divorce awarded the custody of the children to plaintiff and provided for their support, and ordered the payment to her of the sum of $35,000, and also provided for the payment to her of $200 per month "for her own support and maintenance, beginning September 1st, 1927, and to continue during her lifetime unless she remarries; * * *," and the performance of some of the other terms of the agreement. It closes with the statement that the "above provisions are in accordance with the property settlement filed herein, which said property settlement is hereby approved by the Court." The final decree entered in 1928 adopted the terms of the interlocutory decree. Defendant complied with the terms of the decree, except as to some items not here important, until in 1934, when he applied for a modification of the decree with respect to the $200 monthly payments to plaintiff, release from support of one child who had become emancipated, and a reduction in the support payment for the other. The application was based upon changed circumstances (the financial losses and embarrassment of defendant). Plaintiff countered with an affidavit and an order to defendant to show cause why he should not be held in contempt for not paying the full amount for the past year (defendant answered that affidavit) and also an affidavit opposing the modification. She also presented the affidavit of her counsel in opposition to the modification in which it was claimed that the payments of $200 per month were to be in lieu of "an attempted" division of the community property. The issues of contempt and modification being joined, the court on May 11, 1934, made its order stating: "The plaintiff's objection to hearing order to show cause re modification on grounds the Court has no jurisdiction to modify provision of property settlement re support of plaintiff is denied. The Court finds the defendant has paid only $100.00 per month on support since April 1933 and is $1200.00 in arrears, and that contempt has not been willful. Arrearages to be paid at the rate of $50.00 per month until paid; support of plaintiff reduced to $100.00 per month, commencing June 1, 1934, until further Order of Court, or until plaintiff remarries. Order for support of child to remain. These payments to be made direct. Plaintiff's motion for additional attorney fees denied." No appeal was taken from that order and it became final.

Thereafter, on September 25, 1942, plaintiff commenced the instant action on the agreement to recover the difference between the monthly payments of $200 provided for in the interlocutory decree and the monthly payments of $100 as modified by the order of May 11, 1934, which would have accrued since the modification except for it. Defendant pleaded the order of modification as res judicata. The court gave judgment for plaintiff, finding that "said contract was a property settlement agreement wherein the parties agreed upon the settlement of their respective property rights arising out of their marital relations"; that "plaintiff submitted said property settlement contract, herein sued upon, to the Court in said divorce proceeding for its approval and that said Court approved said contract and fully adjudicated and determined all rights arising under said contract"; that "it is not true that all the rights of plaintiff under said contract were adjudicated at the time the Interlocutory Decree was modified on the 11th day of May, 1934."

[1-6] Turning first to the relation between the separation agreement and the divorce decree, it appears to be well settled, that if the agreement is presented to the court in the divorce proceeding for adjudication, and the agreement, or a part thereof, is incorporated in the decree and made a part thereof, the part so incorporated is merged in the decree. See Warren v. Warren, 116 Minn. 458, 133 N.W. 1009; Herrick v. Herrick, 319 Ill. 146, 149 N.E. 820; Wallace v. Wallace, 74 N.H. 256, 67 A. 580, 13 Ann.Cas. 293; Maginnis v. Maginnis, 323 Ill. 113, 153 N.E. 654; Lilley v. Lilley, 125 Conn. 339, 5 A.2d 849; Fleming v. Yoke, D.C., 53 F.Supp. 552; (See Reynolds v. Reynolds, 53 R.I. 326, 166 A. 686); Worthington v. Worthington, 224 Ala. 237, 139 So. 334; Adler v. Adler, 373 Ill. 361, 26 N.E.2d 504; McVeigh v. McConnell, 313 Ill.App. 75, 38 N.E.2d 962; Corbin v. Mathews, 129 N.J.Eq. 549, 19 A.2d 633; Prime v. Prime, 172 Or. 34, 139 P.2d 550; Ex parte Jeter, 193 S.C. 278, 8 S.E.2d 490; Rufner v. Rufner, 131 N.J. Eq. 193, 24 A.2d 180; Applegate v. Applegate, 135 N.J.Eq. 29, 38 A.2d 119, 154 A.L.R. 317; Gavette v. Gavette, 104 Colo. 71, 88 P.2d 964; Holloway v. Holloway, 130 Ohio St. 214, 198 N.E. 579, 154 A.L.R. 439. In Holloway v. Holloway, supra, the issue involved was whether a holding for contempt for failure to pay support allowances under a divorce decree which was based upon a separation agreement incorporated therein would be an unlawful imprisonment for debt, and the court held it would not because the obligation was on the decree and not the agreement, stating at page 580 of 198 N.E.:

"The problem here presented is not the enforcement of an agreement by contempt proceedings, but rather the enforcement by contempt proceedings of a decree which has incorporated therein an agreement to pay alimony. The distinction is important. A decree is valid as such regardless upon what it may be grounded. There is nothing in the law to render a decree invalid or ineffectual merely because it is predicated upon an agreement of separation, which agreement is incorporated bodily in the decree. A decree which incorporates an agreement is a decree of court nevertheless, and as soon as incorporated into the decree *the separation agreement is superseded by the decree, and the obligations imposed are not those imposed by contract, but are those imposed by decree, and enforceable as such. Once the contract is merged into the decree, the value attaching to the separation agreement is only historical.*" (Emphasis added.) And it should logically and justly follow therefrom that thereafter there is no right of action on the agreement incorporated in the decree. Generally, an action on a claim for money resulting in a decree in equity, such as a divorce decree, for the payment of money is merged in the decree, and no action thereafter lies upon the claim. The plaintiff must rely upon the judgment. (Rest., Judgments, § 47, comment g.) True, the basis for an alimony award arises out of the law imposed obligation of support rather than contract, but where the parties agree to a specified amount and the agreement is presented to the court, it becomes a part of the issues litigated. One of the precise issues involved in the divorce action is whether or not support payments should be ordered and if so the amount thereof. The agreement deals with identical questions. When it is incorporated in and made an operative part of the decree, there is no longer any occasion for its independent existence. Additional rights have been thereby gained by the one to whom the payments are to be made. The judgment is enforceable in the customary manner and also by contempt proceedings in a proper case. For those benefits, any disadvantages ensuing from the merger should justly be borne. The action of the court in ordering support payments in the terms of the agreement would be rather an empty gesture if the agreement itself stood alone and could be enforced regardless of the decree. The retained power of the court to modify the decree upon a showing of changed circumstances (Civ.Code, § 139) which is based upon sound policy would be seriously impaired, and any attempt on its part to give relief thereunder would be abortive if the parties could still enforce the agreement which had been made a part of the decree. True, an action on the contract would not carry with it the contempt method of enforcement, but the end result would be that a matter in which the state has a vital interest, the support allowance, would be outside the policy declared by the state. No such anomalous situation should be permitted to exist. It is aptly said in 39 Michigan Law Review 128:

"It is conceived that the basic questions in regard to the power of a court to modify decrees for alimony which are based upon a contract cannot be solved by definition, and it is thought that the solution should lie in an evaluation of the ends which will be accomplished by the various theories and their social desirability.

"In the first place, should the fact that there is incorporated into the decree a contract of the parties as to support alter the power of the court over such decree? Assuming that the court has power by statute to modify a decree not based on contract, it would seem that in the view of most courts there is no sufficient reason to take the decree based on contract out of the operation of the statute as to the alimony provisions. *That the interest of the state in the marital status and the dissolution thereof is sufficient reason to support such a view hardly seems to require demonstration.* * * * The obligation to pay alimony or support money to a divorced wife is one peculiarly justified by considerations of social desirability and generally prescribed as a consequence to dissolution of the marital relation. Being a continuing obligation, and being subject to scrutiny of the courts as to fairness and adequacy at its inception, it should so remain and the contract of the parties should not be allowed to oust the court of power otherwise exercisable. Further, it must be remembered that the alimony obligation of the contract has become enforceable by contempt process due to incorporation in the decree and there seem to be strong reasons why such a drastic sanction should not be available without power in the court to regulate the extent of the obligation for whose enforcement the sanctions may be used. * * * If the parties are still bound under the contract, presumably it is still enforceable by an action thereon, although it may no longer be enforced by contempt proceedings. To hold that the contractual rights of the parties survive the decree seems to leave the party in whose favor modification was ordered in substantially the same position as before. Instead of the deep blue sea of contempt process, he is confronted with the devil of sheriff's sale. If it be conceded that justice demands modification of the agreement in any particular case, then it seems that the deserving party should be relieved not merely from the duty of paying under pain of contempt but from the duty of paying at all. The contractual obligation to pay support money may, therefore, properly be considered as having merged in the decree, since otherwise the substance of the court's power to prescribe the alimony to be paid is substantially limited by the contract of the parties." (Emphasis added.) This does not mean that payments under property settlement agreements may be modified even though incorporated in the decree. They may not. Puckett v. Puckett, 21 Cal.2d 833, 136 P.2d 1; Leupe v. Leupe, 21 Cal.2d 145, 130 P.2d 697; Dupont v. Dupont, 4 Cal.2d 227, 48 P.2d 677; Miller v. Superior Court, 9 Cal.2d 733, 72 P.2d 868; Ettlinger v. Ettlinger, 3 Cal.2d 172, 44 P.2d 540. But in such a situation there is not the same underlying policy. The settlement of property rights should be final in order to secure stability of titles. Support allowances on the other hand should be subject to the discretion of the court as justice may require. It may well be reasoned that the provision of section 139 of the Civil Code authorizing the modification of support allowances becomes an implied part of the agreement when it is incorporated into the decree. It is said in Smith v. Smith, 94 Cal.App. 35, 47, 270 P. 463, 468:

"The holding of the cases there cited is to the effect that the *order* allowing alimony *is subject to revision* at any time. *The parties, in making the agreement, will be presumed to have entered into the same with the understanding that the trial court possessed the power to change or modify the award or provision made for support,* as the circumstances might require or as the justice of the case might necessitate, the distinction being drawn that in some states, there being no statute similar to our code, the power to change or modify must be reserved in the decree." (Emphasis added.)

[7, 8] The law of California is in harmony with the foregoing principles and policy. A husband and wife may contract with each other with respect to support and property rights. See Civ.Code, §§ 158, 159; Puckett v. Puckett, supra. An award of alimony in a divorce decree may be modified under appropriate circumstances (Civ.Code, § 139; Leupe v. Leupe, supra; Puckett v. Puckett, supra), and the incorporation of an agreement in the decree for the payment of support as long as it is not a property settlement agreement does not prevent a modification of the decree under appropriate circumstances. See Puckett v. Puckett, supra; Johnson v. Johnson, 104 Cal.App. 283, 285 P. 902; Smith v. Superior Court, 89 Cal.App. 177, 264 P. 573; Parker v. Parker, 22 Cal.App.2d 139, 141, 70 P.2d 1003; Innes v. McColgan, 47 Cal. App.2d 781, 118 P.2d 855. In Lazar v. Superior Court, 16 Cal.2d 617, at page 620, 107 P.2d 249, at page 250, the agreement authorized its incorporation in the decree, but this court in determining whether the agreement was sufficiently incorporated in the decree to justify a contempt citation for disobedience, stated:

"If a property settlement agreement is complete in itself and is *merely referred to* in a divorce decree or approved by the court *but not actually made a part* of the decree, then the provisions of such agreement cannot be enforced by contempt proceedings. Baxter v. Baxter, 3 Cal.App.2d 676, 40 P.2d 536; Schnerr v. Schnerr, 128 Cal.App. 363, 17 P.2d 749. On the other hand, if, by the language of the agreement itself, it is shown that the intent was to make the agreement a part of a future divorce decree and, if the agreement is actually incorporated in the decree, then *such provisions become a part of the order of the court and may be enforced as such.*" (Emphasis added.) The essence of that statement is that the agreement becomes merged in the decree. It is not vital that the agreement so provides. The action of the parties and the court in the divorce proceeding may be determinative.

Reference has been made in some cases to the issue of whether or not the parties to an agreement incorporated in and ordered performed by the decree may have an independent right of action upon the contract. In some of these cases the issue was mentioned but not decided. Hughes v. Hughes, 68 Cal.App. 195, 197, 228 P. 675; Newell v. Newell, 28 Cal.App. 784, 154 P. 32; Adams v. Adams, 2 Cal.App.2d 173, 37 P.2d 729. In others the agreement was not made an operative part of the decree. See Armstrong v. Armstrong, 132 Cal.App. 609, 23 P.2d 50; Roberts v. Roberts, 83 Cal. App. 345, 256 P. 826, where it was rejected; Green v. Green, 66 Cal.App.2d 50, 151 P.2d 679; Queen v. Queen, 44 Cal.App.2d 475, 112 P.2d 755; Schnerr v. Schnerr, 128 Cal. App. 363, 17 P.2d 749, dictum; Robertson v. Robertson, 34 Cal.App.2d 113, 114, 93 P.2d 175; Makzoume v. Makzoume, 50 Cal. App.2d 229, 123 P.2d 72; Ross v. Ross, 1 Cal.2d 368, 35 P.2d 316. Moreover, it was said in the Roberts case at page 351 of 83 Cal.App., at page 828 of 256 P.:

"But it is also the law that either husband or wife may enter into any agreement or transaction with the other respecting property which either might if unmarried (Civ.Code, § 158); and, therefore, if after scrutinizing the agreement entered into between them for the settlement of their property rights and the circumstances under which it was made, the trial court ascertains and determines that the same is free from the illegal objects and influences above mentioned, it may affirm the agreement (McCahan v. McCahan, supra, 47 Cal.App. 173, 174, 190 P. 458), and the *force given thereto derives its sanction from the decree made by the court with a knowedge of the facts* (Loveren v. Loveren, 106 Cal. 509, 39 P. 801)." (Emphasis added.) The case of Gummerson v. Gummerson, 14 Cal.App.2d 450, 58 P.2d 394, overlooks the anomalous situation heretofore discussed and is therefore disapproved. The statement in Griffith v. Superior Court, 1 Cal.2d 381, 35 P.2d 317, is dictum.

[9] From the foregoing discussion it is apparent that plaintiff had no right of action in the instant case on the portions of the agreement incorporated in and made an operative part of the divorce decree. Her remedy was on the decree including such aids as execution, contempt, and other enforcement process of the court together with an action on the decree. Hence, the judgment should be reversed.

[10, 11] Plaintiff asserts however, that the separation agreement was a property settlement agreement and hence not subject to modification, relying upon Puckett v. Puckett, supra. That contention she should have made and the record shows that she did, in the proceeding for the modification of the decree. The order of modification was adverse to her. No appeal was taken therefrom and it is now final. Necessarily, embraced within that proceeding was the issue of whether or not the divorce decree was based upon a property settlement agreement and hence not subject to modification. She does not in the instant action attempt to have the order of modification annulled or set aside as being in excess of the court's jurisdiction on the theory that the court had no jurisdiction to modify a decree based upon a property settlement agreement. But even if she had she could not prevail. It has been loosely stated generally in passing that the divorce court has no jurisdiction to modify a decree based upon a property settlement agreement. See Ettlinger v. Ettlinger, 3 Cal.2d 172, 178, 44 P.2d 540; Wylie v. Wylie, 26 Cal.App.2d 167, 79 P.2d 152. However, that does not mean that the court does not have jurisdiction on an application for modification to decide correctly or incorrectly whether the decree is based upon a property settlement agreement, and is not subject to modification, or is based upon alimony or support allowance covenants, and is subject to modification. That is one of the basic issues to be determined by the court in modification proceedings. We said in Puckett v. Puckett, supra, 21 Cal.2d at page 841, 136 P.2d at page 5:

"The essential issue to be determined is whether or not the agreement was a property settlement agreement, and the monthly payments ordered by the decree in effect and essence, a phase of the property settlement rather than merely alimony. It would be better practice to have that determination clearly and concisely made by the trial court when it renders the decree of divorce. Considerable confusion and uncertainty could be avoided in that fashion. The court could examine the agreement, the circumstances under which it was made, and the nature and value of the property as related to its division and the amount of the periodic payments giving consideration to the statutory rules on the subject."

It is implicit from what was said in that case that on modification proceedings the issue may be settled. In various cases it has been assumed that the court may pass upon that issue or similar issues in such proceedings. See Ross v. Ross, 1 Cal.2d 368, 35 P.2d 316; Streeter v. Streeter, 67 Cal.App.2d 138, 153 P.2d 441; Black v. Black, 203 Cal. 173, 263 P. 234; Wylie v. Wylie, 26 Cal.App.2d 167, 79 P.2d 152; Wilder v. Wilder, 214 Cal. 783, 7 P.2d 1032; Hodgson v. Hodgson, 6 Cal.App.2d 496, 44 P.2d 544; Gosnell v. Webb, 60 Cal.App.2d 1, 139 P.2d 985; Atlass v. Atlass, 112 Cal.App. 514, 297 P. 53. On appeal from an order denying a motion for modification it is said in Wallace v. Wallace, 136 Cal.App. 488, 493, 29 P.2d 314, 316:

"Furthermore, this agreement was before the court upon the order for modification, and upon that hearing the court made the findings given above, to the effect that the payments directed to be made were not in the nature of alimony but was the balance of the sums due plaintiff under said contract of property settlement. That being a definite finding upon the issue before the court, we are bound thereby. As the court said in Atlass v. Atlass, 112 Cal.App. 514, 297 P. 53, 54: 'Had the court found the provisions for support to have been in fact by way of property settlement then the said provisions could not have been disturbed. * * * There was ample evidence to support the finding in the instant case, and we must therefore accept the same as true."

[12] We conclude therefore that the order modifying the divorce decree was res judicata upon the issue as to whether the provision in the agreement for the support of plaintiff was alimony or a part of the property settlement covered by the agreement.

The judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

26 Cal.2d 575

LANE et al. v. PACIFIC GREYHOUND LINES et al.

S. F. 17079. *

Supreme Court of California.
June 22, 1945.

Rehearing Denied July 19, 1945.

1. Evidence 🔑222(8)

In action against bus company and its driver for motorist's death resulting from collision with bus, driver's statements after the collision tending to indicate that he had not been keeping a proper lookout were admissible against driver as admissions or declarations against interest.

2. Evidence 🔑222(1)

Admissions of a party to an action are admissible as an exception to the hearsay rule.

3. Witnesses 🔑379(1)

In action against bus company and its driver for motorist's death resulting from collision with bus, where driver testified that he could see automobile approaching for about 1,000 feet, driver's statements after collision that he did not see automobile before collision were admissible against driver for purposes of impeachment.

4. Evidence 🔑123(10)

In action against bus company and its driver for motorist's death resulting from collision with bus, driver's statements made shortly after the accident were admissible against driver under the spontaneous declaration rule as an exception to rule against hearsay.

5. Evidence 🔑118

Declarations which are voluntary and spontaneous and made so near the time of the principal act as to preclude the idea of deliberate design, though not precisely concurrent at point of time therewith, are regarded as contemporaneous and admissible as "res gestæ."

See Words and Phrases, Permanent Edition, for all other definitions of "Res Gestæ".

6. Evidence 🔑121(2)

A spontaneous declaration made by an employee may be admissible against employer as an exception to hearsay rule as part of res gestæ apart from question of whether declaration was made in scope of employment.

7. Evidence 🔑121(2)

In action against bus company and its driver for motorist's death resulting from collision with bus, whether statements made by driver after collision were outside scope of his authority was not material in determining whether such statements were admissible against bus company as part of res gestæ.

8. Evidence 🔑118

A statement to be admissible under the spontaneous declarations rule as an exception to rule against hearsay need not be the only evidence on the subject.

9. Evidence 🔑123(11)

In action against bus company and its driver for motorist's death resulting from collision with bus, statements made by driver shortly after the accident which tended to indicate that driver had not kept a proper lookout were admissible against both driver and bus company under the spontaneous declarations rule.

10. Evidence 🔑118

Some discretion must be allowed trial court in determining whether declarations are admissible under the spontaneous declarations rule as an exception to the hearsay rule.

11. Trial 🔑54(2)

In action against bus company and its driver for motorist's death resulting from collision with bus, record established that plaintiffs' counsel did not consent to ruling that admissibility of driver's statements after collision should be limited to him alone, and should not be binding on bus company.

12. Appeal and error 🔑1068(1)

Error in holding that defendant bus driver's statements after collision were binding on him alone, and not on defendant bus company, required reversal, notwithstanding that jury's verdict was for both defendants, in view of the conflicting instructions.

13. Appeal and error 🔑216(2)

Plaintiffs did not waive the error in ruling that defendant bus driver's statements after collision were binding on him alone, and not on defendant bus company, by failing to request an instruction that driver's statements were admissible against bus company, where trial court had repeatedly instructed jury to contrary during trial when the evidence was introduced.

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* Subsequent opinion 174 P.2d 635.

14. Appeal and error ⚷216(2)

If law applicable to facts is stated correctly in a general charge, a party may not, in absence of a request for more specific instructions, complain that a more specific or elaborate instruction should have been given.

15. Appeal and error ⚷216(3)

Where instructions as given are erroneous, plaintiff is not precluded from asserting that error was committed, even though he did not request a proper instruction.

SCHAUER and EDMONDS, JJ., dissenting.

In Bank.

Appeal from Superior Court, Contra Costa County; A. F. Bray, Judge.

Action by Naomi Gae Lane and others against Pacific Greyhound Lines and another for death of John Harold Lane resulting from collision between automobile driven by plaintiffs' decedent and bus owned by named defendant. From a judgment for defendant, the plaintiffs appeal.

Reversed.

Prior opinion, 150 P.2d 227.

See, also, 51 Cal.App.2d 705, 125 P.2d 510; 55 Cal.App.2d 525, 131 P.2d 53.

F. H. Dam, of San Francisco, for appellants.

Cooley, Crowley & Supple, of San Francisco, and T. H. DeLap, of Richmond, for respondents.

CARTER, Justice.

This is an action for damages for wrongful death. Plaintiffs are the widow and only children of John Harold Lane, who was killed when a bus owned by defendant Pacific Greyhound Lines and operated by defendant James C. Perkins collided with the automobile in which decedent was riding. From a judgment entered on the verdict of a jury in favor of defendants, plaintiffs have appealed.

The accident occurred about 7:30 in the evening on December 22, 1940, at or near the point where Tehama Avenue, an east-west street, enters and ends at San Pablo Avenue, a street running north and south, in El Cerrito, California. San Pablo is a four lane paved highway with a double white line running down the center and single lines dividing the traffic lanes. Tehama is a paved street 26 feet in width. There is a conflict in the evidence as to whether there were turning markers and an opening at the Tehama intersection in the double center marker on San Pablo. One of plaintiffs' witnesses testified that there were turning markers, that is, white circles in the center of San Pablo near both the south and north line of Tehama. From that it could have been inferred that there was an opening in the double line on San Pablo at the intersection and provision was made for a left hand turn into Tehama. The 45 mile per hour speed limit zone commenced about 62 feet north of the north line of Tehama. It was dark, the intersection unlighted; it was raining and the pavement was wet. Decedent was driving his sedan north along San Pablo near the center line, en route from San Francisco to his home which was located on the south side of Tehama about 116 feet from the west line of San Pablo. The bus was being driven south on San Pablo in the most westerly traffic lane. The evidence is conflicting with regard to where the collision between the bus and decedent's car occurred. The evidence indicates that the decedent's car was struck on its right or north side by the right front portion of the bumper on the bus. According to defendants' evidence the bus was traveling at the rate of 23 miles per hour and when decedent's car was about 50 feet south of the south line of Tehama Avenue it crossed the double white center line proceeding in a northwesterly direction into the path of the oncoming bus, the impact occurring on the westerly side of San Pablo about 42 feet south of the south line of Tehama. Decedent's car was struck on its side and shoved by the bus the length thereof, about 33 feet and apparently decedent was killed by the impact. Defendant driver of the bus testified that he could see decedent's car approaching for about 1,000 feet. The headlights and brakes on the bus were functioning. On the other hand evidence introduced by plaintiffs consisting of glass and other débris from the impact and other evidence indicated that the collision occurred in the west half of the intersection and probably the northwest quarter thereof which would appear to be where decedent's car would be in the course of a left hand or west turn from San Pablo down Tehama. The bus was being operated at a speed of 40 to 45 miles per hour just prior to the impact although the 45 mile speed limit zone commenced only 62 feet north of the intersection. Prior to the collision the bus driver had been from time to time wiping the inside of the windshield. From the evidence the jury could have found either way on the issue of negligence. Likewise, the record would have supported a determination that decedent was not guilty of contributory negligence.

Plaintiffs contend that prejudicial error was committed in limiting the application of certain evidence introduced by them, to defendant Perkins, the driver of the bus. In that connection the following transpired. Four disinterested witnesses testified for plaintiffs that during various periods following the collision, defendant Perkins stated in their hearing that he did not know where the old man (referring to decedent) came from, or words to that effect. The witness Floyd Olsen who lived about 316 feet from the scene of the collision, testified that he heard the crash caused by the impact and immediately drove in his car to the intersection where Perkins was standing near his bus; that Perkins gave him the "impression at least of being stunned or from shock and he was merely standing there * * *" and upon being asked where the other car came from Perkins replied "I don't know where it came from. I didn't see him at all." Olsen returned home, instructed his wife to call an ambulance and returned to the scene of the tragedy. In five to seven minutes the police arrived. Thereafter Perkins accompanied Olsen to the latter's home where he telephoned to his employer. Immediately after that call and fifteen to twenty minutes after the making of the first statement Perkins again made substantially the same statement which was heard by Olsen's daughter Joyce Olsen and Mrs. Ruby Olsen, the latter fixing the time as five to ten minutes after the accident. The witness Gilbert heard Perkins state at the place of the accident two or three minutes after it occurred: "I don't know where the car came from." No objection was made by defendant Pacific Greyhound Lines that the testimony given by Joyce Olsen, who first testified, was not binding on it. When Mr. Olsen testified concerning Perkins' statement made at the scene of the accident the following occurred:

"Mr. Crowley: (counsel for defendants) Now just a minute. What was said there is hearsay as far as the Greyhound is concerned.

"Mr. Hoey: (one of plaintiff's counsel) Well, as far as the defendant Perkins was concerned he was there.

"The Court: It would be binding on Mr. Perkins. It wouldn't be binding on the Greyhound.

"Mr. Hoey: No."

And later concerning the statement made at Olsen's home:

"Mr. Crowley: Now we object to that as hearsay insofar as the Greyhound is concerned, Your Honor.

"The Court: The jurors are instructed that this conversation is not binding in any way upon the defendant Pacific Greyhound Lines and is only to be considered by you in connection with establishing any responsibility on the part of the defendant Perkins, any liability on the part of the defendant Perkins."

A like objection was made to Mrs. Olsen's testimony and in addition the following occurred:

"Mr. Dam (one of the counsel for plaintiffs) If Your Honor please, I have been thinking of that same objection over night and there are two propositions that I would like to state to Your Honor very briefly. Now whether or not a statement by the driver of the bus would be what is technically called in the law an admission against interest is one thing and whether or not any statement made by the driver of the bus would be evidence upon the question of whether or not he was guilty of negligence or as tending to show negligence on his part is another thing. Now taking up the second part first, inasmuch as the corporation * * *

"Mr. Crowley: (interrupting) Well, Your Honor, if there is going to be any legal discussion I think we could hasten it by having reference to the books and it wouldn't take us a minute.

"The Court: Yes. I was going to suggest if you have any authorities you want to present to me get it to me during the noon hour and the other side will do the same and *in the meantime I will make the same ruling I did yesterday and instruct the jury that any admissions made, or statements made by the driver of the automobile * * * of the bus, to Mrs. Olsen is not binding upon the Pacific Greyhound Lines but is binding upon himself.*

"Mr. Dam: That's merely as an admission against interests.

"The Court: Well, it is binding on him for all purposes and *it is not binding on the Pacific Greyhound Lines.* Now if you can show me an authority to the contrary, then I can instruct the jury to the contrary. Proceed."

Later to a similar objection to the testimony of Mr. Gilbert the court twice made the same remark with regard to it not being binding on Pacific Greyhound Lines. Finally, in the instructions to the jury the court stated: "Any evidence here about *any* statements, if any, made by the driver, Mr. Perkins, to *anyone after the accident, was not admitted against,* and is *in no way related to or binding on the Pacific Greyhound Lines.*" (Emphasis added.)

[1-3] The foregoing evidence was clearly relevant and material. It had a direct and substantial bearing upon the negligence of defendant Perkins. It indicated that he was not keeping a proper lookout. It was undoubtedly admissible against Perkins inasmuch as it was an admission or declaration against interest. Admissions of a party to an action are admissible under an exception to the hearsay rule. 10 Cal.Jur. 1055 et seq. They would also be admissible against Perkins for purposes of impeachment.

[4-7] Those statements of Perkins are also admissible against him under the spontaneous declarations rule which is an exception to the rule against hearsay. The rule is stated in Showalter v. Western Pac. R. R. Co., 16 Cal.2d 460, 465, 106 P.2d 895, 898: "* * * declarations which are voluntary and spontaneous and made so near the time of the principal act as to preclude the idea of deliberate design, though not precisely concurrent in point of time therewith, are regarded as contemporaneous and admissible." Statements falling within that rule are admissible although self-serving. Showalter v. Western Pac. R. R. Co., supra.

Defendants argue however that such statements are not binding upon Pacific Greyhound Lines because they are outside the scope of authority of the employee, Perkins. But the existence of the employer-employee relation is immaterial. Under the circumstances here involved it neither enlarges nor limits the field of admissibility. Declarations coming within the rule are not dependent for their admissibility on the theory of an admission of an agent being binding upon his principal. They are admissible because of the probability of their trustworthiness. Hence, a spontaneous declaration made by an employee may be admissible against his employer as an exception to the hearsay rule pursuant to the rule under discussion separate and apart from the question of whether it was made in the scope of employment. There may be situations where they are admissible under both theories or under only one or the other. As pointed out by Mr. Wigmore (VI Wigmore on Evidence, 3d Ed., § 1756a), in quoting from the dissenting opinion in Snipes v. Augusta-Aiken Ry. & Electric Corporation, 151 S.C. 391, 149 S.E. 111, 115: "There is quite a good deal of confusion of thought and lack of discrimination manifest in the treatment of the subject of the admissibility of declarations of an agent. The lack of discrimination and consequent confusion of thought is demonstrated by the failure to differentiate between the declarations of an agent which are part of the *res gestæ* and those declarations which were made *in the course of his employment,* and while the matter in controversy was actually pending. *The declarations of an agent, which are shown to have been a part of the res gestæ, are admitted, not because he was an agent, but because they come within the class of excepted hearsay evidence which fulfills the requirements of the res gestæ rule; the declarations of one not an agent would be received under the same conditions. The declarations of an agent made within the course of his employment and while the matter in controversy was pending, are admitted, not because they were made as a part of the res gestæ, but because they were made under the circumstances stated.* They would be received weeks or months after the episode inquired into, provided that they were made under those circumstances. They may utterly fail of complying with the rule of res gestæ, and still be admissible upon the entirely different foundation. It is misleading and incorrect, manifestly, to hold that, before the declarations of an agent can be received, they must be shown to have been both a part of the res gestæ and within the course of his employment. They may have been either or both, and admissible for that reason." (Emphasis added.) See also IV Wigmore on Evidence, 3d Ed., § 1078; Rest., Agency, § 289.

Reference is made to Gorzeman v. Artz, 13 Cal.App.2d 660, 57 P.2d 550; Bodholdt

v. Garrett, 122 Cal.App. 566, 10 P.2d 533; Shaver v. United Parcel Service, 90 Cal. App. 764, 266 P. 606; Silveira v. Iversen, 128 Cal. 187, 60 P. 687; Froeming v. Stockton Electric R. R. Co., 171 Cal. 401, 153 P. 712, Ann.Cas.1918B, 408; and Kimic v. San Jose, etc., Ry. Co., 156 Cal. 379, 104 P. 986. The Gorzeman, Bodholdt and Shaver cases must be deemed to have been impliedly overruled by this court in Showalter v. Western Pac. R. R. Co., supra. They proceed in part on the theory that the statements to come within the rule must be contemporaneous with the event and not after it. The Silveira case confuses the rule here involved and the "verbal acts" rule. See discussion, Showalter v. Western Pac. R. R. Co., supra, 16 Cal.2d 468, 106 P.2d 895. The Froeming and Kimic cases are subject to like criticism.

[8] Defendants seek to distinguish Showalter v. Western Pacific R. R. Co., supra, on the ground that here there was other evidence of the conduct of decedent while in that case there was none. We fail to see how that makes any difference. Perkins' statement goes to his conduct not the decedent's. We do not recognize as a limitation on the rule that the declaration must be the only evidence on the subject.

[9] In the instant case it is plain from the record that the statements of Perkins fell within the spontaneous declaration rule. They were made near the time of the accident. They were made by a participant who was the driver of an automobile that had just collided with and badly damaged another vehicle. He had looked at decedent's vehicle and found decedent slumped over the steering wheel apparently dead. Certainly the statements were made under the stress of excitement and emotional upset which would accompany such an event, and when we also consider that they were against the declarant's interest, they are peculiarly imbued with a trustworthy character. While some of the statements were made as long as fifteen to twenty minutes after the collision, they were virtually the same as the earlier statements and for that reason the time element as to those statements is not important in this case. Defendants refer to evidence that after the collision Perkins assisted two minor passengers in the bus who had been thrown from their seats by the impact as showing solicitation for the condition of the passengers in the bus, and also evidence that he flagged down a car for the purpose of having the police notified. But we are of the opinion that the very occurrence of itself created a situation which as a matter of law satisfied the requirements of the rule.

[10] It is true that as expressed in Showalter v. Western Pacific R. R. Co., supra, "there is necessarily some element of discretion in the trial court" with regard to whether or not the declarations come within the rule and are therefore admissible, but the court clearly abused its discretion here. The only reasonable conclusion from the circumstances established is that there was a sufficiently startling occurrence to produce nervous excitement, and that the declarations were made in the course thereof. This conclusion is fortified by the circumstance that the statements were against the declarant's interest. Martin v. City of Corsicana, Tex.Civ.App., 130 S.W.2d 405.

[11] Defendants assert that counsel for plaintiffs consented to the ruling that the admissibility of Perkins' declarations be limited to him, urging that such was the express statement of attorney Hoey, and thus waived any claim of error. However, from the conduct of defendants' counsel in making his objections to the evidence, and the ruling of the court as seen from the above-quoted excerpts from the record, we do not believe that a waiver occurred or that the court or counsel so understood it.

[12] This brings us to defendants' contention that the error, if any, was not prejudicial; that that conclusion must be drawn from the fact that the verdict was in favor of both defendant employee and defendant employer, indicating that the jury even though permitted to consider the evidence of Perkins' declarations as against him, still chose to find in his favor. In disposing of this contention several pertinent factors must be considered: Plaintiffs' allegation in their complaint that the collision occurred while Perkins was driving the bus in the scope of his employment was admitted by defendants. Hence, there was no issue on that subject. The court, in addition to instructing the jury that the evidence of Perkins' declarations were not binding on defendant Pacific Greyhound Lines, also gave instructions that: "It is admitted by the written answer of the defendants * * * that * * * James C. Perkins, was a motor stage driver for the

defendant, Pacific Greyhound Lines, a corporation, and that, at all times mentioned in the complaint of plaintiffs, said Perkins was acting within the course and scope of his employment as a motor stage driver for said corporation. In view of that admission in the pleadings in this action, *you are instructed that if you find any negligence on the part of defendant, Perkins, in the operation of a Greyhound stage, or bus, belonging to said corporation, on said day, such negligence is also the negligence of said corporation, Pacific Greyhound Lines."* Only two forms of verdict were given to the jury, one for the plaintiffs against both defendants and the other for both defendants, the court commenting: "There have been prepared for your convenience and use, two forms of verdict *which under the law it is possible for you to return in the case now on trial.* These forms will be handed to you by the clerk when you retire. They have no significance in and of themselves and are not to be considered by you for any purpose other than as a convenience for your use, having been prepared only for the purpose of saving you labor when you have finally reached a verdict. When you have reached your verdict, your foreman will sign the verdict that you have found and it will then be your duty to return the same to the court.

"If under the facts of the case and the instructions given you you desire to render a verdict for the plaintiffs you will use the form of verdict the body of which reads, 'We, the jury in this case, find for the plaintiffs,' and assess their damages against the defendants in the sum of blank dollars. You will fill in that blank the amount of damages that you award, have that verdict signed by your foreman and disregard the other form of verdict.

"On the other hand if under the facts and the instructions you desire to render a verdict for the defendants you will use the form of verdict the body of which reads, 'We, the jury in this case, find for the defendants;' disregard the other form of verdict; have this form signed by your foreman and come into Court."

The declarations of Perkins were important and vital evidence of negligence, one of the important elements of plaintiffs' case. True they introduced other evidence of negligence, but by reason of the death of decedent, the other participant in the accident, the one who would be best able to testify about it, was not available. On the other hand Perkins, the driver of the bus, was available and testified in detail. He denied making the statements. In order to meet such direct evidence against them, plaintiffs were peculiarly dependent upon evidence of his declarations, which, we have seen, had a high probability of trustworthiness. Under those circumstances the importance of the evidence was sufficient to make its exclusion prejudicial. The instruction to the jury that if Perkins was negligent then both were liable followed by the instruction that the declarations of Perkins were in no way related to and not binding on Pacific Greyhound Lines coupled with the forms of verdict would be confusing and misleading to the jury. The last instruction and forms of verdict may well have led them to believe that the declarations of Perkins could not be considered by them as to either defendant. They may have concluded that they would not hold Pacific Greyhound Lines because, without Perkins' declarations, there was no evidence of negligence, and that if they could not hold that defendant, they could not find Perkins liable because they were not satisfied with the evidence of negligence, notwithstanding the earlier instruction that the former was liable for the latter's negligence. We think it is obvious that the jury was given such hopelessly conflicting instructions that the error in excluding the declarations as against Pacific Greyhound Lines was prejudicial. Hence, it is no answer to the claim of prejudice that the jury found in favor of Perkins as well as his employer. Defendants cite Gorzeman v. Artz, supra. That case holds that where an employer and employee are joined as defendants in an action for damages caused by the employee's negligence, the employer's liability being based solely on the doctrine of respondeat superior, and the employer admits that his employee was acting in the scope of his employment, a spontaneous declaration by the employee showing negligence, while ordinarily not binding on the employer, may nevertheless support a judgment against both the employer and employee. As heretofore stated that case was overruled by Showalter v. Western Pacific R. R. Co., supra, on the point that such declarations were not admissible against the employer, hence, the result reached in the case (affirmance of the judgment) was correct and the conclusion that admissions of an employee other than spontaneous declarations, outside the scope of employment, while not binding on the employer would support a judgment against him, was not necessary to the decision.

[13-15] Plaintiffs did not waive the error by failing to request that the jury be instructed that Perkins' declarations were admissible against Pacific Greyhound Lines. It would have been idle for them to have done so after the court had repeatedly instructed the jury to the contrary during the trial when the evidence was introduced. Moreover, the rule stated in Colgrove v. Lompoc, etc., Club, 51 Cal.App.2d 18, 24, 124 P.2d 128, 131, is applicable: "If the law applicable to the facts of a case is stated correctly in a general charge to the jury, a party may not, in the absence of a request for a more specific or elaborate instruction, complain that a more specific or elaborate instruction should have been given. Townsend v. Butterfield, 1914, 168 Cal. 564, at page 569, 143 P. 760; Ohran v. County of Yolo, 1940, 40 Cal.App.2d 298, at page 307, 104 P.2d 700; 24 Cal. Jur. 796. In this case however, the instructions as to the duty owing to a licensee injured by active negligence were erroneous, and plaintiff is not precluded from asserting that error was committed in instructions which were given, even though he did not request a proper instruction."

Other errors are claimed by plaintiffs but in view of the conclusion we have reached they need not be discussed.

The judgment is reversed.

GIBSON, C. J., SHENK and TRAYNOR, JJ., and GOODELL, Justice pro tem., concurred.

SCHAUER, Justice.

I dissent. The reversal is based essentially on the holding that it was prejudicial error for the trial court to instruct the jury that the admissions or declarations against interest assertedly made by the bus driver Perkins are "not binding in any way upon the defendant Pacific Greyhound Lines and is [are] only to be considered by you in connection with establishing any responsibility on the part of the defendant Perkins." This instruction in slightly varying language was repeated several times during the trial. When the subject was first mentioned one of plaintiffs' counsel agreed with the ruling. Later the matter was discussed again and the court stated to counsel for plaintiffs, "Now if you can show me an authority to the contrary, then I can instruct the jury to the contrary." No authority, it seems, was presented and the court in its formal instructions at the close of the trial said, "Any evidence here about any statements, if any, made by the driver, Mr. Perkins, to anyone after the accident, was not admitted against, and is in no way related to or binding on the Pacific Greyhound Lines." Such instruction was erroneous not only for the reasons elucidated by Mr. Justice Carter but also because, regardless of the doctrine of respondeat superior, the defendant Pacific Greyhound Lines was liable (at least to the extent of $5,000) under the provisions of section 402 of the Vehicle Code St.1937, p. 2353, if the driver, Perkins, was liable. Nevertheless, for the reasons hereinafter stated, I am not persuaded that the giving of such instruction, under the circumstances shown, was prejudicial to plaintiffs.

The court also instructed the jury that "It is admitted by the written answer of the defendants * * * that * * * Perkins was acting within the course and scope of his employment as a motor stage driver for said corporation. In view of that admission * * * you are instructed that if you find any negligence on the part of the defendant, Perkins * * * such negligence is also the negligence of said corporation, Pacific Greyhound Lines."

In respect to the defendant Perkins the trial court made it very clear that the evidence as to his statements was admissible against him. It told the jury that "any admissions made, or statements made by the driver of the automobile * * * of the bus, to Mrs. Olsen is not binding upon the Pacific Greyhound Lines *but is binding upon himself*"; that the statement made at the scene of the accident *"would be binding on Mr. Perkins"*; that "this conversation is not binding in any way upon the defendant Pacific Greyhound Lines and *is only to be considered by you in connection with establishing any responsibility on the part of the defendant Perkins.*" (Italics added.)

It is argued in the majority opinion that the action of the trial court in giving to the jury only two forms of verdict—one for the plaintiffs against both defendants and the other for both defendants against the plaintiffs—contributed to making the erroneous instructions prejudicial; that separate forms as to the defendants Perkins and Pacific Greyhound Lines should have been furnished. But it is obvious that no verdict could properly have been returned as against the corporate defendant unless one was also found against Perkins and that if any verdict was rendered against Perkins there must also have been one against the defendant corporation. It is undisputed in the record that Perkins was an authorized driver for the Pacific Greyhound Lines, the owner of the bus. Hence, even if the jury believed that the evidence against Perkins was sufficient, but was so only by reason of his extra-judicial statements, and concluded that plaintiffs were not barred from recovery by reason of contributory negligence of the decedent, they were bound, under the provisions of section 402 of the Vehicle Code, to return a verdict against the Pacific Greyhound Lines as well as against Perkins.

The statements assertedly made by Perkins were received in evidence. They were considered by the jury. But the verdict was returned in favor of the defendants. The evidence shows that plaintiffs' decedent made a left turn directly into the path of the oncoming bus. It tends strongly, if not overwhelmingly, to establish contributory negligence. Section 4½ of article VI of the Constitution directs that "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." In this case, after an examination of the entire cause, I am not of the opinion that there has been a miscarriage of justice. It seems to me more probable that the jury concluded that the decedent was guilty of contributory negligence than that they found in favor of both defendants solely because they were erroneously told that the asserted statements of Perkins were binding on him but were not "related in any way" to, or binding on, the corporate defendant. Accordingly, it is my opinion that the judgment should be affirmed.

EDMONDS, J., concurred.

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69 Cal.App.2d 720

BOUCHER v. KRIEHN.

Civ. 14960.

District Court of Appeal, Second District, Division 2, California.

June 26, 1945.

Appeal and error ⚷356

Where judgment was entered on January 4 and notice of appeal was not filed until March 8 and none of the conditions constituting exceptions to the normal time of 60 days for taking an appeal existed, appeal was filed 3 days late and District Court of Appeal was without jurisdiction. Code Civ.Proc. § 939; Rules on Appeal, rules 2 (a), 3.

◆

Action by Emma Boucher, administratrix with special letters in the estate of Morris I. Grossman, deceased, against John O. Kriehn, special administrator of the estate of Johanna K. Buck, deceased. From the judgment, plaintiff appeals. On defendant's motion to dismiss plaintiff's appeal.

Appeal dismissed.

K. B. Kennicott, of Los Angeles, for respondent.

Emma Boucher, in pro. per.

McCOMB, Justice.

Respondent moves to dismiss this appeal upon the ground that it was not taken within the time permitted by section 939 of the Code of Civil Procedure, and therefore this court is without jurisdiction to entertain the same.

It is conceded that on January 4, 1945, the judgment was entered from which the purported appeal was taken and that the notice of appeal was not filed until March 8, 1945. No proceedings were ever instituted for a new trial.

This is the sole question necessary for us to determine:

Was appellant's notice of appeal filed within the time prescribed by law?

This question must be answered in the negative and is governed by the rule that the normal time in California for filing a notice of appeal is sixty days from the date of entry of the judgment. Section 939, Code of Civil Procedure; Rules 2(a), Rules on Appeal.

Since none of the conditions set forth in rule 3 of Rules on Appeal, which constitute an exception to the normal time for taking an appeal, exist in the present case, the foregoing general rule is here applicable.

Applying such rule to the facts in the instant case, it appears that the notice of appeal was filed on March 8, 1945, which is sixty-three days after the judgment was entered in the trial court; thus being three days after the time permitted by law. This court is therefore without jurisdiction of the appeal and the same should be dismissed.

It is so ordered.

MOORE, P. J., concurs.

ANHEUSER-BUSCH, Inc., v. STARLEY.*

Civ. 14833.

District Court of Appeal, Second District, Division 2, California.

June 28, 1945.

Hearing Granted Aug. 20, 1945.

1. Subrogation 🔑11

Where shipper of cargo of yeast by common carrier had been reimbursed by carrier for damages to yeast as result of collision between carrier's truck and automobile, action against motorist for damages to the yeast should have been maintained by the carrier, and not by shipper. Civ. Code, § 2194; Code Civ.Proc. § 367.

2. Subrogation 🔑1

The doctrine of "subrogation" permits in proper circumstances one who has paid the debt of another to sue in his own name the party upon whom rests the duty to pay.

See Words and Phrases, Permanent Edition, for all other definitions of "Subrogation".

3. Subrogation 🔑11

Shipper of cargo of yeast by common carrier, after having been reimbursed by carrier for damages to yeast as result of collision between carrier's truck and automobile, could not maintain action against motorist under doctrine of "subrogation". Civ.Code, § 2194; Code Civ.Proc. § 367.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by Anheuser-Busch, Inc., against Maud M. Starley, to recover damages to a cargo of yeast which plaintiff had shipped by a common carrier as result of a collision between common carrier's truck and defendant's automobile. From a judgment for defendant based upon a directed verdict, plaintiff appeals.

Affirmed.

Elbert E. Hensley, of Los Angeles (John H. Klenke, of Los Angeles, of counsel), for appellant.

Sigurd E. Murphy, George Finucane, Jr., and Francis D. Thornton, all of Los Angeles, for respondent.

W. J. WOOD, Justice.

Plaintiff commenced this action to recover damages to a cargo of yeast which it had shipped by a common carrier, Denver-Chicago Trucking Company, from St. Louis to Los Angeles. The truck on which the yeast was loaded collided with the automobile of defendant, resulting in the damages which are the subject of the litigation. At the close of the evidence the trial court granted a motion for a directed verdict in favor of defendant. The appeal is from the judgment entered upon the granting of the motion.

There was no contract between plaintiff and the trucking company other than the usual bill of lading. When the goods were damaged, and before the commencement of the present action, plaintiff made claim against the trucking company and was paid the full value of the yeast in question. The payment to plaintiff was made by the trucking company because of the statutory liability imposed by section 2194 of the Civil Code, which makes an inland carrier liable for the loss or injury to goods in transit, with certain exceptions which are not of any importance in the present litigation. No evidence was presented to the court of any assignment by the trucking company. It appears in the record that the trucking company and plaintiff are represented by the same counsel.

[1] An action must be maintained by the real party in interest. Sec. 367, Code of Civil Procedure. Plaintiff has been

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* Subsequent opinion 170 P.2d 448.

fully reimbursed for any damages suffered and naturally if it should recover against defendant it would be compelled to pay the money to the trucking company. The action should be maintained by the carrier, which alone is entitled to the benefits of the action and which in turn should be responsible for the expenses and costs of the action in case of failure to obtain judgment.

Defendant filed an answer denying negligence on her part and asserting contributory negligence on the part of the driver of the truck. Plaintiff made a motion to strike the defense of contributory negligence and this motion was denied by the court. Defendant now asserts that the defense of contributory negligence would be available in an action by the trucking company but questions whether it is available to defendant in the present action. To this contention plaintiff replies that all of the defenses were before the court and testimony received concerning them. It is noteworthy that plaintiff does not abandon its contention that the defense of contributory negligence should be stricken. However, we do not consider the question of the ruling of the court in denying the motion to strike as of controlling importance on this appeal.

[2, 3] Plaintiff insists that it has the right to maintain the action under the doctrine of subrogation, a doctrine which permits, in proper circumstances, one who has paid the debt of another to sue in his own name the party upon whom rests the duty to pay. In attempting to fortify its position in this regard plaintiff quotes from the decision in Kent v. Bailey, 181 Iowa 489, 164 N.W. 852, 853, wherein the court states that subrogation "depends upon the principles of justice, equity, and benevolence to be applied to the facts of the particular case. It is of equitable origin, adopted to compel the ultimate discharge of a debt or obligation by him who in good conscience ought to pay it." Plaintiff also quotes from Martin v. Hickenlooper, 90 Utah 150, 59 P.2d 1139, 1140, 107 A.L.R. 762, wherein the court states that the development of the doctrine of subrogation "was the natural consequence of a call for the application of justice and equity to particular situations."

We are in accord with the statements of the courts in these two cases but we fail to see the applicability of the doctrine of subrogation to the case now before us. It is true that this doctrine should be applied "to particular situations" and that the "principles of justice, equity and benevolence" should be applied when they are called for by the facts of the particular case. Conceding, without deciding, that the defense of contributory negligence should be permitted in the present litigation, it is obvious that defendant would not be in position to take full advantage of this defense in an action tried before a jury of laymen, in which the trucking company does not appear as a party, but in which the plaintiff is the innocent owner of part of the cargo. A tendency to confuse the jury would naturally result from such a situation. The doctrine of subrogation should be applied to further the cause of justice and not to obstruct it.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

70 Cal.App.2d 51

KLEIN v. FARMER.

No. 12829.

District Court of Appeal, First District, Division 2, California.

July 3, 1945.

Rehearing Denied Aug. 2, 1945.

Hearing Denied Aug. 27, 1945.

1. Corporations 🔑**114**

Under statute, the law respecting delivery of certificates of corporate stock does not differ from law respecting delivery of a deed. Civ.Code, § 330.1.

2. Gifts 🔑**29, 65**

Where a gift of corporate stock is made, there must be not only an intention to make the gift but a present vesting of title by indorsement and delivery of the certificate, whether the gift is causa mortis or inter vivos. Civ.Code, § 330.1.

3. Corporations 🔑**118**

Ordinarily, a contract for sale of shares of corporate stock is executed by the indorsement and delivery of the certificates, but as between the parties and for purposes of contract, the passing of title is determined by their intent. Civ.Code, § 330.1.

4. Appeal and error ⟹1099(4)

Decision on appeal on same record that evidence was insufficient to support finding that a deed, which had been placed in envelope together with certificates representing shares of corporate stock, had not been delivered prior to grantor's death was the law of the case, on issues of intent, delivery and possession of the stock. Civ. Code, § 330.1.

5. Pleading ⟹311

Reference in cross-complaint to filing of verified claim against estate of plaintiff's decedent, copy of which was attached to defendant's answer and cross-complaint, and made a part thereof as though set out at length and marked "Exhibit A", was effective to incorporate into cross-complaint the statements found in attached exhibit.

6. Cancellation of instruments ⟹24(1)

An offer to restore before action is not essential where rights of other party can be fully protected by the decree, and such restoration cannot be made without injuriously affecting rights of party seeking rescission, or relative rights of the parties in event of a rescission could not be determined without an accounting.

7. Executors and administrators ⟹431(1)

Where defendant claimed to have received corporate stock as partial consideration for services rendered plaintiff's decedent over period of six years, asserting that a good delivery of the stock had been made, defendant was not required to offer to restore the stock before asserting an alternative claim in her cross-complaint for value of her services in event that it was found that a good delivery of the stock had not been made. Civ.Code, § 330.1; Probate Code, §§ 700, 707.

8. Judgment ⟹715(3)

Where prior action between same parties involved only the issue as to validity of a deed in which present defendant was named as grantee, which had been placed in an envelope by present plaintiff's decedent together with certificates representing shares of corporate stock, judgment in the prior action was not res judicata as to issue whether there had been a delivery of the corporate stock before death of plaintiff's decedent, or whether defendant was entitled to recover for value of services rendered by her to plaintiff's decedent during his lifetime in event it was found that a good delivery had not been made. Civ. Code, § 330.1; Code Civ.Proc. § 442; Probate Code, § 573.

◆

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Dicka Klein, as administratrix of the estate of William Otto Emerson, deceased, against Florence M. Farmer, to quiet plaintiff's title to corporate stock, wherein the defendant filed a cross-complaint. From a judgment for plaintiff, the defendant appeals.

Reversed.

Augustin Donovan, Louis B. DeAvila, and Rode, Burnhill & Rode, all of Oakland, for appellant.

John L. McVey, of Oakland, for respondent.

GOODELL, Justice.

This is an appeal from a judgment and decree quieting the plaintiff's title to corporate stock.

The decedent, William Otto Emerson, died intestate on December 24, 1940 at the age of 85 years. Shortly thereafter the appellant caused to be transferred from decedent's name into her own and re-issued to herself certificates evidencing the ownership of 12 shares of American Telephone and Telegraph Company and 400 shares of Pacific Gas & Electric Company stock which he had assigned on the back thereof to her. A few days after decedent's death the appellant placed on record a deed made on the 7th, and acknowledged on the 8th, day of February 1933, purporting to convey from decedent to appellant a piece of real property in Hayward. In a suit brought by Dicka Klein as successor in interest of decedent's sole heir at law, to quiet title to said real property, the judgment went against the defendant (appellant herein) and on appeal that judgment was affirmed by this court in Klein v. Farmer, 57 Cal.App.2d 542, 135 P.2d 21, where the statement of facts is sufficient to render unnecessary a repetition here.

While the instant case involves only the stock, it is intimately related to the other case for the reason that the record in that first case shows all the facts and circumstances under which the certificates of stock came into the possession of the appellant, as well as those under which the deed came into her possession. The certificates and the deed were together, the appellant received them at the same time, and whatever was said and done with respect to the deed was said and done with respect to the certificates. By stipulation the record in that case became the record in this case, and it is again before us on this appeal with but slight amplification.

The only new testimony *touching on delivery or possession of the certificates* was that of the appellant that immediately after decedent handed her the stock and the deed, in April, 1934, she discontinued her former business; also that on December 30, 1940 she turned over to her attorney the endorsed certificates for the purpose of having them transferred into her name and that was the first time she had consulted an attorney in this case. Also that one day about the year 1937 when she, her former husband and the decedent were in Oakland, decedent expressed a desire to visit appellant's safe deposit box and see the envelope containing the deed and stock certificates as he wanted to be sure the envelope was in a safe place; they visited the box and showed decedent the envelope. Appellant's former husband corroborated this, except he fixed the time as 1938 instead of 1937. He also testified that in 1938 he accompanied appellant to her safe deposit box and saw a large envelope, on the outside of which a statement was written in decedent's handwriting to the effect that it was to be opened at his death and placed on record. He also testified that decedent had said to him that he had transferred to appellant some stock in the Pacific Gas and Electric Co. and in the American Telephone and Telegraph Co. The witness Hazel Ford testified that 3 days after decedent's death appellant told her over the telephone that she had received in that morning's mail a letter by which decedent had given her the contents of the house. The appellant testified that this letter was included in the same envelope as the deed and the certificates. Respondent's attorney testified that after decedent's death appellant told him over the telephone that the letter by which decedent gave her the contents of the house came through the mail from an unknown source after the decedent's death.

The appellant was asked on cross-examination whether during the decedent's lifetime if she had ceased to stay with him, she would have returned the envelope and its contents to him, to which she replied that she would have on condition that she would be adequately paid for services rendered up until that time. On cross-examination the appellant testified that the decedent showed her the deed and put it in the envelope in which was some stock, the certificates for which he showed her. She knew how many shares there were but not the amount. She did not open each certificate "and look at the amount". She said by "amount" she meant the value of each certificate. She said, "In my testimony I said he handed me the envelope and showed me the deed. I said, then he took it back to his desk and sealed it and put his stamps on it. I never said he handed me the sealed envelope". She said "The agreement was made altogether for the stock and the deed". She testified the decedent many times told her "Florence, when I am gone you will have about $600 net income and you will have this home for yourself. You can sell your home. I want you to live right here so the Boy Scouts and Girl Scouts can come here and enjoy themselves as much as they want. Don't leave the house. With $600. a year and this home you can live nicely."

The witness Edith Cohen testified that about 1938 or 1939 decedent had said to her that he didn't care for wills and was going to make everything right; that there would be no trouble when he left this world and he had given appellant a deed and he was going to look after things for her, what he thought was compensation for all she had done for him. A year later he repeated this—that he had given appellant a deed instead of a will.

A daughter of appellant testified that in 1938 she accompanied the appellant to her safe deposit box and saw in the box a large envelope with something written on it in decedent's handwriting.

None of this additional testimony materially changed the testimony in the first case with respect to *intent, delivery, or possession.*

[1-3] From what has been said it would seem to follow that as far as the questions or issues of intent, delivery and possession are concerned, the trial court in the instant case would be bound to find, on the same record, as it did, that there had been no delivery of the stock, unless the rules

of law respecting the delivery of certificates of stock differ from those respecting the delivery of a deed. We are satisfied that section 330.1, Civil Code, which in 1931 replaced section 324, made no change in the law with respect to delivery. The new section as well as the old, provides that transfer of title is effected by indorsement *and* delivery. With respect to section 330.1 this is said at 6A Cal.Jur. p. 653, section 364: "The ambiguity of the former statute is avoided, although it must be conceded that the courts had pretty well cleared it away by construction, with the result that the Transfer Act is largely declarative of settled and general law." And at page 656, it is said: "As was also the case under the former statute, if title is to pass by gift, it must pass by one of the legal modes. Where a gift of stock is made, there must be not only an intention to make the gift but a present vesting of title by indorsement and delivery of the certificate, whether the gift is causa mortis, or inter vivos." And at page 657 (Sec. 367): "Ordinarily a contract for sale of shares is executed by the indorsement and delivery of the certificates, but as between the parties and for the purposes of the contract the passing of title is determined by their intent."

In the former case the trial court found "that the deed * * * was never delivered by said Emerson to said Florence M. Farmer, and that by reason of such fact the other issues herein * * * are immaterial and do not require any findings with respect thereto."

The trial court *in the instant case* found that it was orally agreed between decedent and appellant prior to April 9th, 1934, that he would give her a deed to a parcel of his real property and some stock if she would come to work for him and remain in his employ throughout his remaining years; that he paid her a salary ranging from $40 to $65 a month during all that time. The court further found "that on April 9th, 1934, said Emerson handed an envelope, containing a deed * * * the stock here in controversy * * * and another paper to defendant Farmer, and at said time stated to her 'Now Florence this shows I will keep my part of the bargain and you keep yours and it is yours so long as you stay with me. If, at any time, you leave my employ you are to give me that envelope back in the same condition in which I give it to you; and if you are in my employ and I pass along it is yours'; on the envelope, after it had been sealed and a sticker put around it there was written on the envelope by said Emerson 'To be opened at my death and put on record immediately'. Defendant Farmer remained with said Emerson until his death, whereupon she recorded the deed and had the stock transferred to her own name." The court also found that decedent handed to appellant the certificates endorsed by him to her but also found "that it is not true that William Otto Emerson purported to or intended to sell, assign or transfer any interest in or to said stock * * * or any thereof, to defendant." The court further found "* * * that it is not true that the corporate stock * * * or any part thereof, was delivered by William Otto Emerson to defendant with intent to transfer ownership of or any interest in, the same, or any part thereof, to defendant, or was delivered to defendant at all", and that it "is not true that defendant ever has been or is now the owner of any of the corporate stock referred to in plaintiff's amended complaint."

[4] This court held on the appeal of the first case that the evidence was sufficient to support the finding that the deed had not been delivered. On this same record on appeal this court cannot hold otherwise than it did in the first case (57 Cal.App.2d 542, 135 P.2d 21) on findings which reach the same ultimate result as the earlier findings reached.

This was the course followed in the case of Kimball v. Tripp, 136 Cal. 631, 69 P. 428, which was a suit brought by one of the heirs of Elizabeth L. Cook, deceased, to set aside certain conveyances of lands and releases of interest therein, and certain assignments of mortgages made to the defendant by the deceased. Several years theretofore the administrator of Mrs. Cook's estate had sued said Tripp to recover from him certain personal property, or its value, alleged to belong to the estate and had been awarded a judgment from which an appeal was taken. Knight v. Tripp, 121 Cal. 674, 54 P. 267. On appeal in the second case the court said, after discussing the findings, "These findings, which are not attacked by the specifications, bring the case, we think, within the authority of the decision in Knight v. Tripp [121 Cal. 674, 54 P. 267.] This is clearly the case with reference to the assignments of the notes and mortgages, which come directly within the decision. Nor do we think the principle of the decision is less applicable to the conveyances of land. The lands were conveyed on the same trusts as the personal property, * * *." The appellant in Kimball v. Tripp urged that the earlier judgment operated as an estoppel, but the court held otherwise on that point. Kimball v. Tripp is cited by us not for what it holds on the merits as to gifts, but simply as an illustration of how the judgment on appeal in the first case becomes authority in this case *on the issues of intent, delivery and possession* irrespective of the doctrine of res judicata. Our conclusion on this phase of the case renders unnecessary a discussion of the authorities cited by both sides on the subject of delivery.

The appellant claims that the court erred in its action on her alternative claim for a money judgment, sued on in her amended cross-complaint. In the present case when the appellant answered the first case had not yet been decided and she filed a cross-complaint herein in which she reasserted her claim to the real property and the stock, but in addition to asserting those claims (which might be called her *primary* claims) she set up a *secondary* and *alternative* claim for a money judgment in case her *primary* claims failed. Appellant's claims (both primary and secondary) are based on an oral agreement which she alleges was made about April 9, 1934 between decedent and herself by the terms of which she entered his employ as his general housekeeper, nurse and companion and in *part payment* for which services she alleges he agreed to pay her $40. a month *and* to convey to her the land and transfer to her the stock. It is further alleged that under this oral agreement she was to, and did, give up her business as a real estate broker, notary public and public stenographer so she could give the decedent as much time as was necessary during the usual day-time hours, and that about July 9, 1939 the agreement was modified whereby appellant was to, and did, stay in decedent's home during the nighttime as well as the daytime (because he needed more care and assistance), and whereby she was to receive $65 a month "as part consideration for said services" instead of the $40 theretofore paid, but that in other respects the agreement remained the same. She alleges full performance on her part; the presentation of her creditor's claim against the estate; its rejection, and that "there remains due, owing and unpaid * * * the sum of $12,442.50, no part of which has been paid." The claim is made a part of the cross-complaint by reference "as though set out at length herein". The prayer of the cross-complaint is, first, for a decree adjudging that the defendant is the owner of the land and the stock and, second, *"in the event it be judicially determined that this defendant is not the owner of said real property and of said corporate stock, that defendant have judgment against plaintiff as such administratrix, that plaintiff do pay to defendant in due course of administration, the sum of $12,442.50, as set forth in said claim."*

The claim attached to the pleading is a *contingent* claim, and is so denominated. It contains a rather detailed statement of the appellant's position under the oral contract, as well as her assertion of title to both the land and the stock. It contains also the following statement: "That the reasonable value of claimant's services so performed by her to and for decedent from April 9th, 1934 to the date of his death on December 24th, 1940 was the sum of $175 to $200 per month; in the event that it should be judicially determined that claimant is not the owner of said real property and of said stock certificates, claimant presents this contingent claim against the estate of said decedent for the sum of * * * $12,442.50 * * * being the difference between the amount of cash paid to her by decedent as aforesaid and the actual value of said services being computed at the rate of $200.00 per month". The concluding part of the claim also shows that it is *"contingent upon the event that it should be judicially determined that claimant is not the owner of said real property and of said stock."*

At the trial the respondent objected to the testimony presented in support of the cross-complaint, and moved to strike out such testimony, on the ground that the cross-complaint did not state facts sufficient to constitute a cause of action. The court granted this motion, struck out the testimony and as a conclusion of law formally declared that the amended cross-complaint does not state facts sufficient to constitute a cause of action herein. The appellant attacks this ruling while the respondent presents several reasons supporting it.

[5] First, the respondent claims that there is no allegation in the cross-complaint

showing either the agreed or the reasonable value of appellant's services. A few lines back we quoted verbatim the statement of appellant under oath of the value of her services ($175 to $200 a month) *contained in her creditor's claim.* True, this statement was not repeated in words within the four corners of the pleading itself, but in the cross-complaint there is found a reference to the filing of this verified claim, *a copy of which,* the pleader alleges, *"is attached to defendant's Answer and Cross-complaint filed in this action and made a part hereof as though set out at length herein and marked 'Exhibit A'".* That such language in a pleading as that just emphasized by us is effective to incorporate into such pleading the statements found in an attached exhibit is held in the case of Holly Sugar Corp. v. Johnson, 18 Cal.2d 218, 115 P.2d 8, 12, where the court says: "* * * the complaint's distinct and definite reference to the attached verified protest for the avowed purpose of setting forth the grounds of objection to payment of the additional tax has the effect of incorporating into the body of the complaint the recitals of the exhibit as fully and to the same extent as if they were, in fact, directly made in the principal pleading. Accordingly, the truth of the allegations of the complaint together with those of the annexed exhibit is admitted by respondent's general demurrer, and both documents form part of the record before this court." The judgment in that case was reversed with directions to overrule the demurrer.

The cases cited by respondent on this question of incorporation by reference are not in point for the reason that, as pointed out in the Holly Sugar case, by appropriate language within the pleading itself the pleader's intent to make the statements contained in the exhibit his own allegations, is made manifest, and the cases relied on by the respondent did not do that.

Moreover, even if it were not permissible to so incorporate by reference, a reading of the claim in connection with the pleading proper shows beyond doubt that the pleading, if itself deficient, is certainly susceptible of easy amendment to state by way of mere repetition therein what is already stated in the claim.

[6, 7] The second reason urged by the respondent why the amended cross-complaint does not state a cause of action is that no allegation is found therein that the appellant has restored or offered to restore the deed and the stock. In support of that contention the respondent relies on Hill v. Den, 121 Cal. 42, 53 P. 642. Let us examine the situation in which the appellant found herself. The stock which she claims to have received as partial consideration for services rendered over a period of six years, is claimed by the respondent. The appellant claims in good faith that there was a good delivery of it to her. She has an unquestioned right to defend herself in this litigation and to carry it up on appeal, as she has done just as she had an unquestioned right to litigate with respect to the real property. If, as now contended, she can not assert her *secondary* claim for money compensation without first restoring that which she maintains is hers, she would be forced to abandon her *primary* claim in the interest of a mere alternative one. The decision of the former case on appeal settled her claim to the real property adversely to her. The filing of the creditor's claim was not an after-thought, nor a last minute attempt by a shift to recapture something already lost; there was no way in which she could sit back and await the outcome of this litigation for by virtue of sections 700 and 707 Probate Code she had to present her claim within a limited time or forever waive it. Foreseeing the uncertainties of litigation, she filed a contingent claim and it shows plainly and frankly on its face that it is intended only as an alternative measure. She pursued a procedure analogous to that in replevin where a plaintiff prays, alternatively, for damages or the value of the goods, if the goods themselves are not recoverable. The appellant's alternative position, moreover, was taken in the same litigation as that in which her primary claim is asserted, which means that she cannot enjoy both remedies, and in the judgment herein every claim which she asserts should be ultimately determined.

The rule followed in Hill v. Den requiring restoration or an offer to restore as a condition precedent to the maintenance of an action is the same as the rescission rule applied in many California cases. But the rule is subject to many and various exceptions discussed at some length in Kelley v. Owens, 120 Cal. 502, 47 P. 369, 371, 52 P. 797, where it is said: "There are exceptional cases where restoration or an offer to restore before suit brought is not necessary, as, for instance, * * * where, without any fault of plaintiff, there have been peculiar complications which make it impossible for plaintiff to offer full restoration, although the circumstances are such that a court of chancery may, by a final decree, fully adjust the equities between the parties * * *." See also 4 Cal.Jur. p. 767 and 4 Ten Year Supp. 287 and cases cited and Shaffer v. Security T. & S. Bank, 4 Cal.App.2d 707, 41 P.2d 948. It would seem that the instant case is one presenting just such complications as those spoken of, and *there was no fault on the part of the appellant which caused them.* It would seem, further, that the court in this case can, by its judgment or decree, fully determine the rights of the parties.

The case of California, etc., Co. v. Schiappa-Pietra, 151 Cal. 732, 739–742, 91 P. 593, contains an exhaustive review of this question. At page 740 of 151 Cal., at page 596 of 91 P., it is said: "The authorities fully sustain the proposition that an offer to restore before action is not essential where the rights of the other party can be fully protected by the decree, and such restoration cannot be made without injuriously affecting the rights of the party seeking rescission, or the relative rights of the parties in the event of a rescission cannot be determined without an accounting. The statute itself dispenses with the necessity of such an offer, where the other party is himself unable to restore what he has received. In such event an offer on the part of the rescinding party would be a vain thing, and the respective rights of the parties can be fully guarded by the decree." In the case at bar the services which the appellant claims to have rendered the decedent over a period of six years could not, of course, be "restored" by his estate. We conclude the discussion of this phase of the case by adopting the following from the last-cited case (151 Cal. page 741, 91 P. at page 596): "the facts of this transaction are exceedingly complicated, and it is very clear that the terms upon which * * * the property received (can be) restored, can only be determined upon a judicial investigation, in which the rights of all the parties can be fully guarded. We are therefore of the opinion that the circumstances shown * * * fully justify the failure * * * to offer to restore possession of the property before the commencement of the action, and bring the case within those classes of cases in which no such offer is necessary as a condition precedent to action."

The second ground just discussed is not, in our opinion, sufficient to support the ruling that no cause of action was stated and, for the reasons given and on the authorities cited, Hill v. Den is distinguishable.

[8] The respondent contends that the first case, involving the title to the real property, is res judicata in this action (1) of the issues raised by the complaint and answer, and (2) of the issues raised by the cross-complaint and the answer thereto.

In the former case a complaint to quiet title to the real property described in the appellant's deed (and other real property deeded to George A. Gray not here involved) was filed within a month after the decedent's death. It alleged that the plaintiff, Dicka Klein, was the owner, subject to administration, and entitled to the possession of the real property; that the defendants claimed some right, title or interest in it, but that their claims were without right, and it prayed for a decree quieting plaintiff's title. The defendants Florence M. Farmer and George A. Gray answered denying plaintiff's ownership or right to possession and admitted and asserted their own respective claims. By way of cross-complaint the defendants alleged affirmatively their own ownership and right to possession, and that plaintiff claimed some right, title, or interest, but that such claims were without right and prayed for a decree quieting *their* title. The plaintiff then filed an answer to the cross-complaint, denying the defendants' claims. By an amended answer to the cross-complaint the plaintiff alleged, inter alia, that the deed to this appellant was never delivered and that there was no consideration for her deed. It then alleged that confidential relations existed between the decedent on the one hand and appellant and George A. Gray, her former husband, on the other, and that the appellant was employed by the decedent on a salary. It then alleged that the deed to appellant and the deed to her former husband, and large sums of money and corporate stocks all of a value in excess of $20,000, were obtained by the defendants by undue influence. The findings were to the effect that the plaintiff was the owner and entitled to the possession of the real property claimed by the appellant, subject to administration, and that neither defendant had any right, title or interest therein. They found that the other defendant, George A. Gray, was the owner of the real property which *he* claimed. They found that the deed under which this appellant claimed "was never delivered * * * and that by reason of such fact the other issues herein as between plaintiff, Dicka Klein and defendant Florence M. Farmer are immaterial and do not require any findings * * *" and they negatived the charges of confidential relationship and undue influence. The conclusion of law was that appellant was entitled to no relief by her cross-complaint. The judgment cancelled and set aside the deed from the decedent to the appellant, and adjudged that plaintiff was the owner of the property described therein, subject to administration. That judgment was affirmed on appeal (57 Cal. App.2d 542, 135 P.2d 21) by this court on the ground already shown.

We have summed up the pleadings, findings and judgment in the first suit to show just what were the issues therein. The only issues raised by the complaint and answer and cross-complaint were as to the ownership of the real property. The cross-complaint set up only the appellant's claim to the real property. We are satisfied that under section 442, Code of Civil Procedure, the appellant could not have pleaded any cause of action with respect to the stock or with respect to anything other than the land under either the "transaction" clause or the "subject" clause of that section, and in saying that we are mindful of the recent cases (California Trust Co. v. Cohn, 214 Cal. 619, 7 P.2d 297, 299, and others) which have enlarged the scope of that section, holding that "The facts surrounding the cause of action and not the form of the complaint are determinative of what constitutes the transaction." We are dealing now only with the question whether the judgment in the first case is res judicata, either as a bar or by way of estoppel, *as to the corporate stock.* We are satisfied it is not, for the reason that nothing with respect to personal property (not related to the real property in question) could have been litigated in that suit by way of cross-complaint or otherwise, even under the most enlarged interpretation of section 442, under the complaint which was filed therein. The present plaintiff might well have sued the appellant in that case to quiet title to both the real property *and* the corporate stock, Sec. 573, Probate Code, but did not see fit to do so. It is wholly unnecessary to discuss the many cases cited by both sides on the applicability, or not, of the doctrine of res judicata for we are satisfied that the pleadings in the first case, in the light of the authorities dealing with what can and what cannot be litigated in an ordinary suit to quiet title to land, and the provisions of section 442 settle the question, as far as the corporate stock is concerned.

That there are conflicts in the findings is not questioned by either side. In view of what has been held as to this court following, on this appeal, its earlier decision on substantially the same facts, and of the fact that there has to be a reversal on the ground already stated, it is not necessary to discuss these conflicts nor is it necessary for us to discuss the attacks which the appellant makes on the findings on the fifth defense (specification II of points relied on). On a retrial of the case the appellant should have the opportunity of laying before the court whatever evidence it has on the fifth defense, and new findings will, of course, be made thereon.

The trial court erred, in our opinion, in its conclusion of law No. 2, "That the amended cross-complaint of defendant herein does not state facts sufficient to constitute a cause of action" (specification V); in sustaining plaintiff's objection to the testimony taken in support of said amended cross-complaint, and in granting plaintiff's motion to strike said testimony (specification VI) for the reasons and on the authorities already given.

The judgment is reversed.

NOURSE, P. J., concurs.

69 Cal.App.2d 639

**BLATZ BREWING CO. et al. v.
COLLINS et al.**

No. 12779.

District Court of Appeal, First District,
Division 1, California.

June 22, 1945.

Rehearing Denied July 21, 1945.

Hearing Denied Aug. 16, 1945.

1. Licenses 🔑1

A "license" means leave to do a thing which licensor could prevent.

See Words and Phrases, Permanent Edition, for all other definitions of "License".

2. Licenses 🔑1

A "license" means the grant of permission to do a particular thing, to exercise a certain privilege or to carry on a particular business or to pursue a certain occupation.

3. Intoxicating liquors 🔑48

A rule of the State Board of Equalization requiring foreign beer manufacturers to obtain certificates of compliance, granted only on certain conditions prescribed by Board, and prohibiting local dealers from purchasing from foreign manufacturers not having certificates, was void as requiring "license" not authorized by Alcoholic Beverage Control Act, and as prescribing different penalty than those prescribed by such act. St.1937, p. 2159, § 38e.

4. Constitutional law 🔑62

Legislature may delegate authority to administrative boards to adopt and enforce reasonable rules for carrying into effect expressed purpose of a statute even though such rules include authorization to exercise discretion in doing so, provided that discretion is not purely arbitrary and does not amount to a sanction to add to or change statute or confer upon board a right to determine what law shall be in a particular case.

5. Constitutional law 🔑62

Legislature may not delegate authority to a board or commission to adopt rules which abridge, enlarge, extend or modify statute creating the right.

6. Constitutional law 🔑60

Power conferred upon the Legislature to make laws cannot be delegated to any other authority.

7. Constitutional law 🔑62

The Legislature may delegate to boards and commissions administrative functions in carrying out purposes of statute and various governmental powers for the more efficient administration of the laws.

Appeal from Superior Court, City and County of San Francisco; Theresa Meikle, Judge.

Action by the Blatz Brewing Company and others against R. E. Collins and others for an injunction and a judgment declaring a rule of the State Board of Equalization void. From a judgment of dismissal, plaintiffs appeal.

Reversed with instructions.

Athearn, Chandler & Farmer, Walter Hoffman, Philip H. Angell, and M. J. Donnelly, all of San Francisco, for appellants.

Robert W. Kenny, Atty. Gen., and Carl W. Wynkoop, Deputy Atty. Gen., for respondents.

BRAY, Justice pro tem.

Plaintiffs brought this action for injunction and declaratory relief against the members of the State Board of Equalization to obtain an adjudication that rule 55 of that board applying to out-of-state manufacturers of beer shipping their products into California is void. The lower court sustained the defendants' demurrer to the complaint without leave to amend, and thereafter entered a judgment of dismissal. From this judgment the plaintiffs have appealed.

The principal contentions of plaintiffs are:

1. The State Board of Equalization (hereinafter referred to as the "board") had no authority under the provisions of the Alcoholic Beverage Control Act, St. 1935, p. 1123 (hereinafter referred to as the "A. B. C. Act"), to adopt the regulation in question. 2. If such authority exists, the regulation itself is, (a) unconstitutional, and (b) discriminatory.

Six of the seven companies plaintiff are manufacturers of beer outside California. The seventh plaintiff, Pabst Sales Company, is the sales company in California for plaintiff Pabst Brewing Company. Plaintiffs Blatz Brewing Company, Adolph Coors Co. and P. Ballantine & Sons each holds an importer's and wholesaler's license issued pursuant to the provisions of the A. B. C. Act and sells its own products in this state. Plaintiffs Joseph Schlitz Brewing Company and Theo. Hamm Brewing Company transact no business directly in California; they manufacture and sell beer outside the state to independent beer importers and wholesalers, duly licensed in California, who in turn sell the beer here.

On May 27, 1941, after a hearing and pursuant to a notice, which stated that the notice was given pursuant to the provisions of section 38e of the A. B. C. Act, St.1937, p. 2159, the board adopted the following rule or regulation:

"On and after July 1, 1941, no beer wholesaler nor beer importer shall purchase any beer not manufactured within the State of California by a manufacturer holding a license as a beer manufacturer from the State of California, or transport or cause the same to be transported into the State of California for resale therein, unless the manufacturer of such beer has obtained from the board and holds a valid unrevoked and unsuspended certificate of compliance. A certificate of compliance shall be granted when such manufacturer of beer shall have made a written agreement with the board to furnish to the board, on or before the fifteenth day of each month, a report under oath, on a form to be prescribed by the board, showing the quantity of beer sold or delivered by such manufacturer to each licensed beer importer in this State during the preceding month and shall further have agreed with the board, that such manufacturer of beer and all general sales corporations or agencies owned and maintained by it shall and will faithfully comply with all laws of the State of California pertaining to the sale of alcoholic beverages and all rules and regulations of the board. If any such manufacturer of beer shall, after obtaining such certificate, fail to submit such report, or if such manufacturer or general sales corporation or agency owned and maintained by it shall violate the terms of such agreement, the board may suspend or revoke the certificate of compliance in the manner provided by the Alcoholic Beverage Control Act for the suspension or revocation of licenses, and after a hearing which shall be held in the City of Sacramento or in such other county seat in this State as the board determines to be convenient to the holder of the certificate. No fee shall be charged for such certificate of compliance but same must be renewed annually on or before July 1st of each year hereafter."

It will be noted that this rule provides: (1) That no beer wholesaler or importer in California shall purchase or bring into California beer manufactured outside the state unless the manufacturer of such beer holds the valid unrevoked and unsuspended certificate of compliance provided for in the section; (2) such certificate of compliance will only be granted if the out-of-state beer manufacturer agrees with the board in writing, (a) to make to the board a monthly report of beer sold to California importers; (b) that such manufacturer and all general sales corporations or agencies owned or maintained by it will faithfully comply with all California laws pertaining to the sale of alcoholic beverages and also all rules and regulations of the board; and (3) that, for failure to file the required reports, or violating the terms of the agreement, the board may suspend or revoke the certificate of compliance, after hearing in the manner provided by the A. B. C. Act for suspension or revocation of licenses.

The question of the authority to adopt rule 55 primarily depends upon the question as to whether or not the so-called "certificate of compliance" is a license. The defendant board concedes that the A. B. C. Act gives the board no authority to require an out-of-state beer manufacturer to obtain a license in order that its beer may be sold in this state. The board contends that rule 55 is an administrative regulation and not a grant of authority or permission to perform designated acts, as is a license. Plaintiffs contend to the contrary. This is the crux of the case.

Webster's New International Dictionary defines "regulation" as "A rule or order prescribed for management or government; a regulating principle; a governing direction, precept, or law"; and "rule" in law, as "An order or direction made by a court, usually in writing, regulating court practice (general rule) or regulating the action of parties in special cases (special rule)." A "rule" is "a definite regulation prescribed by the law for the conduct of trials." Watts v. Holland, 56 Tex. 54. Webster defines "license" as "Authority or liberty given to do or forbear any act; permission to do something (specified); esp., a formal permission from the proper authorities to perform certain acts or to carry on a certain business which without such permission would be illegal. * * *"

[1] License means leave to do a thing which licensor could prevent. Western Electric Co. v. Pacent Reproducer Corporation, 2 Cir., 42 F.2d 116, 118.

[2] The word "license", generally speaking, means a grant of permission to do a particular thing, to exercise a certain privilege, or to carry on a particular business or to pursue a certain occupation. City and County of San Francisco v. Pacific Telephone & Telegraph Co., 166 Cal. 244, 135 P. 971.

[3] Rule 55 patently does more than establish a rule or regulation for the gov-

erning of the actions of out-of-state beer manufacturers. It requires that such manufacturers obtain a license, called, it is true, a certificate of compliance, but a license nonetheless, in order that their beer may be legitimately sold here. It provides that such license may be taken away for violation, not alone of the regulation that reports of sales must be filed, but for violation of any regulation of the board, or any alcoholic beverage law of the state. The board claims as its authority for adopting rule 55 the following provision of section 38e of the A. B. C. Act: "The board may adopt such other rules and regulations as will foster and encourage the orderly wholesale marketing and wholesale distribution of beer * * *." Defendants take the position that rule 55 fosters and encourages the orderly wholesaling and distribution of beer in California, for the reason, as set forth on page 24 of respondents' reply brief, that it "prevents foreign manufacturers from underselling domestic manufacturers of beer and forcing domestic manufacturers to meet low competitive markets of foreign manufacturers," and call attention to section 2 of the Twenty-first Amendment to the Federal Constitution, which grants to the states the power and authority to regulate the importation of intoxicating liquors from one state to another. This argument of defendants is one of the strongest proofs that the board is legislating rather than administrating. The Legislature in no way attempted in its long and complete scheme of alcoholic beverage control as set forth in the A. B. C. Act to discriminate between out-of-state beer, and in-state beer, nor attempted to prevent, again in the words of appellants' brief, foreign beer manufacturers from flooding the California market with their product. Nor is the situation changed by the fact that the only manufacturers' licenses provided for by the act are limited to in-state manufacturers. It is very apparent from the completeness of the act itself that the Legislature, for its own reasons, did not desire to require out-of-state manufacturers to obtain a license or a permit to send their product into California.

Rule 55, attempting to regulate out-of-state beer manufacturers, prescribes a license. That it is such is shown by the terms of the regulation: (1) The products of the out-of-state manufacturer cannot be sold, purchased or transported in California unless it holds a valid, unrevoked and unsuspended certificate of compliance. (2) If the manufacturer violates any regulation or law the board may suspend or revoke the certificate. (3) The certificate must be renewed annually. What the writing required to be obtained is called is immaterial. Wilkie v. City of Chicago, 188 Ill. 444, 58 N.E. 1004, 1007, 80 Am.St.Rep. 182, points out that there is no distinction in substance between a license and a certificate. "The certificate, by express terms, authorizes the recipient to engage in the business of plumbing. A certificate or paper having that effect is a license, which, in its general sense, is an authority to do something which, without such authority, is prohibited. Webster defines a license to be a formal permission from proper authorities to perform certain acts or carry on a certain business, which, without such permission, would be illegal. The certificate is within that definition, and is a license." The license feature of the certificate is not affected by the fact that the rule does not directly require the out-of-state manufacturer to obtain the certificate, but requires it indirectly, by providing that unless such manufacturer has the certificate, no beer wholesaler or importer in California can transport the manufacturer's beer into the state for resale here. Although denominated a "certificate of compliance" it is actually a license. Without it, the manufacturer cannot send its products into the state. (4) The regulation provides that the certificate may be suspended or revoked "in the manner provided by the Alcoholic Beverage Control Act for the suspension or revocation of licenses."

An examination of the A. B. C. Act shows that the Legislature very comprehensively covered the entire field of alcoholic beverage control and licensing in California. The act provides twenty-four different types of licenses. It is significant that the basic theory of the act is to make the licenses locational rather than personal. Section 6 of the act, St.1937, p. 2132, provides that the licenses provided for in the act shall authorize the person to whom the license is issued to exercise the rights and privileges of his license "at the premises for which issued." Rule 55 of the board, on the other hand, attempts to provide a license not contemplated by the act, and one attached to the individual rather than to the location.

The Legislature in framing the act did not see fit to provide a license for out-of-state manufacturers of beer, although it did provide for licensing in-state manufacturers. The board by rule 55 does attempt to do this, and in the words of defendants' brief, "Should the board attempt to add additional types of licenses, it would in effect usurp the power of the Legislature."

[4, 5] The law as to administrative bodies is concisely set forth in American Distilling Co. v. State Board of Equalization, 55 Cal.App.2d 799 at pages 805, 806, 131 P.2d 609, 612, where the court says:

"It is true that the Legislature may delegate authority to administrative boards to adopt and enforce reasonable rules for carrying into effect the expressed purpose of a statute even though such rules include the authorization to exercise discretion in doing so, provided that discretion is not purely arbitrary and does not amount to a sanction to add to or change the statute or confer upon the board a right to determine what the law shall be in a particular case. * * * It is a well-established principle of law that the Legislature may not delegate authority to a board or commission to adopt rules which abridge, enlarge, extend or modify the statute creating the right. Campbell v. Galeno Chemical Co., 281 U.S. 599, 50 S.Ct. 412, 74 L.Ed. 1063, 1069; People v. Kuder, 93 Cal.App. 42, 51, 269 P. 198, 630; 11 Am.Jur. 955, § 240. In the authority last cited it is said:

"'Clearly, the legislative body must declare the policy of the law and fix some kind of legal principles which are to control in given cases. It must provide an adequate yardstick for the guidance of the executive or administrative body or officer empowered to execute the law. * * * In all cases the rules and regulations may be tested in the courts to determine whether they are reasonably directed to the accomplishment of the purposes of the statute under which they are made. Moreover, regulations promulgated by administrative departments may not extend the statute or modify its provisions.'"

Applying the test of the decision in that case to the facts here, we find that the Legislature provided no yardstick for the regulation of out-of-state beer manufacturers in the manner attempted by the board, other than that it obviously appears from the whole act that the Legislature figured that the entire subject was covered or was to be left unregulated. Moreover, rule 55 definitely attempted to enlarge and extend the statute, which is beyond the power of the board. Tux Ginger Ale Co., Ltd. v. Davis, 12 Cal.App.2d 73, 54 P.2d 1122, held that the authority of the board under the A. B. C. Act to make rules and regulations limited the board to making such rules and regulations pursuant to the provisions of the act, and did not authorize it to extend the definition of "wines," as set forth in the act, to include a liquor containing wine, alcohol, flavoring and water.

Not only does rule 55 require a license not contemplated by the Legislature itself, but it provides a penalty additional to and different from the penalties provided in the act, since it outlaws the product, rather than preventing the operations of the licensee at a particular premise only. The cases cited by respondents as authority for the proposition that section 38e of the A. B. C. Act authorizes the adoption by the board of rule 55 do not support their contention. In fact, those that are in point support the contention of the plaintiffs. Premier-Pabst Sales Co. v. McNutt, D. C., 17 F.Supp. 708; Ziffrin, Inc. v. Reeves, 308 U.S. 132, 60 S.Ct. 163, 84 L.Ed. 128; Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395, 59 S.Ct. 256, 83 L.Ed. 246; and Mahoney v. Joseph Triner Corporation, 304 U.S. 401, 58 S.Ct. 952, 82 L.Ed. 1424, were concerned with the constitutionality of the legislative acts themselves, not with the question of the authority under such acts of the administrative boards.

Respondents place great emphasis upon the decision in Dugan v. Bridges, D. C., 16 F.Supp. 694, 699, because there was involved in that case in New Hampshire a "certificate of approval" which was almost identical in terms and effect with the "certificate of compliance" in our case. However, section 26, Laws N.H.1933, c. 99, as amended by Laws 1935, c. 152, § 2, providing for the certificate of approval, was not a section of rules or regulations of the State Liquor Commission but was a section of the act of the Legislature providing for liquor control. The court in that case held that the Legislature was within its constitutional power in passing that act and requiring out-of-state brewers to obtain such a certificate and pay a fee therefor. Nowhere in the case is there any discussion of the question involved here, the authority of a board to make such a requirement.

Anheuser-Busch v. Walton, 135 Me. 57, 190 A. 297–301, was a case similar to the one at bar. There, certain regulations of the Maine State Liquor Commission were challenged by out-of-state brewers as being beyond the power granted by the Legislature to the commission. These regulations required the out-of-state manufacturers and wholesalers to obtain a certificate very much like the one in question here, called a "certificate of approval." A fee was charged therefor. Certain reports, similar to those required by rule 55, were required. Just as in our case, the failure to obtain or hold the certificate was punished indirectly, by prohibiting any in-state license holder from handling or selling the products of a noncertificate holder. In holding that the Maine Legislature in its beverage control act did not grant the commission any authority to make the regulations in question, although the act did authorize the commission "To adopt rules and regulations for the administration of this act and for the supervision and regulation of the manufacture, sale and transporation of malt beverages throughout the state", Pub.LawsMe.1933, c. 268, § 5, par. 2, the court said, 190 A. at page 301: "No principle is more firmly embedded in our concept of government than that the laws under which we live shall be enacted by the people or by their representatives in Legislature assembled. * * * By adherence to this principle we have been saved from the tyranny consequent on the promulgation of executive edicts, by which the liberties of peoples in other lands have been destroyed, and have established here in the apt phrase of the declaration of rights of the Commonwealth of Massachusetts 'a government of laws and not of men.'" 190 A. at page 302, "Nowhere in the statutes relating to this subject is there the slightest indication that the Legislature even attempted to give to the State Liquor Commission the authority which it now claims to have. Its power to make rules and regulations extends only to such details of administration as are necessary to carry out and enforce the mandate of the Legislature." The court, 190 A. at page 302, comments upon the fact that "* * * this regulation was promulgated in spite of the fact that * * * the Maine Legislature refused to pass an amendment to Public Laws 1935 * * *", the purpose of which was the same as that of the regulation. This language is significant in view of the fact that rule 55 is practically the same, word for word, as a legislative bill vetoed by the Governor, in April, 1941, just a month before it was adopted by the board.

Then, there is Zukaitis v. Fitzgerald, D. C., 18 F.Supp. 1000, which, like the Anheuser-Busch case, is cited by defendants. In that case, two main questions were involved, one, the constitutionality of a section of the Michigan Liquor Control Act, and the other, certain regulations of the commission created by that act. The court held that although both the acts and the regulations imposed discriminatory burdens upon out-of-state liquors, nevertheless, the Twenty-First Amendment to the Federal Constitution permitted these. The second question arose as to the power of the commission under the act. Said the court, 18 F.Supp. at page 1004: "We do not, however, find ourselves in accord with defendants' contentions that * * * the Michigan Constitution vests the Michigan Liquor Control Commission with complete authority over the alcoholic beverage traffic except where expressly limited by statute. The commission is, in fact, exercising legislative, executive, and judicial powers. Such exercise of power contravenes the fundamental theory of our Republican form of government. * * * One of the chief merits of the American system of written Constitutions is the separation of the powers of government." The court then goes on to hold that it was the intention of the Michigan Liquor Control Act to give the commission powers as an administrative agency to regulate modes of procedure within the terms of the act, but not to make rules or regulations which change statutory provisions. It then holds that certain of the commission's regulations are beyond the authority of the act, while others are within its authority. One of these latter was a rule requiring out-of-state brewers to obtain a license. But the court's decision was based upon what it terms the broad language of the act, which said: "Except as by this act otherwise provided, the commission shall have the sole right, power and duty to control the alcoholic beverage traffic and traffic in other alcoholic liquor within the state of Michigan, including the manufacture, importation, possession, transportation and sale thereof." Pub.Acts Mich.1933, Ex.Sess., No. 8, § 1. In the Alcoholic Beverage Control Act there is no such broad delegation of power. The board, itself, does not claim any such broad delegation. It rests its sole claim of authority on section 38e.

In considering whether or not section 38e confers authority upon the board to adopt regulations on subjects other than beer prices, it is of some value to consider the construction which the board itself placed upon the section when in 1941 it issued and distributed a publication which it entitled "California Alcoholic Beverage Control Act and Related Constitutional Provisions." In this publication, each section of the act is preceded by a heading which indicates its context. Section 38e is designated "Beer Price Posting." Since the question here is solely one of statutory construction, it is also interesting to note the framework of the act as devised by the Legislature. The only section of the act which appears to give over-all authority to the board is section 38, St.1937, p. 2158, which states: "The board shall administer all of the provisions of this act and to that end shall prescribe all necessary rules and regulations to carry out such provisions. For the performance of its duties the board shall have the power conferred by section 353 of the Political Code." It is conceded that section 38 does not provide the authority for the board to adopt rule 55, as it is restricted solely to authority for the purpose of administering and carrying out the provisions of the act. Then, there are a number of places in which the act authorizes the board to adopt regulations in connection with specific subjects mentioned in a particular section; thus rules and regulations are authorized in section 4, St.1937, p. 2130, in connection with sale of a stock of liquor after revocation or surrender of a license; section 5, St.1937, p. 2130, in connection with proportionate license fee for a fractional year; section 6 (k), St.1937, p. 2132, in connection with the sale of warehouse receipts by wholesalers; section 6 (r) in connection with sales to nonlicensees within government reservations or parks; section 6.5, St.1937, p. 2136, in connection with giving away samples; section 21, St. 1937, p. 2141, in connection with hearing of protests; section 22a, St.1937, p. 2142, in connection with annual reports of wine manufacturers; section 23b, St.1937, p. 2144, in connection with claims of exemption from tax; section 38e, in connection with beer price posting. Thus we have an act containing one general section, and ten sections in which the Legislature conferred specific authority upon the board to adopt regulations with respect only to the restricted subject of each respective section. This is the systematic pattern of the act. It grants only limited authority in the case of specific subjects. There can be no greater reason for holding that the authority to adopt rules and regulations in section 38e is not limited to the context of that section, than of holding that the same is true of the other nine sections.

This section was before this court in the case of Adolph Coors Co. v. Corbett, 123 P.2d 74. While that case is no longer authoritative, as a hearing was granted in the Supreme Court, and then the case was dismissed by the parties, its analysis of section 38e and its conclusion as to the effect of the language in that section, upon which defendants here base their entire case, are logical, persuasive and correct. In that case the board had passed a regulation prohibiting the sale in California of beer in eight ounce containers. The board, as here, based its right to adopt such rule on that portion of section 38e which reads: "The board may adopt such other rules and regulations as will foster and encourage the orderly wholesale marketing and wholesale distribution of beer." The court, after an exhaustive examination of every provision of the act, found: first, that the Legislature had so well covered the field, and yet had remained silent upon the question of a minimum beer container, as to indicate that it did not desire a minimum to be prescribed; therefore, any rule of the board constituted " 'legislating' upon a subject with respect to which the law-making body in its wisdom had seen fit to remain silent", 123 P.2d at page 78; and, secondly, that section 38e is limited to matters having to do with "the stabilization of the wholesale prices", 123 P.2d at page 79, of beer. The court discusses section 38e as follows:

"As already pointed out, the respondents rely upon section 38e of the act. That being so, an examination of that section is in order. Section 38e was added to the act in 1937 (pp. 2159–2161). It is lengthy and is broken up into six paragraphs. By this section each manufacturer, importer and wholesaler of beer is required to file and thereafter maintain on file with the board a written schedule of his sale prices for beer sold in this state; such schedules may be changed from time to time by filing new ones. The first schedule becomes effective immediately; the amendatory ones become effective ten days after being filed. Then there is a proviso with respect to the filing of schedules 'to meet lower posted and filed competing prices in a trade area' and provision, in such cases, as to effective dates. Such price schedules, the section says, are subject to public inspection and are in no sense confidential. Upon the filing of these schedules— original or amendatory— 'all prices therein stated shall be strictly adhered to by the filing licensee and any departure or variance therefrom * * * shall constitute and be a misdemeanor.' There are two provisions vesting the board with power to prescribe the form of the schedules. The section then goes on to provide that "Any director, officer, agent or employee of any licensee who knowingly assists or aids in the violation of this section or any effective posted price or any rule or regulation of the board passed to carry out the provisions of this section shall be guilty of such violation equally with the licensee.' Then follows the paragraph authorizing 'other rules and regulations' quoted above, which is followed by another paragraph, again dealing with prices and marketing, reading as follows: 'No manufacturer, importer or wholesaler mentioned in this section shall be prohibited the right of choice of customers, nor shall any such licensee be prohibited from dividing his customers into functional classes and establish different prices for the same articles for such different functional classes, such different functional classes being based upon the manner in which such classes sell beer, as wholesaler or retailer.' The succeeding paragraph sets up the machinery for court action by any trade association to enjoin violations 'of this section,' with damages as well. The last paragraph provides safeguards for the licensee against the revocation of his license for 'a violation of the provisions of this section.'

"From the foregoing review of section 38e it will be seen that what the legislature dealt with therein was the wholesale selling price of beer; the publication of prices; the maintenance of such prices and strict adherence to them. Immediately following a penal provision designed to prevent the 'violation' of effective posted prices is found the language relied upon to support rule 35a, viz., 'The board may adopt such other rules and regulations as will foster and encourage the orderly wholesale marketing and wholesale distribution of beer * * *.' A reading of section 38e shows that the preceding and succeeding parts of that section do, in fact, deal with 'the orderly wholesale marketing and wholesale distribution of beer.' On behalf of the appellant it is argued that when, in the middle of this section, the legislature speaks of 'other rules and regulations' the word 'other' must be limited to wholesale marketing and distributing practices of the same kind, to wit, relating to prices, price cutting, meeting competitive prices and adequate disclosure of prices. Rules and regulations were mentioned in the earlier part of the section in connection with a specific subject—the filing of price schedules, therefore, it is not at all surprising to find provision for 'other rules and regulations' later on in the same section. The interpretation for which appellant contends finds support in the fact that that part of the section next following the rules and regulations provision continues to deal with the subject of prices, price discrimination and different prices for customers in different functional classes. In short, that part of section 38e upon which the respondents rely to support a rule dealing with the size of containers finds itself sandwiched in between two provisions dealing with price stabilization, a subject utterly foreign to that of the size of containers. As already noted, the general grant of the rule-making power is found in section 38, yet the respondents do not rely upon that section, and section 53.6 which does deal with the size of containers is utterly silent with respect to rules and regulations. 'The doctrine of "ejusdem generis" simply means that where general and specific words, relating to the same things are associated together, they take color from each other, and the general words are restricted to a sense analogous to that of those less general.' 23 Cal.Jur. 755, section 130. We are satisfied that that doctrine applies in this case and that the language found in section 38e was not designed to authorize such a rule as 35a, but must be confined to such rules for 'the orderly wholesale marketing and wholesale distribution of beer' as have to do with the stabilization of the wholesale prices of that beverage."

Certainly in the case at bar, in view of the very extensive scheme of licensing provided by the act, and the silence of the act upon the question of licensing out-of-state beer makers, the adoption by the board of rule 55 was legislating upon a subject with respect to which the law-making body in its wisdom had seen fit to remain silent. Moreover, the regulation in question was not a rule for "the orderly wholesale marketing and wholesale distribution of beer," having "to do with the stabilization of the wholesale prices of that beverage." It was admittedly done, as stated in respondents' brief, to prevent flooding the California market with outside beer in competition with the local product. Whether such a purpose is necessary or advisable is one for the Legislature to determine and to legislate against, not for an administrative body, such as the board.

[6, 7] We do not have here a situation where the Legislature has provided (as with the twenty-four types of license set forth in the A. B. C. Act) a method of licensing by the board, in which the act of licensing would be administrative, but one where the board itself has attempted the legislative act of requiring a license not contemplated by the Legislature. In administering the twenty-four licenses prescribed by the A. B. C. Act the board is acting administratively, but in setting up a new type of license the board is acting legislatively. This is another of those situations frequently met with today in which administrative boards feel called upon not merely to administer the act under which they are created, or to carry on the powers delegated to them, but to assume additional powers, and to attempt to assume authority which cannot be delegated to them, because of the rule that "* * * power conferred upon the Legislature to make laws cannot be delegated to any other authority." Cooley's Constitutional Limitations, vol. 1, pp. 228–230. Defendants attempt to invoke the rule set forth in the same authority, pages 231–232: "Though legislative power cannot be delegated to boards and commissions, the Legislature may delegate to them administrative functions in carrying out the purposes of a statute and various governmental powers for the more efficient administration of the laws." In order to come within this rule, the board admittedly and necessarily must deny that rule 55 constitutes the imposing of a license requirement, but such a denial is fallacious. Without the certificate of compliance, the out-of-state manufactured beer cannot legally be imported into the state: first, because no licensed importer or wholesaler could sell such beer in California; and secondly, because under section 49, St.1937, p. 2164, beer can only be brought into this state by common carriers and only when consigned to a licensed importer, and to the premises of such licensed importer. A carrier would be guilty of a misdemeanor if it transported such beer into the state.

To sum up, rule 55 is void, because, (1) section 38e of the A. B. C. Act, the claimed source of authority for the rule, is restricted solely to the subject matter of the section and does not authorize the board to adopt such a rule; (2) the rule is contrary to the entire concept and theory of the act; (3) the rule prescribes a type of license and a theory of liquor control fundamentally different from those contemplated by the act; and (4) the rule provides a penalty additional to and different from the penalties provided by the act.

In view of the decision as to lack of authority in the board to adopt rule 55, the other questions raised on the appeal concerning the alleged unconstitutionality of the regulation and its being discriminatory, become unimportant and need not be considered.

The complaint states a cause of action and the demurrer should not have been sustained. The judgment dismissing the action is reversed, and the lower court is instructed to overrule the demurrer to the complaint, giving the defendants a reasonable time to answer.

PETERS, P. J., and WARD, J., concur.

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69 Cal.App.2d 787

GLASTON v. GLASTON.

Civ. 14706.

District Court of Appeal, Second District, Division 1, California.

June 28, 1945.

Rehearing Denied July 16, 1945.

Hearing Denied Aug. 27, 1945.

1. Constitutional law 🔑309(2)
Judgment 🔑17(3), 818(2)

A personal judgment upon constructive or substituted service of process upon a nonresident defendant who does not appear is contrary to due process of law and is not valid either in state where rendered or in any other state in which its enforcement may be sought.

2. Divorce ⟹331

New York judgment for separation which ordered husband to pay wife $100 per week for her support, predicated upon substituted service upon husband who, at time of such substituted service and entry of judgment, was residing in California, was effective only as an adjudication of a separation, and was not entitled to full faith and credit in California against husband as a money judgment.

3. Divorce ⟹326

New York judgment of separation from bed and board granted to a wife and based upon husband's alleged desertion and cruelty did not deprive California court of jurisdiction to entertain husband's subsequent action for divorce on ground that wife had been adjudicated the innocent party, since such an adjudication could not have prospective application.

4. Divorce ⟹130

Evidence of wife's conduct after she secured a judgment for separation from bed and board without dissolving marriage authorized entry of judgment of divorce for husband on ground of extreme cruelty.

5. Divorce ⟹330

Where wife secured a separation from bed and board in New York, and in husband's subsequent California divorce action wife cross-complained and alleged the same facts which formed basis for New York judgment, wife, by presenting to California court for determination the issues decided by New York court, foreclosed her right to assert defense of recrimination based on New York adjudication in view of trial court's finding against wife on issues tendered.

6. Equity ⟹65(2)

Under the clean hands doctrine, a cause for divorce which was provoked by defendant is not available by way of recrimination.

7. Divorce ⟹150(2)

Where New York judgment was not entitled to full faith and credit except in so far as it effected a legal separation of the parties, finding in California divorce action that New York judgment was a final judgment of separation in favor of wife and was duly given and made upon grounds of cruelty, nonsupport, and desertion by husband, that husband was not estopped by New York judgment from alleging or attempting to prove matters alleged in complaint as basis for cause of action for divorce, and that it was not true that New York judgment barred husband from suing for divorce, were not conflicting.

◆

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by Joseph Glaston against Rosalie Glaston for divorce, wherein defendant cross-complained. From an interlocutory judgment for plaintiff, defendant appeals.

Affirmed.

Samuel Schwartzberg and Henry P. Goodwin, both of Los Angeles, for appellant.

Rosalind Goodrich Bates, of Los Angeles, for respondent.

YORK, Presiding Justice.

Defendant wife appeals from a judgment granting to plaintiff husband an interlocutory decree of divorce on the ground of cruelty. Defendant, a resident of New York State, appeared and filed her cross-complaint in the instant action.

The parties intermarried in New York State on September 7, 1940, and they separated on October 9, 1940. It is admitted by both that respondent attempted a reconciliation and that on October 25, 1940, they signed a document whereby, in return for the establishment of a joint bank account and one-half of respondent's weekly earnings, appellant promised to resume marital relations with respondent, starting November 25, 1940. However, on October 31, 1940, appellant instituted in New York State an action for separation from bed and board on the grounds of cruelty, non-support and desertion. Respondent, who was then and now is, a publicity agent for the well-known comedy team of Abbott and Costello, was sent to California on November 2, 1940. After handling publicity for his employers at Chicago and Detroit en route to California, he shortly thereafter arrived at Los Angeles, where he has ever since resided.

Substituted service was made upon respondent in the New York action by the publication of summons in two New York newspapers, and by mailing copies of the complaint and summons to respondent at two different addresses in New York City. Thereafter, judgment was taken against him by default upon the three grounds heretofore stated, appellant receiving a judgment for separate maintenance and respondent ordered to pay her $100 per week for her support, although he was never at any time personally served with either the summons or complaint.

To the amended complaint in the instant cause, appellant wife filed her first amended answer and cross-complaint in which she denied the acts of cruelty charged against her in said amended complaint, alleged a course of cruel and inhuman conduct by respondent husband, and set up the judgment rendered in the New York action as a bar to the within action for divorce, praying that said foreign judgment be established and enforced in this State, and that she be awarded a money judgment thereon for the unpaid sums accrued thereunder, to-wit, $8,600. The allegations of appellant's cross-complaint filed herein with respect to respondent's cruel and inhuman treatment of her are identical with the allegations of her complaint filed in the New York action.

After a trial of the issues during which appellant introduced the New York judgment and rested, the court made findings of fact in favor of respondent husband, and denied any relief to appellant on her cross-complaint. Among other things, the trial court found as follows: That "by and under a certain final judgment of separation in favor of defendant herein, duly given and made by the Supreme Court of the State of New York, County of New York, on or about October 6, 1941, in a certain action for separation from bed and board * * * brought by this defendant, as plaintiff therein, against the plaintiff herein, as defendant therein, upon the grounds of cruelty and non-support and desertion by the plaintiff herein, it was duly found and determined by said court that the defendant herein was entitled to a judgment of separation upon all the grounds therein mentioned", all as set forth in a duly exemplified copy of said judgment attached to appellant's answer and cross-complaint herein as Exhibit A.

"XI. That it is not true that the plaintiff herein is therefore by said prior final judgment and adjudication estopped from alleging or attempting to allege or prove any or all, of the matters and allegations contained in said Paragraphs V and VI of the Amended Complaint as grounds for or basis of his cause of action for divorce therein. * * * XXI. That it is not true that as a result of the judgment rendered in the above mentioned separation suit plaintiff is barred from suing for a divorce."

The judgment which followed granted an interlocutory decree of divorce to respondent husband, and ordered him to pay to appellant's attorneys $750 for fees and $100 for costs, payable in monthly payments of $100 commencing March 10, 1944. This appeal, as heretofore stated, has been perfected from that portion of said judgment granting an interlocutory decree of divorce to respondent.

In support of her claim that this state must give full faith and credit to the judgment rendered in the New York action for separation from bed and board which, she urges, has been attacked herein on the sole ground that respondent was not personally served in that action, appellant cites the case of Williams v. State of North Carolina, 317 U.S. 287, 63 S.Ct. 207, 213, 87 L. Ed. 279, 143 A.L.R. 1273. The cited case held that the full faith and credit clause of the Federal Constitution requires the extraterritorial recognition of the validity of a divorce decree obtained in accordance with the requirements of procedural due process in a state by a spouse who under the law of such state had acquired a bona fide domicil there, although the spouse who remained in the state of the original matrimonial domicil did not appear in the divorce suit and was not served with process in the state in which the divorce was granted. In view of certain dictum enunciated by the court therein to the effect that a divorce suit "is not a mere in personam action" and that "the decrees in this case like other divorce decrees are more than in personam judgments", appellant here contends that the "jurisdictional holding of the United States Supreme Court" in the cited case "is not limited to the matrimonial status of the parties but is also applicable to the judgment for alimony contained in the New York judgment."

Since the decision hereinbefore referred to (317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279, 143 A.L.R. 1273), the Williams case has again been before the Supreme Court of the United States. In its last decision rendered May 21, 1945, the court in referring to the first opinion says: "It was there held that a divorce granted in Nevada, * * * must be respected in North

Carolina, where Nevada's finding of domicil is not questioned though the other spouse had neither appeared nor been served with process in Nevada and though recognition of such a divorce offended the policy of North Carolina. The record then before us did not present the question whether North Carolina had the power 'to refuse full faith and credit to Nevada divorce decrees because, contrary to the findings of the Nevada court, North Carolina finds that no bona fide domicil was acquired in Nevada.' Williams v. North Carolina, supra, 317 U.S. at page 302, 63 S.Ct. at page 215, 87 L.Ed. 279, 143 A.L.R. 1273. This is the precise issue which has emerged after retrial of the cause following our reversal." This issue was determined by the court in the following language: "We conclude that North Carolina was not required to yield her State policy because a Nevada court found that petitioners were domiciled in Nevada when it granted them decrees of divorce. North Carolina was entitled to find, as she did, that they did not acquire domicils in Nevada and that the Nevada court was therefore without power to liberate the petitioners from amenability to the laws of North Carolina governing domestic relations." Williams v. North Carolina, 325 U.S. 226, 65 S.Ct. 1092, 1094, 1099, 89 L. Ed. 1577.

There is nothing in either of the Williams v. North Carolina decisions, supra, which would indicate that the Nevada decrees of divorce there under consideration did anything more than alter the marital status of the parties thereto. The question of alimony apparently was not in issue and the judgments of divorce did not make a money award as against either of the spouses served by publication, hence those decisions are not applicable to the facts presented by the instant litigation.

[1] The law is well established "that a personal judgment upon constructive or substituted service of process upon a nonresident defendant, who does not appear, is contrary to due process of law and is valid neither in the state where rendered nor in any other state in which its enforcement may be sought. Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565." 126 A. L.R. 1475. See, also, 21 Cal.Jur. 500, and authorities there cited; De la Montanya v. De la Montanya, 112 Cal. 101, 44 P. 345, 32 L.R.A. 82, 53 Am.St.Rep. 165; and Comfort v. Comfort, 17 Cal.2d 736, 741, 112 P.2d 259.

In the case of Geary v. Geary, 272 N.Y. 390, 6 N.E.2d 67, 69, 108 A.L.R. 1293, a decree, somewhat similar to the one here being considered, was entered which provided that "the plaintiff is entitled to a judgment of separation, from the bed and board of defendant forever, because of the abandonment of the plaintiff by the defendant, because of the cruel and inhuman treatment of plaintiff by the defendant, and because of his failure, neglect and refusal to provide for the plaintiff and the issue of the marriage of the plaintiff and defendant." Said decree ordered defendant to pay $3,000 per month for the support of plaintiff and the two minor children, an order for the sequestration of property of defendant located in New York having previously been made. In the cited case it was held by the New York Court of Appeals that "In matrimonial actions the 'res' is the marital status of a resident of the state, and, to the extent that the purpose of the action is to alter or affect the matrimonial status, the action is a 'proceeding substantially in rem' where 'substituted service by publication or in any other authorized form' is sufficient notice to answer the requirement of 'due process,' as formulated in Pennoyer v. Neff, supra. Thus even before seizure of any property the courts of New York might assume jurisdiction of the action for separation, though *the jurisdiction so assumed would not extend to the inclusion of an award of alimony in the judgment of separation.* Rigney v. Rigney, 127 N.Y. 408, 28 N.E. 405, 24 Am.St.Rep. 462. * * * In this case, though the defendant was served personally in California under a valid order of the court, and failed to appear or plead in the action, the *judgment which could be granted upon default could not include an effective award of alimony payable out of sequestrated property of the defendant which had not previously been seized.*" (Emphasis added.)

[2] The judgment in the New York action effected a separation of the parties from bed and board without terminating the marriage, therefore, under the foregoing rules of law, it is not entitled to be enforced in California against respondent herein as a money judgment, with respect to the alimony therein granted and now remaining unpaid.

[3] The opinion in the case of Comfort v. Comfort, 17 Cal.2d 736, 112 P.2d 259, holds that a decree of separate maintenance and divorce from bed and board granted to a wife and based upon desertion by the husband and upon his cruelty, does not deprive a California court of the jurisdiction to entertain an action for divorce brought subsequently by the husband. There the wife's argument was that the New York decree conclusively established that she was the innocent party and that, under the cases, the marital domicil follows that of the innocent party. This argument was rejected by our Supreme Court not only because the cases do not support the rule as alleged by the wife, but also on the ground that the New York decree simply established that at the time the decree was entered, and prior thereto, the wife was the innocent party, but that it could not, and did not, establish her continued innocence subsequent to that date.

"A husband against whom a judgment for support and maintenance has been rendered is not precluded thereby from asserting new grounds for divorce against his wife which have arisen since the rendition of the judgment. Condon v. Condon, 1917, 8 Ohio App. 189." 138 A.L.R. 362.

[4] In the instant case, the testimony of the witnesses Green that appellant made certain admissions subsequent to the rendition of the New York judgment, to-wit: in January of 1942, that some man other than her husband was providing for her, together with the further admission that she signed the document of October 25, 1940, hereinbefore referred to, constituted sufficient evidence to support the judgment granting respondent a divorce on the ground of extreme cruelty. In other words, what acts may have been committed by either party since the entry of the New York judgment are open to investigation in the subsequent divorce action, because the marital status of the parties still exists, and if either party has done something which constitutes a ground for divorce the other party is entitled to have the benefit of it.

[5, 6] In answer to appellant's contention that the court erred "in failing to find and hold that the judgment and findings of the New York court constituted conclusive proof of the defense of recrimination of the wife to the husband's divorce action", suffice to say that appellant, in addition to pleading the New York judgment as a bar to the instant action, also filed a cross-complaint in which she alleged the same facts which formed the basis for the New York judgment. By presenting for determination in the instant action the very issues decided by the New York court, appellant has foreclosed her right to assert the defense of recrimination, because the trial court herein has found against her as to each and every issue that she so presented to it for determination. Moreover, an examination of the entire record herein discloses a situation from which the trial court would be justified in assuming that appellant was guilty of provocatory conduct. A cause of divorce which was provoked by a defendant in a divorce action is not available by way of recrimination. Popescu v. Popescu, 46 Cal.App.2d 44, 115 P.2d 208. He who comes into equity must come with clean hands. Comfort v. Comfort, 17 Cal.2d 736, 112 P.2d 259; Mayo v. Mayo, 3 Cal.2d 51, 43 P.2d 535.

[7] Appellant urges as a ground for reversal of the judgment herein certain inconsistencies between certain findings of fact, to-wit: Finding X is to the effect that the New York judgment was a final judgment of separation in favor of appellant and against respondent and was "duly given and made" by the Supreme Court of New York State upon the grounds of cruelty, nonsupport and desertion by respondent. Finding XI is to the effect that respondent is not estopped by the adjudication and final judgment in the New York action from alleging or attempting to prove any or all matters alleged in his amended complaint as basis for his cause of action for divorce herein, and Finding XXI reads: "That it is not true that as a result of the judgment rendered in the above mentioned separation suit plaintiff is barred from suing for a divorce."

Since it is the conclusion of this court that the New York judgment is not entitled to full faith and credit except insofar as it alters the marital status of the parties and effects a legal separation, the findings adverted to are consistent with this view, and together with other findings made, are amply sufficient to support the conclusions of law and the judgment.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.

Hearing denied; CARTER, J., dissenting.

70 Cal.App.2d 16

FUCHALIN v. HAYES et al.

Civ. 7120.

District Court of Appeal, Third District, California.

June 29, 1945.

1. Appeal and error ⚷930(1)

District Court of Appeal, in reviewing the evidence, resolves all conflicts in favor of respondent and indulges in all legitimate and reasonable inferences to uphold the verdict, if possible.

2. Appeal and error ⚷996

To maintain defense of contributory negligence as against judgment of trial court, evidence must be such that reviewing court can say that there is no substantial conflict on the facts, and that from the facts reasonable men can draw but one inference pointing unerringly to the negligence of plaintiff proximately contributing to his own injury.

3. Appeal and error ⚷1011(1)

The fact that another truck and two busses were able to successfully pass defendant's stalled truck and trailer which partially obstructed highway at night or that driver of plaintiff's truck did not act at all times as another might under the circumstances was not determinative of question of contributory negligence, which in view of conflicting evidence was a question for trier of fact.

4. Appeal and error ⚷1012(1)

District Court of Appeal could not substitute its deductions for those of trial court on questions of fact, even though it might feel from reading the record that evidence in support of plaintiff in whose favor judgment was entered was not particularly persuasive.

5. Appeal and error ⚷989

The power of District Court of Appeal begins and ends with a determination as to whether there is any substantial evidence which will support conclusion reached by trial court.

◆

Appeal from Superior Court, Yuba County; Arthur Coats, Judge.

Action by Walter Fuchalin, doing business under the fictitious name and style of Valley Livestock Transportation Service, against A. W. Hayes and others to recover for damages arising out of a collision between plaintiff's truck and trailer and defendant's truck and trailer, wherein named defendant cross-complained. Judgment for plaintiff and defendants appeal.

Affirmed.

Van Dyke & Harris, of Sacramento, for appellants.

A. Brooks Berlin, of San Francisco, Lloyd E. Hewitt, of Yuba City, and A. Dal Thomson, of San Francisco, for respondent.

PEEK, Justice.

This is an appeal by defendants and cross-complainant from a judgment rendered against them for damages arising out of a collision between a truck and trailer of plaintiff which was being operated by his employee, one R. F. Butler, and a truck and trailer belonging to defendant Hayes and driven by his agent, the defendant Gilbert.

Plaintiff by his complaint sought damages against the defendants by reason of the alleged negligent operation of defendant's truck and trailer by Gilbert. By their answer and cross-complaint defendants admitted that the Hayes truck and trailer had become disabled on the highway but denied that any carelessness or negligence of either of them contributed to the accident, and as a further defense alleged the accident and resulting damage was caused solely by the careless and negligent operation of plaintiff's truck and trailer by Butler.

The case was tried before the court sitting without a jury. At the conclusion thereof findings were adopted favorable to plaintiff, and judgment was entered accordingly.

The admitted and only uncontradicted facts are that defendant's truck and trailer loaded with lumber was being driven in a southerly direction along Highway 99E at approximately 1 o'clock a. m. Said equipment was eight feet wide and had an overall length of 56 feet. At a point approximately four miles south of Live Oak in Sutter County, California, an auxiliary fuel tank came loose and fell under the wheels of the trailer. Upon application of the brakes by the driver, the trailer went out of control causing the truck to swerve to the left, spilling the lumber on the highway. When the truck was finally stopped it was entirely within the northbound lane of traffic, heading south, and the trailer extended diagonally across the highway in such a manner as to partially obstruct the southbound lane. Immediately in front of the truck was a culvert guarded by concrete abutments at each side of the highway. The highway at this point was originally 18 feet in width but had been widened to a width of 22 feet by the addition of cement shoulders two feet wide. The culvert, however, had not been widened and was therefore four feet narrower than the highway. Shortly thereafter plaintiff's truck and trailer, loaded with cattle, which likewise was proceeding in a southerly direction, struck the rear of defendant's stalled trailer. One flare had been placed in a disputed spot at a disputed distance from the rear of the stalled equipment. No lights were burning on the trailer, the connection between the truck and trailer having been disconnected when defendant's driver uncoupled the trailer from the truck. The headlights on the truck were burning. Prior to the accident, one truck and two busses, after coming to a complete stop, proceeded on past the stalled truck and trailer.

The balance of the pertinent evidence is in complete conflict. Gilbert testified that he placed the flare in the center of the highway approximately thirty-five steps to the rear of the trailer. Other witnesses stated it was placed upon a pile of lumber near the trailer, while others stated it was anywhere from 25 to 50 feet to the rear of the wreck. There was even disagreement on the condition of the weather, some stating there were fog pockets, others stating it was a clear, dark night.

The driver of plaintiff's truck and trailer testified that he was traveling 35 to 45 miles per hour when he saw the flare 150 or 200 feet away; that within the next 50 to 100 feet he saw the lumber, and had reduced his speed to 25 or 30 miles per hour; that upon seeing the lumber he turned to the right on to the shoulder and then saw a concrete culvert immediately in front of defendant's truck; that in endeavoring to turn back on to the highway and go between the culvert and the stalled equipment he struck the trailer, his truck veering off and turning over on the culvert, and that at the time of the impact he was traveling 20 to 25 miles per hour. His equipment was eight feet wide.

Appellants' sole contention is that the judgment and the findings of fact upon which it is based are both contrary to law and the evidence. The court in the particular finding attacked by appellants, followed the language of appellants' pleading, and found that the plaintiff's driver Butler was not, at the time of the accident, operating the truck carelessly or negligently and that "the said accident and resultant damage was not caused solely, entirely and proximately by the carelessness and negligence of said Raymond Butler in the operation of said truck and trailer." Appellants then conclude that if such finding can be construed as a finding that plaintiff, through his agent, was not guilty of contributory negligence, said finding is without the slightest evidentiary support in that plaintiff's agent was as a matter of law contributorily negligent.

[1, 2] It is the well-established rule that in reviewing the evidence "all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible." Crawford v. Southern Pac. Co., 3 Cal.2d 427, 429, 45 P.2d 183, 184. It is equally well established that to maintain the defense of contributory negligence as against the judgment of the trial court "the evidence must be such that the appellate court can say that there is no substantial conflict on the facts, and that from the facts reasonable men can draw but one inference, which inference points unerringly to the negligence of the plaintiff proximately contributing to his own injury." Crawford v. Southern Pac. Co., supra. In other words, the record on review must present what the Supreme Court, in Seller v. Market Street Railway Co., 139 Cal. 268, 72 P. 1006, referred to as a "rare" instance, which enables a court to say under the particular circumstance that as a matter of law, negligence has been shown. Such cannot be said of the present case.

[3-5] The fact that the record discloses that others were able to successfully pass defendant's stalled equipment or that plaintiff's driver did not act at all times as another might under the circumstances is not determinative of the question of his negligence. There can be no set standard of the decree of ordinary care in the operation of vehicles upon the highways to which all must account. That question was

one of fact addressed solely to the trial court, and its conclusions are binding upon us. We cannot substitute our deductions for those of that court even though we might feel from our reading of the record that the evidence in support of plaintiff was not particularly persuasive. In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689. The power of this court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trial court, Crawford v. Southern Pac. Co., supra, and we conclude there is.

For the foregoing reasons the judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

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70 Cal.App.2d 37

RAVETTINO v. CITY OF SAN DIEGO et al.

Civ. 3370.

District Court of Appeal, Fourth District, California.

June 29, 1945.

Rehearing Denied July 23, 1945.

Hearing Denied Aug. 27, 1945.

1. Municipal corporations 🔑745½

A city acting in governmental capacity is not liable for negligence of its officers or employees engaged in such governmental capacity, but, where activities are proprietary in character, city may be held liable.

2. Municipal corporations 🔑733(1)

In government and control of bay of San Diego and tidelands below mesne high-tide line, city of San Diego may act in a governmental capacity or proprietary capacity, depending on nature of the activity.

3. Municipal corporations 🔑733(1)

If city of San Diego through Harbor Commission had power to make use of power crane for lifting heavy material along water front at fixed rental fee charged to private companies and individuals operating on tidelands, city was acting within its "proprietary capacity", not "governmental capacity".

See Words and Phrases, Permanent Edition, for all other definitions of "Governmental Capacity" and "Proprietary Capacity".

4. Municipal corporations 🔑753(1)

Generally, municipal corporations are not liable for unauthorized acts of their officers or employees.

5. Municipal corporations 🔑59

A municipal corporation is invested with full power to do everything necessarily incident to proper discharge of its public functions, but no right to do more can be implied, and, in absence of express legislative sanction, municipality cannot engage in any independent business enterprise or occupation such as is usually pursued by private individuals.

6. Municipal corporations 🔑719(2)

The provision of charter of city of San Diego authorizing Harbor Commission to adopt with approval of council by ordinance such regulations as may be necessary to exercise powers and duties prescribed by charter forming commission does not limit jurisdiction of commission to carry out duty prescribed by charter and general laws in name of the city, but limitation goes only to question whether commission may adopt rules without approval of council by ordinance. St.1941, p. 3436, § 54(c).

7. Municipal corporations 🔑61

Generally, powers given to municipal corporations include the further power to employ such modes of procedure as are appropriate and necessary for their effective exercise.

8. Municipal corporations 🔑61

The delegation of power to municipal corporations, without providing mode for carrying such power into effect, impliedly gives them right to select lawful and reasonable means whereby power is to be carried out, and all doubts as to propriety of means used in exercise of undoubted municipal power should be resolved in favor of municipality where there is no abuse of power or discretion.

9. Municipal corporations 🔑57

A municipal corporation may act through such agencies as Legislature directs, and power conferred must be exercised for a public use or purpose, and what constitutes a public, as distinguished from a private, purpose must be determined by particular circumstances.

10. Municipal corporations 🔑733(1)

In determining whether city's renting of power crane in connection with city's management of San Diego Bay and tidelands fronting thereon is for a public or private purpose, court must consider broad purposes of grants to city of power to maintain its harbor facilities. St.1911, p. 1357; St.1941, p. 3436, § 54(b, c).

11. Municipal corporations 🔑753(1)

Where city of San Diego through Harbor Commission rented a power crane and operator to lessee of tidelands for purpose of lifting engine from boat docked in harbor, acts of commission and crane operator were not ultra vires, and hence city was liable for injuries sustained by lessee's employee who was struck by engine which fell from crane boom when pawl, which held the brake pedal, was released. St. 1911, p. 1357; St.1941, p. 3436, § 54(b, c).

12. Municipal corporations 🔑857

In action against city for injuries to employee of lessee of tidelands who was struck by engine which fell from boom of power crane which was operated by harbor department's employee in lifting engine from lessee's boat, employee's contributory negligence was for jury.

13. Appeal and error 🔑1066

Alleged error in giving instruction on last clear chance which did not apply was harmless, where court merely explained different elements necessary to be present to make doctrine applicable and stated to jury that, if any of six elements were lacking, plaintiff could not recover under doctrine, and record failed to show that, without such error, verdict would have been different.

14. Appeal and error 🔑1060(1)

Alleged error in permitting counsel for plaintiff to argue doctrine of last clear chance to jury in closing argument without having covered it in opening argument was not prejudicial, where applicability of doctrine was left to jury which might have rejected entire theory as well as counsel's argument on the subject in rendering a verdict for plaintiff.

15. Appeal and error 🔑1026

Where it did not appear that there had been a miscarriage of justice or that errors complained of were so prejudicial that without such errors a new trial would probably result in a different verdict, alleged errors were not prejudicial.

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Action by Alfredo Ravettino against the City of San Diego and another to recover for injuries sustained when plaintiff was struck by an engine which fell from the boom of a crane operated by city's employee. From a judgment for plaintiff, defendants appeal.

Affirmed.

J. F. DuPaul, City Atty., J. H. McKinney, Deputy City Atty., and Shelley J. Higgins, Special Counsel for City of San Diego, all of San Diego, for appellants.

Luce, Forward, Lee & Kunzel and A. T. Procopio, all of San Diego, for respondent.

GRIFFIN, Justice.

In this action for damages the jury returned a verdict for plaintiff and against the defendants in the sum of $45,000. The City of San Diego, through its Harbor Department, exercises in the name of the City, the powers and duties prescribed by the charter and other applicable ordinances and laws in managing and controlling the harbor of San Diego and the tidelands adjacent thereto. Through the Harbor Commission the City maintains a harbor, wharves, piers and the usual equipment for loading and unloading ships, and controls and maintains the tidelands of the City. For several years the Harbor Department owned and operated a Browning crane with six-ton lifting capacity. It was installed in position upon a truck operated by defendant Marsh, a regular employee of the Harbor Department, employed for that particular work. It was used principally for lifting heavy material along the water front and off and on boats docked in the harbor. Occasionally it was rented, with the driver, to private companies and individuals who were operating on tidelands along the water front. The Harbor Commission adopted and published certain tariff rates, which designated charges to be made for certain services performed and which also established a rate to be charged for rental of the crane above mentioned. That rental was fixed at $7.50 per hour plus 10 per cent insurance.

On February 15, 1943, defendant Marsh was directed by the Port Director to take the power crane to the Robbins Marine Engine Works, located on the tidelands which were under lease by them from the City of San Diego, for the purpose of lifting a marine engine out of a boat docked at that place. The Robbins Company, a private concern, had, on other occasions rented the outfit from the City at the rental published in the existing tariff rate, and in this instance there was no understanding that the work would be done for Robbins without charge. Plaintiff Ravettino had been regularly employed by the Robbins Company and on the day in question he was on the boat owned by that company when the power crane arrived. The crane was placed on a hard road running parallel to a small dock to which was tied the boat, and from which boat the engine was to be lifted. The boom of the crane was extended over the boat. Plaintiff attached the cable to the engine. Marsh operated the power crane and lifted the engine from the boat. The truck backed up until the engine was left hanging over the hard road where it remained stationary for about a minute and a half. While the engine was in this position plaintiff was directed by Robbins, his employer, to get a dolly, located about 75 feet from the road, and put it under the engine so that it could be moved inside of the shop for repair. Plaintiff walked over to the dolly. He testified that it was from that position that he last saw the boom with the engine on it above the road, and did not at any time see the boom move towards him. He was going to move the dolly under the engine. He stooped to take hold of the handle of the dolly. Meanwhile, Marsh had swung the boom and engine over toward the dolly until the engine was swinging in the air within a few feet of plaintiff as he stooped down. The boom was brought to a stop but the engine continued to swing with a "pendulum motion". As the boom swung around, it had been lowered until it reached a point a few feet from plaintiff and about three feet above him. The boom was then stationary but the engine still swayed.

Marsh testified that he saw plaintiff stooped over the dolly; that plaintiff backed up a step or two while pulling on the handle of it and that suddenly, without warning, the engine dropped upon plaintiff, crushing him to the ground. It caused indescribable injuries and plaintiff survived only by a miracle.

Defendants make no point of excessive damages for the injuries sustained. The engine weighed about 1800 pounds. It dropped free and about 25 feet of cable ran out on the ground. Marsh applied the brakes to the drum to stop the running of the cable. He could give no explanation of the sudden dropping. He testified that, in some way, the pawl, which held the brake pedal, was released. The brakes were applied by putting the foot of the operator upon a pedal. The brake was held down by a pawl ratchet on the pedal and could be released by pressure of the foot, which would cause the engine to drop. If the foot of the operator should hit the pawl while it was locking the brake, the load would drop.

Defendants produced an expert witness who testified that the load on this crane could not have dropped of its own weight unless the pulley was released by foot pressure. Defendant Marsh admitted that at the time of the accident his foot was near the pawl on the brake, that in some way the pawl was released, which in turn caused the brake to be released, but that he did not release it. After the accident the crane was inspected and was found to be in good working condition.

Motion for judgment of nonsuit, motion for instructed verdict, and a motion for judgment notwithstanding the verdict were each denied.

Defendants contend on this appeal that the court erred in denying the motions upon four separate grounds. The first is that the City of San Diego was not liable in damages for the negligence of the defendant Marsh because the evidence shows at the time the City was acting in a governmental and not a proprietary capacity. The second contention is this: that if the City was acting in a proprietary capacity then such act was ultra vires and beyond its municipal powers and therefore the City could not be held liable for the act of an officer or employee engaged in such ultra vires act. We will consider these two questions together.

[1] It is conceded that if the City of San Diego, at the time in question was acting in a governmental capacity then it is not liable in damages for any negligence of its officers or employees occurring while such officers or employees are engaged in

such governmental activity. Where the activities are proprietary in character the City may be held liable. Rauschan v. State Compensation Insurance Fund, 80 Cal.App. 754, 253 P. 173; Peccolo v. City of Los Angeles, 8 Cal.2d 532, 66 P.2d 651; Yolo v. Modesto Irrigation District, 216 Cal. 274, 278, 13 P.2d 908. The distinction between the two functions is pointed out in Chafor v. City of Long Beach, 174 Cal. 478, 483, 163 P. 670, L.R.A.1917E, 685, Ann. Cas.1918D, 106; Benton v. City of Santa Monica, 106 Cal.App. 339, 343, 289 P. 203.

The difficulty in this case arises in determining from the facts whether or not, in the particular activity of the municipality at the time of the commission of the tort, the City was engaged in a governmental duty imposed upon it as a political subdivision of the State. The following cases have held that certain activities of a municipal corporation are governmental in character. Miller v. City of Palo Alto, 208 Cal. 74, 280 P. 108 (disposal of garbage); Municipal Bond Co. v. Riverside, 138 Cal.App. 267, 32 P.2d 661 (street improvements); Brindamour v. Murray, 7 Cal.2d 73, 59 P.2d 1009 (police car used for private business); Wood v. Cox, 10 Cal.App.2d 652, 52 P.2d 565 (negligence of police officer); Meyer v. San Francisco, 9 Cal.App.2d 361, 49 P.2d 893 (operation of train in public park); Crone v. City of El Cajon, 133 Cal.App. 624, 24 P.2d 846 (operation of swimming pool). Others have held the City to be acting in a proprietary capacity, such as Davoust v. City of Alameda, 149 Cal. 69, 84 P. 760, 5 L.R.A.,N.S., 536, 9 Ann.Cas. 847 (operation of an electric light plant); Chafor v. City of Long Beach, supra (maintenance of municipal auditoriums); Morrison v. Smith Bros. Inc., 211 Cal. 36, 293 P. 53 (water system); Karsey v. San Francisco, 130 Cal.App. 655, 20 P.2d 751 (operation of street cars).

[2] In the government and control of the bay of San Diego and the tidelands below the mesne high tide line, the City may act in a governmental capacity or a proprietary capacity, depending on the nature of the activity.

In Coleman v. City of Oakland, 110 Cal. App. 715, 295 P. 59, where the City was held liable for damages resulting from the negligent operation of a city-owned truck while engaged in work in a city airport, it was held that the maintenance of an airport was similar to that of a harbor with its wharves and docks maintained as a landing place and haven of ships that navigate the waters. Language is quoted therein from authorities to the effect that where a city maintains a public wharf and charges toll or wharfage for the use of the wharf, it is liable to the same extent as an individual wharf owner.

General Petroleum Corp. v. Los Angeles, 22 Cal.App.2d 332, 70 P.2d 998, 72 P.2d 551, involved the negligence of a harbor pilot employed by the Harbor Commission to pilot a steamship from the open sea to the docks, which docks were leased by the plaintiff from the City. It was held, where plaintiff paid the defendant City a fee for the use of the pilot, pursuant to rules and regulations of the Harbor Commission, the City was engaged in a purely proprietary capacity.

In Denning v. State, 123 Cal. 316, 55 P. 1000, relied on by defendants, it was held that injury due to negligence of the employee of the Harbor Commission in maintaining a ladder on a tug-boat used for protection from and extinguishment of fires, was a result of an essential governmental activity and that the City was not acting in its proprietary capacity. The protection against or extinguishment of fires is uniformly held to be the exercise of a purely governmental function.

In Los Angeles Athletic Club v. Board of Harbor Commissioners, 130 Cal.App. 376, 386, 20 P.2d 130, the court says that in the leasing of tidelands, pursuant to authority granted by the state, a municipal corporation acts in a proprietary function, while in granting of a franchise over the tidelands the city acts in a governmental capacity.

[3] We are convinced, from the evidence, when considered in connection with the cited cases, that if the city, through the Harbor Commission, had power to make use of the crane for the purposes described, at a fixed rental fee, the act of the City in so doing must be considered as being within its proprietary capacity as distinguished from its governmental capacity. Defendants practically concede this conclusion in their brief (page 21). We will therefore consider the question of the power of the City, through its Harbor Commission, to so act.

[4, 5] It is a fundamental rule that municipal corporations are not liable for the unauthorized acts of its officers or em-

ployees, except under circumstances not appearing here. Healdsburg E. L. & P. Co. v. Healdsburg, 5 Cal.App. 558, 90 P. 955; Foxen v. City of Santa Barbara, 166 Cal. 77, 134 P. 1142; Wichmann v. City of Placerville, 147 Cal. 162, 81 P. 537. A municipal corporation is invested with full power to do everything necessarily incident to a proper discharge of its public functions, but no right to do more can be implied, and in the absence of express legislative sanction, it has no authority to engage in any independent business enterprise or occupation such as is usually pursued by private individuals. Vol. 1 McQuillan's Municipal Corporations, Revised Second Edition, sec. 375; Taylor v. Dimmitt, 336 Mo. 330, 78 S.W.2d 841, 98 A.L.R. 995; Low v. Marysville, 5 Cal. 214; Brougher v. Board of Public Works, 205 Cal. 426, 271 P. 487; Vallejo Ferry Co. v. City of Vallejo, 146 Cal. 392, 397, 80 P. 514.

To determine, therefore, whether the City of San Diego, through its Harbor Commission, had power to engage in the business of renting out power cranes for the purposes herein described, we must look first to the charter and then to the General Laws applicable to the City of San Diego and see whether or not there has been given expressly, or by necessary implication, to the City the power to rent the crane in connection with its management and control of San Diego bay and the tidelands fronting thereon.

The Charter of the City of San Diego, sec. 54, subd. (b), article V, as amended in 1941, Stats.1941, pp. 3429, 3436, provides, among other things, that the Harbor Commission is vested with jurisdiction and authority to exercise, in the name of the City of San Diego, such powers as are prescribed by general laws now in force and hereafter enacted, together with such additional powers and duties as may be prescribed by ordinance, this charter, or by the laws of the United States. The Commission shall have jurisdiction, supervision, management and control of the Bay of San Diego fronting on the City of San Diego and within the jurisdiction of said City, including all tide and submerged lands. Subdivision (c) thereof provides that the Harbor Commission shall have power to adopt, with the approval of the Council by ordinance, such rules and regulations as may be necessary to exercise and carry out the powers and duties prescribed by this Charter for said Harbor Commission.

It is in reference to subdivision (c) that defendant City of San Diego bases its main argument that the Harbor Commission had no power to do the things herein described in connection with the rental of the crane. It is contended that although the Harbor Commission adopted certain published rules and regulations to carry out their powers and duties, nevertheless, the City Council had never approved such rules, as adopted, by ordinance, and that therefore the acts of defendant Marsh were unauthorized and were beyond the power of the City, through its Harbor Commission, to perform.

As we view it, it is mainly because of the fact that the City Council, by oversight or otherwise, failed to ratify or approve by ordinance the rules and regulations of the Harbor Commission, as adopted by them, that they now claim immunity from liability.

[6] The City of San Diego derives certain of its powers over the port of San Diego and its tidelands from the Act of the Legislature conveying the tidelands to the City. Stats.1911, chap. 700, p. 1357. This grant conveyed to the municipality such tidelands with the power to govern, control, improve and develop the same in the interest of commerce, navigation and fishing, together with the right to make, upon said premises, all improvements, betterments, and structures of every kind and character, proper, needful and useful for the development of commerce, navigation and fishing, including the construction of all wharves, docks, piers, ships, and the construction and operation of a municipal beltline railroad in connection with said dock system. The act provides that the City shall never charge any unreasonable rate or toll or make any unreasonable charge, burden or discrimination. The grant gives to the City the right to lease wharves, docks, or piers constructed by it. The authority conferred under this grant is discussed in Atwood v. Hammond, 4 Cal.2d 31, at page 38, 48 P.2d 20, at page 23, and refers to the amendments to said Act as not affecting "the terms and conditions upon which the city was (by the original act) permitted to lease tidelands and harbor facilities * * *." Under section 54, article V of the City Charter, subd. (b), Stats. 1941, p. 3436, the Harbor Commission is, by its very terms, vested with jurisdiction and authority to exercise in the name of the City such powers as are prescribed by Gen-

eral Laws now in force and shall have jurisdiction, supervision, management and control of the bay and tidelands. Under subdivision (c) it has the additional power to adopt such rules and regulations as may be necessary to carry out the powers and duties prescribed by the charter, provided such rules and regulations are approved by the council by ordinance. We do not construe subdivision (c) as in any wise limiting the power and jurisdiction of the Harbor Commission to carry out its duty prescribed by the charter and General Laws in behalf of and in the name of the City of San Diego. The limitation, if any, goes to the question whether they may adopt rules and regulations without the approval of the Council by ordinance. The jurisdiction and power to manage, supervise and control the harbor and tidelands was already conferred upon the Harbor Commission by the Charter and General Laws even though no rules or regulations might thereafter be adopted by that Commission. This is not an action based upon a suit for fees chargeable or rates fixed by those rules or regulations or for any violations thereof.

In Black's Law Dictionary, Third Edition, page 1392, under Constitutional Law, "power" is defined as: "The right to take action in respect to a particular subject-matter or class of matters, involving more or less of discretion, granted by the Constitutions to the several departments or branches of the government, or reserved to the people. Powers in this sense are generally classified as legislative, executive, and judicial. Implied powers are such as are necessary to make available and carry into effect those powers which are expressly granted or conferred, and which must therefore be presumed to have been within the intention of the constitutional or legislative grant." (Citing cases.)

[7-9] In general, powers given to municipal corporations include the further power to employ such modes of procedure as are appropriate and necessary for their effective exercise. The delegation of power to municipal corporations, without providing the mode for carrying such power into effect, impliedly gives them the right to select lawful and reasonable means whereby that power is to be carried out. All doubts as to the propriety of means used in the exercise of an undoubted municipal power should be resolved in favor of the municipality, where there is no abuse of power or discretion. A municipal corporation may act through such agencies as the legislature directs. Of course, it is necessary that the power conferred be exercised for a public use or purpose. What is a public use or purpose is not capable of absolute distinction. The courts, as a rule, have attempted no judicial definition of a public, as distinguished from a private purpose, but have left each case to be determined by its own peculiar circumstances. The modern trend of decision is to extend and liberally construe the term in considering the municipal activities sought to be brought within its meaning. The power of cities to erect structures on tidelands and to lease them to private individuals has been universally upheld.

[10, 11] In Chafor v. City of Long Beach, 174 Cal. 478, 163 P. 670, L.R.A. 1917E, 685, Ann.Cas.1918D, 106, the City built an auditorium on its reclaimed tidelands and rented it out on occasions to private individuals. This right was upheld and it was also held that the City was acting in its proprietary capacity in maintaining the building. In solving the question as to whether the act done is for a public or for a private purpose, we must take into consideration the broad purposes of the grants to the municipality of the power to maintain its harbor facilities. City of Oakland v. American Dredging Co., 3 Cal.2d 220, 224, 44 P.2d 309; City of Oakland v. Williams, 206 Cal. 315, 327, 274 P. 328. The operation of a power crane is certainly one of the incidental functions in the operation of a port or of wharves and docks. In this instance the crane was used on a boat docked in the harbor at a dock located upon tidelands leased from the City. The use of the power crane cannot be excepted from the other activities of the harbor, and the use of it in removing the engine from this boat in question cannot be divorced from its other general purposes of lifting heavy objects, either cargo or other objects, in and around the docks and tidelands and off and on privately owned freighters. These are some of the purposes for which the harbor and docks are maintained and from which the City derives a revenue, and indirectly, at least, it may be said that the service rendered is in the interest of commerce, navigation and fishing, and is needful and useful to the development thereof. This court cannot adopt the limited view of the defendant that the evidence establishes, as a matter of law, that the acts of the Harbor Commission and the driver of the truck here involved,

were ultra vires and that therefore the City was not liable.

[12] We see little merit to defendant's contention that the plaintiff was guilty of contributory negligence as a matter of law. If there was any negligence on his part it was a factual question for the jury to determine. The following dialogue illustrates plaintiff's personal views on the charge of his contributory negligence. The plaintiff, on cross-examination, answered counsel's question on that subject as follows:

"Question: Maybe you did not have any business getting under the engine here? Answer: How? Let me tell you something. You sitting over there on your chair, and if I come along with a blackjack and hit you over the head, you had no business sitting on the chair, too. Right?"

The next question presented is a more serious one. Under the evidence, the trial court gave, at the request of plaintiff, an instruction on the doctrine of last clear chance, based on the theory that if the jury found defendant guilty of negligence and also found that plaintiff was guilty of contributory negligence, nevertheless, if the jury found that the defendant had the last clear chance to avoid the accident by moving the engine to some other location than directly over the plaintiff, plaintiff might still recover. The form of the instruction is not involved. The only point is that the doctrine is not applicable to any reasonable construction of the evidence. The evidence as to the position of the crane and engine at any given time, and as to the time elapsing between the several operations thereof, is indefinite and difficult to determine from the record. Defendant Marsh described the portion of the facts leading up to the accident as follows: "Well, I swung around in this position. This dolly was sitting there and I lacked about, I would say, six feet of being over this dolly * * *. The engine was hanging on the boom * * * when the rig had stopped the boom was swung in this position. This dolly was back here * * * north of the * * * engine * * *. About six feet * * *. Mr. Ravettino came through this gate here. The next time I seen him he was over there and he was facing north in a stooped position and he got hold of the tongue of this dolly. As I stated, he was bent over, backing out with this dolly. He backed right under this motor hanging on the boom. All of a sudden everything let go"; the engine fell in "Twenty or thirty seconds or less" after he got "more or less under it".

In his deposition, received in evidence, he testified that about 1½ minutes elapsed between the time the boom stopped before the engine dropped; that the "boom was at the radius I wanted it and my intention was to pull it over this dolly and set it on it * * * before I could do that, Mr. Ravettino, here, as I stated before, with the dolly, backed under it * * *. It (the motor) was standing there, and let go".

[13] It is defendant's contention that the element of time was instantaneous and insufficient to permit the operator of the machine to do anything after plaintiff had arrived in the claimed perilous position. It is plaintiff's theory that there was sufficient time for defendant operator to act in moving the crane after discovering plaintiff's claimed perilous position and that a clear opportunity presented itself to avoid injuring plaintiff after acquiring actual knowledge of his claimed dangerous situation. The evidence on this subject is confusing and certainly not clear. We are more inclined toward the belief that, under the evidence, the instruction was not applicable and therefore should not have been given. Wallace v. King, 27 Cal.App.2d 174, 80 P.2d 523. However, the trial court did not instruct the jury that the doctrine of last clear chance did in fact apply to the case, nor did the trial court instruct the jury to find for the plaintiff and against the defendant if the jury believed from the evidence that the defendant had the last clear chance to avoid the injury. The court merely explained the different elements that must be present to make the doctrine applicable, and further stated to the jury that if any of the six elements are lacking the plaintiff could not recover on the doctrine of the last clear chance. Thus the court left it to the jury to determine from the evidence whether or not the doctrine should be applied. The trial court instructed the jury fully on the subject of negligence, contributory negligence and proximate cause.

A consideration of the entire evidence in this case does not admit of the conclusion that, without the claimed error in the instructions, the verdict would have been different from the verdict actually rendered by the jury.

In Wallace v. King, supra, it was held that the last clear chance doctrine did not apply but that the verdict against the defendant should be upheld notwithstanding the error of giving such an instruction because it must affirmatively appear from the evidence and the appellate court must be of the opinion that there has been a miscarriage of justice before a reversal will be ordered. To the same effect are Rasic v. Schultheiss, 121 Cal.App. 560, 9 P.2d 550; Etienne v. Kendall, 202 Cal. 251, 259 P. 752; Haney v. Takakura, 2 Cal.App.2d 1, 37 P.2d 170, 38 P.2d 160.

[14] In connection with this last point presented, defendants further contend that it was error for the trial court to permit counsel for plaintiff, over objections, to argue the doctrine of last clear chance to the jury in his closing argument without having covered it in his opening argument, citing the rule in 64 C.J. pp. 248, 249, to the effect that it is the duty of counsel having the burden of the issues to present the whole case, as he relies on it, in his opening argument so that the opposing attorney may then discuss the propositions he has presented. In the opening argument plaintiff's counsel strongly argued the question of the negligence of the defendants. In reply, defendants' counsel argued the claimed contributory negligence of the plaintiff. It was in reply and in response to that argument that counsel for plaintiff then argued the doctrine of last clear chance. It is stated in the briefs of respondent that copies of plaintiff's proposed instructions on that doctrine were given to counsel for defendants and the propriety of giving such instructions were discussed with the court before arguments of counsel commenced. Of course neither party knew whether or not the trial court was, in fact, going to give such an instruction until after the argument was closed and the jury was instructed. Notwithstanding the impropriety of not presenting the entire theory upon which plaintiff sought a recovery from defendants, in the opening argument, the question whether the rule was applicable under the evidence was left to the jury. They may have rejected the entire theory as well as counsel's argument on the subject.

[15] Assuming the giving of the instruction on the doctrine of the last clear chance to be error, and having in mind the impropriety complained of, under the evidence here set forth, we are firmly convinced that such error, if any, was not prejudicial. The negligence of the defendant was clearly established and the claimed contributory negligence of plaintiff, if any, was not very apparent. The last time plaintiff saw the crane to which the engine was attached was when he went for the dolly to a place 75 feet from it. It is apparent he did not see the men move the engine to that position, nor is there evidence that he saw it when it came to a position immediately above him. The only argument advanced by defendants is that the engine was hanging so close to plaintiff, immediately before the accident, that he should have seen it and should have known that he was in a position of danger. There is no evidence that he knew or believed he was in a position of danger. Apparently, as far as he knew, the crane and engine were still 75 feet from him. Surely, he would not be expected to anticipate that the crane would be moved and that the brake or pawl would be kicked off or would slip, allowing the engine to fall upon him, and particularly so at that location. It does not appear that there has been a miscarriage of justice nor that the errors complained of were so prejudicial that without such errors a new trial would probably result in a different verdict. Wallace v. King, supra.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

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69 Cal.App.2d 729

BROADFOOT v. LEATHER SUPPLY CO. et al.

Civ. 3368.

District Court of Appeal, Fourth District, California.

June 26, 1945.

Hearing Denied Aug. 20, 1945.

1. Automobiles 🔑244(26)

Where driver had been given permission to use automobile but questions as to whether owner had restricted use and whether at time of accident driver was violating such restrictions, thereby relieving owner of statutory liability, were so close that it could not be said from record that clear weight of evidence was on either side, jury's implied finding that driver was using automobile within scope of permission as disclosed by verdict against owner for statutory amount was sustained by evidence. Vehicle Code § 402, St.1937, p. 2353.

2. New trial ⚷70

Trial court can set a verdict aside on motion for a new trial where he takes a contrary view of evidence, and it is his duty to do so where he is convinced jury was wrong on material points, but he is not compelled to do so when evidence is amply sufficient to sustain verdict and he is not firmly convinced that jury wrongly decided the controlling questions of fact.

3. New trial ⚷163(2)

When a new trial is granted, finding of jury is set aside.

4. New trial ⚷163(2)

In action against automobile owner based on statutory liability for negligence of driver operating automobile with owner's permission, where question of permission was submitted to jury on correct instructions and a new trial was denied, implied finding of jury on question of permission stood as only finding of fact thereon regardless of conflicting thoughts of trial judge expressed in considering motion for new trial. Vehicle Code § 402, St.1937, p. 2353.

5. New trial ⚷65

In pedestrian's action against owner of automobile based on statutory liability for negligence of driver operating automobile with owner's permission, in which scope of permission was in issue, verdict for pedestrian, under the circumstances, was not contrary to law or facts. Vehicle Code § 402, St.1937, p. 2353.

6. Appeal and error ⚷854(1)

Orders actually entered by trial court are the official pronouncements so that it is the orders themselves which are reviewable and not the reasons which court may have given for its action.

7. Automobiles ⚷244(9, 35)

Evidence authorizing inference that pedestrian after alighting from street car was walking in a marked cross-walk towards the nearest curb and that driver of automobile, while traveling at excessive speed at night with inadequate lights, failed to yield right of way and struck pedestrian, knocking her some 36 feet, was evidentiary support for implied finding of jury of negligence on driver's part and supported verdict against owner of automobile who had given driver permission to use automobile. Vehicle Code § 402, St. 1937, p. 2353.

◆

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action by Kate Broadfoot against Leather Supply Company and another to recover for injuries sustained when plaintiff was struck by an automobile. From a judgment for plaintiff, named defendant appeals. On the appeal plaintiff moved to strike from the transcript certain remarks made by the trial judge.

Motion to strike denied, and judgment affirmed.

Monroe & McInnis, of San Diego, for appellant.

Renwick Thompson and Edgar B. Hervey, both of San Diego, and Henry F. Walker, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is a case involving the liability of the owner of an automobile, under section 402 of the Vehicle Code, St.1937, p. 2353, for the negligence of the driver thereof.

About 10:45 o'clock P.M. on April 10, 1943, the plaintiff was injured while crossing a portion of Orange Avenue in the city of Coronado. She had just alighted from a northbound street car and while proceeding easterly in a marked crosswalk, toward the nearest curb and sidewalk, she was struck and knocked or thrown a distance of some 36 feet. It rather conclusively appears that she was struck by an automobile driven by the defendant Rowland, although he testified that this car did not strike the plaintiff; that he was proceeding north on Orange Avenue at about 12 miles an hour; that when he reached this intersection he saw the body of the plaintiff lying in the street; that he stopped about half a car length before he reached the body; and that he got out and went to her assistance.

It was stipulated that this automobile was owned by the defendant Leather Supply Company. Permission to drive the car on that day had been given to Rowland by Mr. Gillespie, president of the corporation, acting largely through his daughter who also worked for the corporation, but the evidence is conflicting as to the extent of that permission. Rowland was not employed by the corporation but had become acquainted with the Gillespies at a club where they resided. All of these parties lived in Los Angeles, where the car was kept.

Rowland testified that on April 8, he asked Mr. Gillespie for the use of the car over the week-end; that Mr. Gillespie told him he could have it and to see his daughter; that nothing more was said; that this was the third or fourth time Mr. Gillespie had permitted him to take the car; and that on April 8, Miss Gillespie told him the car was ready for him to use over the week-end and gave him a written order for the car. This note, which was introduced in evidence, was signed by Miss Gillespie, but is undated. It is addressed to the manager of a public garage, and reads: "Please let Mr. Roland have Mr. R. L. Gillespie's Plymouth Coupe Saturday and Sunday. He will return the car to the garage Sunday evening." Rowland further testified that when he went to get the car Miss Gillespie walked to the garage with him and instructed the garage man to give him the car, so the note was not used; that nothing was said as to where he was going with the car; that he told her he would bring the car back Sunday evening, the 11th; that she did not tell him to bring the car back by Saturday evening; and that he borrowed the car for the week-end and no restriction was placed on his use thereof.

Mr. Gillespie testified that on April 8 or 9 Rowland asked him if he could borrow the car to go to Altadena; that he told him to see his daughter; that this was all of their conversation; that he had loaned the car to Rowland on previous occasions; that two or three weeks before Rowland had asked for the use of the car and he had told him to see his daughter; and that he had then instructed his daughter to let Rowland have it.

Miss Gillespie testified that on the morning of April 10, she was informed by her father that Rowland would ask to borrow the car; that Rowland came to the store that morning and asked to borrow the car; that she told him he could have it if he would promise to have it back at six o'clock that night; that the car was then parked back of the store and she gave him the key and he drove off; that he said he wanted the car to go to Altadena; that nothing was said about driving to San Diego and she would not have permitted him to take the car had she known he was going to do so; that she knew that he did not return the car that night; that she went to the garage the next night (Sunday) and found that the car had not yet been returned; that it was returned, however, by Monday morning; and that Rowland was again allowed to take the car on Friday, April 16.

She further testified that Rowland had been allowed to take the car on the last two week-ends in March, again on April 3, again on April 10 and once later, on April 16; that the first time he said he was going to Altadena and had the car Friday and Saturday; that she did not know where he went the second time but that "he just had it one day"; that on April 3 he said he was going to Santa Monica and on April 16 said he was going to Hollywood; that on the occasions he had it for one day, instead of two days, it was only because he asked for it for one day and not because she restricted him to one day's use; that on the first occasion she was not concerned particularly with where he was going except that he just mentioned that he was going to Altadena; that she was not interested in whether or not he went to Altadena, or whether he went to Pasadena, Glendale, Burbank or San Diego; that on the second occasion he did not tell her where he was going and she did not know; that she did not tell him anything about where he should not take the car; that he was going to take his wife and mother-in-law out and she did not know where he was going to do his sightseeing; that on April 3, he said he wanted to go to Santa Monica but she did not tell him not to go anywhere else; that she did not tell him how many miles he could drive the car but did tell him he would have to furnish his own gasoline; that at no time did she ever tell him not to drive outside of Los Angeles County; that the only time she told him to bring the car back at a particular time was on April 10, when she told him to return it by six o'clock; and that the only restrictions placed on him at any time when the car was loaned to him was first, that he must furnish his own gasoline, and second, on the trip of April 10, that he should have the car back at six o'clock. She also testified that she gave Rowland the written order for the car, above referred to, on the first occasion he borrowed it and not on or about April 10. In that connection, she testified that the first time he borrowed the car she went to the garage with Rowland on Friday night, introduced him and told the garage man to let him have the car the next morning, and that later that evening she gave him the written order for the car. It may be observed, in passing, that the jury may well have doubted her testimony that the written order was given in connection with the first permissive use of the car, since on that occasion she had already personally introduced him at the garage and arranged for his use of the car.

In connection with the matter of permission the court instructed the jury, among other things, that if it found that in giving possession of this automobile to Rowland the owner had limited his use thereof, either with respect to time or place, it must appear that his use was in accordance with the permission as thus limited before the owner could be held liable and that, on the other hand, if it found that the permission given Rowland was without limitation or that his use at the time of the accident was within any limitation placed thereon then Rowland's negligence, if any, would be imputed to the owner. The jury returned a verdict in favor of the plaintiff as against both defendants. A motion for a new trial was denied and judgment was entered imposing the statutory amount as against the corporation, and a larger amount against Rowland. The judgment has become final as against the driver, but the owner has taken this appeal.

The appellant's main contention is, in effect, that the trial judge committed reversible error in refusing to grant its motion for a new trial. It is argued that it is thoroughly established in this state that the owner is not liable in such a case where his restrictions, as to time or place, on the use of the car have been exceeded or violated; that any finding of permissive use at the time in question must rest solely on Rowland's testimony; that his testimony is unworthy of belief because he even claimed that the car had not struck the respondent; that his testimony was so thoroughly discredited that a finding of permissive use is clearly contrary to the weight of the evidence; that the court found this to be true; that the court, having found that the jury's finding was contrary to the weight of the evidence, should have granted a new trial; that although the judge disagreed with the jury as to the weight of the evidence, he refused to act because he was mistaken as to the law in that he improperly concluded that by loaning the car the appellant became automatically liable and could not limit its liability by any attempted restriction, as to time or place, on the use of the car, and that it follows that the court erred in denying a new trial.

These contentions are based on certain remarks made by the trial judge during the proceedings on the motion for a new trial. At the first hearing, after argument by counsel, he pointed out that while permission to use the car was established there was a conflict with regard to just what the permissive use was to be. He then indicated that there could well be an honest difference of opinion in resolving this conflict and that he might be wrong in his own views. After remarking that Rowland's testimony was to be distrusted because he had testified that he had not hit the respondent, he pointed out that there was a weakness in "the other testimony on this point of permission" which he regarded as important. This was that Rowland had been allowed to take the car again, shortly after he had violated the permission granted him. He then observed that if this violation made no difference to the owners it indicated that "Rowland felt free to use it generally". He then stated that he would, of course, be bound by the Engstrom case (Engstrom v. Auburn Automobile Sales Corporation, 11 Cal.2d 64, 77 P.2d 1059) "if it is applicable. It may not be." He then asked for further assistance from counsel.

At a subsequent hearing the judge made a lengthy statement in which he expressed belief that Rowland was told to have the car back at Los Angeles at six o'clock that day and that his permissive use was to take the car to Altadena in Los Angeles County, but that this was not "enough for me to deny the motion for a new trial." He expressed the belief that the Souza decision (Souza v. Corti, 22 Cal.2d 454, 139 P.2d 645, 147 A.L.R. 861) was in conflict with the Henrietta and Engstrom cases (Henrietta v. Evans, 10 Cal.2d 526, 75 P.2d 1051, and Engstrom v. Auburn Auto. Sales Corporation, supra), but remarked that he was not "taking it upon myself to decide something contrary to" the latter two cases. He then said: "There is not to my mind any conceivable method of interpreting that statute one way for one contract of bailment and another way for another contract of bailment, and so I stand." He then denied the motion, after which, in response to a question from counsel as to whether it was his feeling that the weight of the testimony was with the Gillespies, with respect to the claimed limitation as to time and place, he replied in the affirmative.

It is difficult to tell from his remarks the precise reasons which impelled the judge to deny the motion. While he expressed a "feeling" that the weight of the evidence, with respect to the extent of the permission granted, was on the side of the appellant he also indicated that he had considerable doubt as to whether he was right in this regard. Such a doubt is understandable in view of the written direction to the garage man to let Rowland take the car for Saturday and Sunday, and the weakness of Miss Gillespie's explanation that she signed that authority on a prior occasion immediately after she had taken Rowland to the garage and personally arranged for him to be allowed to take the car. There is also her testimony that on the five occasions he was allowed to take the car the only time limitation imposed was on the day of this accident; that although she knew that he then kept the car for at least an additional twenty-seven hours she again loaned him the car a week later; that, other than on April 10, she had never been interested in limiting his use of the car to one day; and that on no occasion did she give any instructions as to where he should go or that he should remain within the county.

While the judge expressed the belief that the Souza decision was in conflict with the Henrietta and Engstrom cases he not only said that he was not sure they were applicable here, but that he was not taking it upon himself to decide something contrary to those cases.

[1, 2] The matter as to the extent of the permissive use of the car on this occasion presented a close question of fact and it cannot be said from the record that the clear weight of the evidence was on either side. The jury's implied finding is amply sustained by the evidence. While the trial court can set a verdict aside on motion for a new trial, where he takes a contrary view of the evidence, and while it is his duty to do so where he is convinced the jury was wrong on material points, it is another matter to hold that he is compelled to do so when the evidence is amply sufficient to sustain the verdict, and when he is not very firmly convinced that the jury has wrongly decided the controlling questions of fact. While, in thinking out loud, the judge expressed conflicting ideas, some of which may not be legally sound, he did not base his ruling on the idea that the law prohibited an owner from limiting his liability by any attempted restriction as to time or place of the use of the car. He had otherwise instructed the jury, and he stated that he was not then deciding contrary to the Engstrom and Henrietta cases. While he contradicted himself in the course of his reasoning, after reviewing the whole matter, with its questions, doubts and inconsistencies, he came to the conclusion that the verdict should not be disturbed. If the question were otherwise open here, it could hardly be said, as a matter of law, that under the circumstances here appearing the appellant was entitled to a new trial.

[3-6] When a new trial is granted the finding of the jury is set aside. That is not the situation here. The question of permission was submitted to the jury on correct instructions as to the law. A new trial having been denied the implied finding of the jury on that question still stands as the only finding of fact in that connection. It is supported not only by rather strong affirmative evidence but by obvious weaknesses in the evidence to the contrary. It cannot be said that the verdict is contrary either to the law or to the facts. The order denying the motion for a new trial merely recited that the appellant had moved for a new trial and ordered the same denied. It has frequently been held that the orders actually entered are the official pronouncements and that it is the orders themselves which are reviewable and not the reasons which the court may have given for its action. In re Estate of Finkler, 7 Cal.2d 97, 59 P.2d 801; Moore v. Specialty Oil Tool Co., 128 Cal.App. 662, 18 P.2d 82; Fechtner v. Costa, 16 Cal.App.2d 691, 61 P.2d 473. Nothing here appears which is contrary to law under the facts as found, and no abuse of discretion or reversible error appears in this connection.

[7] The appellant further contends that the implied finding of negligence on Rowland's part is without evidentiary support. It is argued that if it be assumed that this car struck the respondent there is nothing to indicate negligence on Rowland's part. The evidence fully justifies

the inference that the respondent was walking in a marked crosswalk toward the nearest curb and that the driver failed to yield the right of way. Nicholas v. Leslie, 7 Cal.App.2d 590, 46 P.2d 761; Hall v. Kaufman, 37 Cal.App.2d 264, 99 P.2d 339. While this was a dim-out area at the time, there is evidence that this intersection was fairly well illuminated by a street light and that Rowland was driving the car with only its parking lights on, which were not of the size and strength permitted in dim-out zones. While Rowland testified at one time that he was driving 25 miles an hour, and later changed this to 12 miles an hour, the fact that the respondent was thrown a distance of some 36 feet justifies the inference that his speed was excessive for that time and place, especially since he should have seen that a street car had just stopped and discharged its passengers. This contention is without merit.

The respondent has moved to strike from the transcript the remarks made by the trial judge in passing upon the motion for a new trial. Without going into the matter thus suggested we prefer to deny that motion.

The motion to strike is denied and the judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

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69 Cal.App.2d 607

In re CRAWFORD'S ESTATE.

CRAWFORD v. MILLSAP et al.

MILLSAP v. CRAWFORD et al.

Civ. 14746.

District Court of Appeal, Second District,
Division 1, California.
June 18, 1945.

1. Appeal and error 🔑907(3)

On appeal upon a judgment roll alone, findings are conclusively presumed to be supported by evidence, and should be liberally construed.

2. Wills 🔑167

The right to revoke a will lies with testator until time of his death unless limited by an agreement in writing. Civ. Code, § 1624, subd. 6.

3. Wills 🔑64

Reciprocal wills executed by husband and wife, standing alone, do not prove the existence of an alleged collateral agreement between the spouses not to revoke.

4. Frauds, statute of 🔑75

The fact that husband executed will bequeathing all his property to his wife in consideration of marriage, and delivered will to wife with oral promise not to revoke will, did not constitute an irrevocable contract in writing not to revoke will within statute of frauds. Civ.Code, § 1624, subd. 6.

5. Wills 🔑290

Evidence did not establish that testator's will, wherein he bequeathed all his property to his wife, was made irrevocable by agreement so as to make invalid a subsequent will bequeathing his property to strangers.

6. Wills 🔑386

Where contestant on appeal from judgment admitting will to probate alleged that proponent was estopped to urge statute of frauds as bar to oral agreement not to revoke prior will bequeathing all the property of testator to contestant but contestant did not establish estoppel, findings of probate court admitting later will which revoked prior will was required to stand, since estoppel, like fraud, must be proved. Civ.Code, § 1624, subd. 6.

◆

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Proceeding in the matter of the estate of William Crawford, deceased. On application of Antoinette Milburn Crawford, opposed by R. C. Millsap and others for probate of a will dated March 23, 1943, and to contest a will dated January 3, 1944, and on application of R. C. Millsap against Antoinette Milburn Crawford and others for probate of the later will and to contest the prior will. From a judgment and order denying probate of the prior will and admitting the later will to probate, Antoinette Milborn Crawford appeals.

Affirmed.

See also, Cal.App., 160 P.2d 65.

John J. McMahon, of Los Angeles, for appellant.

William Ellis Lady, of Los Angeles, for respondents Bessie Gates and Hattie Vaughn.

DRAPEAU, Justice pro tem.

Decedent left a last will dated January 3, 1944. Appellant filed a contest thereto, which was heard by the probate court. The court found that the decedent died without issue; that the will was not the result of undue influence, and that a prior will dated March 23, 1943, was not entitled to probate.

The prior will named contestant Antoinette Milburn Crawford as the sole beneficiary and appointed her executrix without bond. Contestant alleged that this will was made in consideration of her marriage to decedent and that he promised her he "would bequeath to her all his property and estate upon his death." The court found that such promise, if any, was not in writing.

The court further found that decedent was competent to make the will dated January 3, 1944; that it was duly executed as provided by law, and that it was in every respect entitled to probate. It expressly revoked all former wills and codicils and gave all of decedent's property to strangers, to the exclusion of contestant and nominated his attorney executor.

Judgment was rendered denying probate of the prior will, and order followed admitting the last will to probate. From this judgment and order contestant has appealed.

[1] These facts have been taken from the Clerk's Transcript, the appeal being upon the judgment roll alone. Therefore, the findings are conclusively presumed to be supported by the evidence and are to be liberally construed. Menghetti v. Dillon, 10 Cal.2d 470, 75 P.2d 596; Middleton v. Parsons, 22 Cal.App.2d 250, 70 P.2d 515.

[2-5] Appellant urges that the execution of the will and its delivery to her together with his promise constituted an irrevocable contract not to revoke. The right to revoke a will lies with the testator until the time of his death unless limited by an agreement in writing. De Mattes v. McGovern, 25 Cal.App.2d 429, 77 P.2d 522. Two wills standing alone do not prove the existence of an alleged collateral agreement between the spouses not to revoke. Notten v. Mensing, 20 Cal.App.2d 694, 67 P.2d 734. The appeal being presented on the judgment roll, there is no testimony to support the contention that there was any agreement making the prior will irrevocable. Moreover, it is conceded that such agreement as there might have been was oral and not in writing. This would be invalid and unenforceable in any event. Subdivision 6, Sec. 1624, Civil Code; Zaring v. Brown, 41 Cal.App.2d 227, 106 P.2d 224.

[6] Appellant suggests, however, that the proponent of and the beneficiaries under the will are estopped to urge the bar of the statute. It is true that in some cases involving wills estoppel may be applicable. Notten v. Mensing, 3 Cal.2d 469, 45 P.2d 198; Sonnicksen v. Sonnicksen, 45 Cal.App.2d 46, 113 P.2d 495; and cases therein cited. But estoppel, like fraud, must be proved, and in the absence of such proof the allegation falls. Notten v. Mensing, 20 Cal.App.2d 694, 67 P.2d 734. There being no proof of estoppel on this appeal, the findings will prevail.

The judgment and order are affirmed.

YORK, P. J., and DORAN, J., concur.

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69 Cal.App.2d 609

In re CRAWFORD'S ESTATE.

GATES et al. v. CRAWFORD et al.

Civ. 14748.

District Court of Appeal, Second District, Division 1, California.

June 18, 1945.

Rehearing Denied July 16, 1945.

Hearing Denied Aug. 16, 1945.

1. Marriage 🔑40(1)

Where widow testified that there was a marriage ceremony in Mexico and subsequent cohabitation, trial court was entitled to adopt presumption that there was a valid marriage.

2. Appeal and error ⟹1010(1)

Where there was substantial evidence in support of presumption that there was a valid marriage, District Court of Appeal was without power to set aside trial court's finding adopting presumption.

3. Executors and administrators ⟹188

Where husband and wife had lived together for about six weeks and husband took up residence with friends after a quarrel with wife and died about a month thereafter, trial court did not abuse its discretion in granting wife a family allowance on ground that she was a member of husband's family.

4. Executors and administrators ⟹194(1, 7)

Granting of family allowance to wife is a matter of discretion for probate court, and such orders may not be disturbed unless it appears that there was an abuse of discretion.

◆

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

In the matter of the estate of William Crawford, deceased. Proceeding in the matter of the application of Antoinette Milburn Crawford and R. C. Millsap, executor, opposed by Bessie Gates and others, for a family allowance. From an adverse order, contestants appeal.

Affirmed.

William Ellis Lady, of Los Angeles, for appellants.

John J. McMahon, of Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

Decedent and respondent were residents of Los Angeles. On or about October 19, 1943, they went to Tiajuana, Mexico. While there decedent went into an office to see if they could get married; when he came out he told respondent they could get married and then they both went in.

While in the office they signed papers and answered questions put to them by a Mr. Seriano. Decedent paid this man $23, whereupon he told them to stand up, pronounced them man and wife, and congratulated them. Before they left he told them they would get some papers later on. These papers were received by decedent and respondent by mail about two weeks afterward. They were received in evidence and show a proxy marriage in Juarez, Mexico, based upon the appearance of the parties at Tiajuana, and their nomination of proxies.

After the marriage the parties returned to Los Angeles and lived together as husband and wife for a short time. Decedent made a will giving all of his property to his wife. During the time they were living together he introduced her as his wife. Then trouble ensued. Decedent left the family dwelling house and made a last will leaving his property to beneficiaries not his wife. He attempted to negotiate a property settlement agreement with her, and in his last will recited that she was his wife.

January 18, 1944, decedent died in Los Angeles. Matters connected with the last will have been determined on another appeal in this court. 160 P.2d 64.

In the present case respondent petitioned the probate court for a family allowance; an order was made granting her an allowance of $150 per month as the widow of decedent, from which order appeal has been perfected.

The principal ground of appeal is that the Tiajuana marriage was illegal and void. Other grounds are that the court erred in admitting certified copies of the documentary record of the marriage by proxy; and that, assuming there was a valid marriage, at the time of death of decedent, respondent was not a member of the family.

[1, 2] Facts in this case are similar in many respects to those in Re Estate of Chandler, 113 Cal.App. 630, 299 P. 110. In that case, as in this, the widow testified that there was a marriage in Tiajuana. Cohabitation in that case was for a long time; in the present case for a short time. Based upon the testimony of a marriage ceremony in Tiajuana and subsequent cohabitation, it was held that the trial court was entitled to apply the presumption that the marriage was valid and legal. In this case, the trial court has adopted the same presumption that there was a valid marriage. There being substantial evidence in support of the presumption, this court is without power to set it aside.

It therefore becomes unnecessary to consider whether there was error in admitting in evidence the record of the proxy marriage.

[3, 4] This brings us to the final contention of appellant, that the widow was

not a member of decedent's family at the time of his death, and is therefore not entitled to a family allowance. The parties did live together from October 13, 1943, to about December 1, 1943. There was a quarrel between them at about that time, decedent took up his residence with friends and acquaintances, and died January 18, 1944. Granting family allowance is a matter of discretion for the probate court and such orders may not be disturbed unless it appears there was an abuse of discretion. The recited facts support the order.

The order is affirmed.

YORK, P. J., and DORAN, J., concur.

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69 Cal.App.2d 549

SHIDELER et al. v. ROBERTS et ux.

Civ. 14673.

District Court of Appeal, Second District, Division 1, California.

June 13, 1945.

Rehearing Denied July 3, 1945.

1. Covenants 🔑1, 84

An agreement, whereby owners of lots bound themselves not to permit occupancy of their respective lots by persons not of the Caucasian Race and to incorporate such a restriction in all deeds of transfer of their respective lots, was a valid covenant binding upon the parties thereto, and equally binding upon all others who take with notice thereof.

2. Appeal and error 🔑662(1)

In action to enjoin violation of agreement between lot owners restricting occupation of premises to persons of the White or Caucasian Race, a claim of prejudicial error in denying defendants right to show change in conditions in neighborhood surrounding restricted area or tract was without merit, where record showed that court not only received evidence in respect thereto, but actually made a finding of fact on such question.

3. Injunction 🔑58

Where all or substantially all of contiguous lots of a tract to a substantial extent are subject to race restrictions, the court should not fail to enforce the covenants as to restricted area merely because surrounding property eventually is put to the use and occupation prohibited to the restricted area.

4. Injunction 🔑58

Even if restrictions are not enforceable as to every lot in an area originally covered by an agreement, they may be upheld as to a part of that area if such part is of sufficient extent and so located that the original purpose of the restrictions can be accomplished.

5. Injunction 🔑58

Actions to enjoin violation of agreement between lot owners to effect that lots should be occupied only by persons of the White or Caucasian Race arise out of the contractual relation and, where valid, the obligation thereof will be enforced unless for purely equitable reasons the enforcement would be to no purpose so far as the rights of the parties to the action are concerned.

6. Injunction 🔑130

Finding, in action to enjoin violation of restrictive covenant limiting occupation of premises to persons of White or Caucasian Race, refuted defendant's claim that change of character of surrounding neighborhood not resulting from the breach of covenant had created a condition whereby enforcement of restrictive covenants by a court of equity would not benefit the plaintiff, and would serve only to injure and harass the defendants.

7. Injunction 🔑62(1)

A change in character of the use of neighboring property does not warrant the court's failure to enforce covenants as to restricted area, where the original purpose of the covenant to avert changes in the restricted territory can yet be realized.

8. Injunction 🔑58

Where change of character in restricted area is a result of breach of restrictive covenant for which relief is seasonably sought, there can be no valid claim of change of character sufficient to defeat enforcement of restrictive covenants.

9. Injunction ⚿62(1)

Even though expiration date of restrictive covenants respecting use of lots is one of material facts to be considered in action to enjoin breach of covenant, it is not conclusive of the issue as to whether or not the covenant will be enforced.

10. Equity ⚿3

Generally, the granting or withholding of equitable relief involves the exercise of a judicial discretion.

◆

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Andrew F. Shideler and others against Bolden B. Roberts and wife, seeking to enjoin defendants from permitting a certain lot to be occupied by any person or persons not of the White or Caucasian Race, in violation of the terms of an agreement. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Irvin C. Evans and Daniel N. Dougherty, both of Los Angeles, for appellants.

Arthur C. Arnold, of Los Angeles, for respondents.

PER CURIAM.

This is an appeal by defendants from a judgment rendered by the court sitting without a jury, whereby Bolden B. Roberts and Ruby J. Roberts, his wife, are enjoined and restrained "from permitting Lot 86, Crestmore Tract, in the City and County of Los Angeles, State of California, to be occupied by any person or persons not of the white or Caucasian race, in violation of the terms of the agreement * * * in plaintiffs' complaint", and by which judgment the above named defendants "are enjoined and restrained from occupying the said premises in violation of the terms of said agreement * * * until the expiration of said agreement, to-wit: the first day of January, Nineteen Hundred and Fifty".

Plaintiffs own and reside upon real property in Crestmore Tract, a real estate subdivision in the City of Los Angeles. Embraced within Crestmore Tract are a total of 115 lots, including all of the lots fronting on both sides of Thirtieth and Thirty-first Streets and the north side of Jefferson Boulevard, between Arlington Avenue on the west and a line parallel with and 250 feet easterly of Cimarron Street on the east. Eighty-five of said lots are in that part of the tract lying between Arlington Avenue and Cimarron Street, while the remaining 30 lots are east of Cimarron Street. In 1925, some 112 persons, owners of property in Crestmore Tract, executed and caused to be recorded a written instrument whereby each signing owner, as a covenant running with the land, agreed to restrict the use and occupancy of the property owned by him, up to the first day of January 1950, to persons of the Caucasian race. The foregoing agreement impressed the restriction on 76 lots of the 85 lots west of Cimarron Street, including lot 86 at 2200 West Thirtieth Street, which is the subject of this litigation. In June of 1936 defendants, who are non-Caucasians, acquired the title to said lot 86 and, until on or about July 9, 1940, maintained said lot for use and occupancy by persons of the Caucasian race, but on or about the last named date defendants themselves entered into occupancy of said property contrary to the aforesaid restriction agreement, and at the time of the commencement of this action were occupying the same. At the time defendants took title to Lot 86 and at all times since, they had actual and constructive notice and knowledge of the foregoing restrictive covenants against their use and occupancy of the same.

Plaintiffs are the owners of and reside upon certain of the restricted lots in that portion of Crestmore Tract west of Cimarron Street.

By their answer defendants denied practically all of the material allegations of the complaint and set up the following five affirmative defenses: (a) Changed conditions; (b) waiver; (c) estoppel; (d) laches; and (e) the statute of limitations.

The complaint alleged and the court found the facts as to ownership to be as alleged by plaintiffs; that the aforesaid restriction agreement was duly executed and recorded; and also that as to Lot 86 which is here involved that the agreement was executed by the then owners, from whom by mesne conveyance defendants herein acquired title prior to the commencement of this action.

The court further found that, since the signing, execution and recordation of said agreement, "and of the date hereof, the said real property in said agreement described has been maintained for the exclusive residential use of persons of the Caucasian race, except as to that portion of said tract east of Cimarron Street"; that "from said 5th day of June 1936 to on or about the 9th day of July 1940, defendants and each of them maintained said Lot 86 for the use and occupation of persons of the Caucasian race"; but that on the 9th day of July, 1940, defendants entered upon said premises and continued to use and occupy the same up to the time of the commencement of this action contrary to and in violation of the provisions of said agreement; that at the time defendants took title to said Lot 86 and at all times thereafter, the defendants and each of them "had actual and constructive notice and knowledge of the provisions against use and occupancy of said Lot 86 by persons not of the Caucasian race, as provided in said agreement". The court further found "that it is true that the said occupancy of said premises by said colored defendants, and the continuance of their said occupancy, result and will continue to result in great and irreparable injury to plaintiffs, in that the said occupation of said Lot No. 86 by said colored defendants makes plaintiffs' property less desirable to them for residential purposes and likewise greatly injures and depreciates the sale value of the same"; that "the use and occupation of said Lot No. 86 by said colored non-Caucasian defendants was intended by said defendants and each of them, to violate and breach the restrictions set forth in said agreement; was intended to affect the racial character of the residents of that portion of said Crestmore Tract west of said Cimarron Street, and was intended to make the plaintiffs' property less desirable for the use and occupation for residential purposes by plaintiffs and persons of the Caucasian race"; that said "colored defendants and each of them, without regard to the rights of plaintiffs, intended by said use and occupation of said premises not only to secure the violation and breach of the restrictions contained in said agreement but intended also thereby, to change the general racial character of said tract and make plaintiffs' property less desirable to plaintiffs for their use and occupancy; and intended that said use and occupancy of said Lot No. 86 should be an inducement and encouragement to other non-Caucasian persons to secure the use and occupancy of other residential property therein, and thus seek to nullify the restrictions set forth in said agreement".

With reference to the affirmative defenses set up by defendants, the court found that "the area immediately east of said tract extending about three hundred (300) feet easterly of said Cimarron Street is now occupied to a great extent by persons other than of the Caucasian race, and that there is one public school situate six blocks distant from said Lot 108, having a majority attendance of non-Caucasian pupils"; and "that it is not true that it is against the best interests of public policy or of any public policy or at all, that the plaintiffs are now at this time not entitled to enforce said restrictions or to prevent the defendants from using and/or occupying said Lot 86 of said Crestmore Tract for residential purposes for themselves". The court further found "that it is not true that almost continuously since the year 1925 to the present time, and particularly within the past ten (10) years, there has been in a very marked degree, or in any marked degree or at all, a voluminous change or any change at all in the racial residential population in and upon that portion of said tract west of Cimarron Street; that it is not true that the plaintiffs or some of the plaintiffs, or some of the persons whom the plaintiffs for whom and on behalf of whom this action is brought, expressly waived their rights or waived any rights or at all, to the enforcement of the restrictions mentioned in plaintiffs' complaint or knowingly or at all permitted persons and families not of the Caucasian race to be in possession of and occupy parcels of land in said tract for many years for residential purposes, save and except upon two lots thereof upon which restrictions do not apply; that it is not true that the plaintiffs or other persons on behalf of whom this action is brought have by tacit consent or by any tacit consent or acquiescence or by any consent or acquiescence or at all, therein waived such and any and all rights or any rights whatsoever which the plaintiffs claim for themselves and said other persons to object to the use of said Lot 86 by said defendants for residential purposes"; and "that it is not true that the changes in uses to which any land adjacent to that portion of said Crestmore Tract west of Cimarron Street have been put have made any said portion of said tract embraced within said agreement, any the less desirable for use and occupation by Caucasian persons; that it is not true that there has been any change in the character of the use and occupation, by Caucasian persons, of any of the lots in said portion of said tract West of Cimarron Street, embraced in said agreement, since the recordation thereof". The court further found against defendants on the contention of the latter that since prior to the first day of July, 1940, plaintiffs and other persons in whose behalf plaintiffs alleged the action was brought have permitted and consented that defendants might use and occupy said Lot 86 as their residence, and further that it was untrue that defendants occupied said premises for a period of three years immediately prior to the commencement of this action or that defendants expended a sum of money considerably over Two Thousand Dollars ($2,000) in improving said premises since the occupancy thereof by them under the belief that their residing upon said premises was not in violation of the aforesaid conditions, covenants and restrictions, and on the contrary found that "if any improvements or repairing were made to said premises by said defendants, said repairing and said improvements were made by defendants with actual and constructive notice and knowledge by the defendants of the restrictions against use and occupancy of said premises by persons of other than the Caucasian race, as set forth in plaintiff's complaint". The court also found against defendants' contention that the instant action was "barred by the provisions of subdivision 2, section 338, of the Code of Civil Procedure of the State of California", and that said action was not "barred by any other section in said code contained, or at all".

[1] The case of Wayt v. Patee, 205 Cal. 46, 49, 269 P. 660, is authority for the statement that the agreement herein, being one whereby the parties thereto bound themselves not to permit occupancy of their respective lots by persons not of the Caucasian race and to incorporate such a restriction in all deeds of transfer of their respective lots, was a valid covenant binding upon the parties thereto, and equally binding upon all others who, like the defendants herein, take with notice thereof.

[2] As their first ground of appeal, appellants assert that the trial court committed prejudicial error in denying them the right to show change in conditions in the neighborhood surrounding the restricted area or tract, and in limiting testimony to only that part of the restricted tract lying west of Cimarron Street. This claim is without merit, because the record shows that the court not only received evidence as to that part of Crestmore Tract east of Cimarron Street, but actually found as a fact "that it is true that the area immediately east of said tract extending about three hundred (300) feet easterly of said Cimarron Street is now occupied to a great extent by persons other than of the Caucasian race, and that there is one public school situate six blocks distant from said Lot 108, having a majority attendance of non-Caucasian pupils".

[3-6] Appellants next assert that finding XVI, in which the court found "that there had been no change in the character", is worthless and of no effect in view of the court's failure to receive evidence on that issue. However, the challenged finding is to the effect that the adjacent territory east of Cimarron Street had changed but that, despite and notwithstanding the changed condition east of Cimarron Street, that portion of said Crestmore Tract west of said street still remains "desirable for use and occupation by Caucasian persons" and that since the recordation of the agreement here in question there has not been "any change in the character of the use and occupation, by Caucasian persons, of any of the lots in said portion of said tract west of Cimarron Street". The law is now well settled that "where all, or perhaps substantially all, of the contiguous lots of a tract or substantial extent are subject to race restrictions, the courts should not fail to enforce the covenants as to the restricted area merely because surrounding property eventually is put to the use and occupation prohibited to the restricted area". Fairchild v. Raines, 24 Cal.2d 818, 151 P.2d 260, 265. In the case just cited, 24 Cal.2d at page 827, 151 P.2d 265, it is further stated: "Obviously the precise purpose of the covenants is to avert changes in the restricted territory, not in the surrounding neighborhood, and they can have no legal efficacy beyond the area of the tract to which they are applicable. The mere fact that a change in the character of the use of neighboring property may make free use of restricted property more profitable does not warrant failure to enforce the restriction * * *." The vital question is whether "the original purpose of the covenant can still be realized". The evidence herein clearly justified the court in

finding that Cimarron Street, as it passes through Crestmore Tract, forms, as it were, a dividing line between non-Caucasian occupation on the east of said street and Caucasian occupation on the west. There was also substantial evidence that, at the time this action was commenced, all of the restricted lots west of Cimarron Street, totaling some eighty-nine percent thereof, except Lot 86 here in issue, were occupied by Caucasians. Appellants point to three lots west of Cimarron Street which were unrestricted and which were occupied by non-Caucasians, but the court found on substantial evidence that this fact does not in the instant case militate against realization of the original purpose of the restrictive covenants. As was said in Fairchild v. Raines, supra, 24 Cal.2d at page 828, 151 P.2d 265: "Even if restrictions are not enforcible as to every lot in an area originally covered by an agreement they may be upheld as to a part of that area if such part is of sufficient extent and so located that the original purpose of the restrictions can be accomplished". In the same case, the court, 24 Cal.2d at page 825, 151 P.2d 264, stated that, "subject to certain broad principles, each case of this character must be determined upon the facts peculiar to it". Were this not so, all restrictive covenants could be rendered nugatory through a change in the character of the population surrounding the restricted area or through a few isolated changes within the area. And in that regard, this court said in Stone v. Jones, 66 Cal.App.2d 264, 269, 152 P.2d 19, 22, "this is so because of the very nature of the issues involved and because of the variety of situations incident to such agreements, for in such circumstances there can be no formula by which the equities in one case can be measured by the equities in another". Actions of the character with which we are here concerned arise out of a contractual relation. And where valid the obligations thereof will be enforced unless, as was held in Stone v. Jones, supra, 66 Cal.App.2d at page 269, 152 P.2d 22, "for purely equitable reasons the enforcement thereof would be to no purpose so far as the rights of the parties to the action are concerned." The findings based upon competent evidence refute appellants' claim that change of the character of the surrounding neighborhood, not resulting from a breach of the covenants, had created a condition whereby enforcement of the restrictive covenants by a court of equity would not benefit the plaintiffs and would serve only to injure and harass the defendants.

[7] Appellants next contend that the court erred in upholding the validity of a race restriction agreement where respondents in their complaint admit such agreement was unenforcible in a large section of the restricted area or tract. The complaint alleged that, "since the signing, execution and recordation of said agreement, as aforesaid, and to the date hereof, the said real property in said agreement described has been maintained for the exclusive residential use of persons of the Caucasian race, *except as to that portion of said tract east of Cimarron Street*". It is upon the italicized portion of the complaint just quoted that appellants base their argument of waiver and abandonment. Conceding that the restrictions east of Cimarron Street are unenforcible under the findings of the court that such section of the tract "extending about three hundred feet easterly of said Cimarron Street is now occupied to a great extent by persons other than of the Caucasian race", nevertheless, as we have heretofore pointed out, that is not determinative of whether the enforcibility of the restrictions west of Cimarron Street ceased. A change in character of the use of neighboring property does not warrant the court's failing to enforce the covenants as to the restricted area where the original purpose of the covenants, to avert changes in the restricted territory, can yet be realized. The trial court's finding that since 1925 there has been no "change at all in the racial residential population in and upon that portion of said tract west of Cimarron Street", and that plaintiffs at no time waived their right to seek enforcement of the restrictive covenants upon the property which is the subject of this action is supported by the record.

Appellants insist that had the court permitted them to show by testimony the conditions of the surrounding neighborhood they "could have shown the housing facilities available in the district occupied by the colored population and their need for additional housing which would justify an expansion of the district by an absorption of the restricted area". What we have heretofore said with reference to the rights of the parties to an action to have their contractual agreements enforced when they are lawful and not against public policy answers this contention, as does the language of this court in Stone v. Jones, supra, 66 Cal.App.2d at page 269, 152 P.2d 22, wherein we said: "Collateral possibilities or indirect consequences are beside the issue. Changes, or the likelihood thereof, incident to the growth of a community, may create or forecast perplexing social problems, but such problems, from the very nature of things, cannot be solved by the courts in the process of litigation of a purely private nature. Any attempt to do so would be an unwarranted interference with the functions of other branches of the government already equipped with power and means for the comprehensive consideration of such problems."

[8] Appellants' contention that the court erred in striking out testimony concerning changed conditions in the area west of Cimarron Street after the date of filing the complaint and in refusing defendants permission to file a supplemental answer cannot be sustained. From the testimony which was stricken out, it appears that at the time of trial there were a total of six lots in the area west of Cimarron Street occupied by non-Caucasians. However, three of these lots were concededly occupied by non-Caucasians prior to the filing of the complaint and were therefore not affected by the court's ruling. As to the testimony concerning the remaining three lots west of Cimarron Street it is sufficient to say that there can be no valid claim of "change of character" in the area when such change is a result of the breach of restrictive covenants for which relief is seasonably sought. Fairchild v. Raines, supra; Hurd v. Albert, 214 Cal. 15, 3 P.2d 545, 76 A.L.R. 1348.

[9, 10] Finally, appellants predicate prejudicial error upon the claim that "the trial court erred in failing to consider the early expiration date of the race restrictions". That the court did give consideration to and have in mind the expiration date of the restrictive covenants is evidenced by the fact that in making its conclusions of law and in ordering the issuance of an injunction, the court directed that such injunction "continue until the expiration of said agreement, to-wit: the first day of January Nineteen Hundred and Fifty". Conceding that the expiration date of the restrictive covenants is one of the material facts to be considered, Fairchild v. Raines, supra, 24 Cal.2d at page 826, 151 P.2d 260, nevertheless it is not conclusive and determinative of the issue as to whether or not the covenants will be enforced. The court should, and in the instant case as heretofore indicated did, give consideration to the expiration date.

As pointed out in Fairchild v. Raines, supra, 24 Cal.2d at page 826, 151 P.2d 264, "it is the general rule that the granting or withholding of equitable relief involves the exercise of judicial discretion". In the case with which we are here concerned, nothing has been presented from which it can be said that the trial court was guilty of an abuse of the discretion vested in it. Competent and substantial evidence adduced at the trial support the findings and the latter support the judgment. No prejudicial errors appear in the record and the judgment must therefore stand.

For the foregoing reasons, the judgment is affirmed.

JURI v. JURI.

Civ. 7136.

Sac. 5703.

District Court of Appeal, Third District, California.

June 27, 1945.

Rehearing Denied July 17, 1945.

Hearing Denied Aug. 20, 1945.

1. Evidence 🔑568(2)

Testimony of witnesses, whose qualifications to express such opinions were not shown, that in their opinion removal of minor children of divorced parents from their present environment in home of father and maternal grandmother would be detrimental to their nervous systems and health, was entitled to no consideration, since the subject was not one upon which opinion evidence is proper. Code Civ. Proc. § 1870.

2. Divorce 🔑303(2)

That minor children had grown two years older since entry of order awarding custody to mother during four summer months and to father during remainder of year and had become accustomed to environment in home of father and paternal grandmother and somewhat estranged from mother and that mother had remarried and could give them a comfortable home with husband and his two children by former marriage, did not constitute such change of circumstances as would justify modification of order so as to award exclusive custody to father.

3. Divorce 🔑303(3)

Where trial court found that both father and mother were proper persons to have custody of children, in view of tender years of children and statute setting forth considerations for guidance of court in awarding custody, trial court, in exercise of its discretion, should have awarded custody to the mother. Civ.Code, § 138.

4. Divorce 🔑298(1)

While as between parents claiming custody of minor children, neither is entitled to it as of right, and welfare of children is the paramount consideration in determining custody, mother's rights are not less than those of father and in determining what is best for the welfare of children, not only their immediate welfare but their future should be considered.

5. Divorce 🔑303(3)

Where ability, willingness, and eminent fitness of mother to have custody of son and daughter, four and five years of age respectively, was unquestioned and age of paternal grandmother indicated that before many years she would be unable to give the children proper care and attention, trial court abused its discretion in modifying decree dividing custody between the parents by awarding exclusive custody to father Civ.Code, § 138.

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Action for divorce by Ernest Juri against Mary Margaret Juri, now Mary Margaret Arenander, wherein a final decree of divorce was entered awarding custody of minor children to plaintiff except during four summer months when defendant should have their custody. From an order modifying the final decree by awarding exclusive custody of the children to plaintiff, defendant appeals.

Order reversed.

Jos. H. Huberty, of San Andreas, for appellant

Gumpert & Mazzera, of Stockton, and Virgil M. Airola, of San Andreas, for respondent.

ADAMS, Presiding Justice.

This is an appeal from an order modifying a decree of divorce in regard to the custody of two minor children of the parties. The same case was previously before this court (Juri v. Juri, 61 Cal.App. 2d 815, 143 P.2d 708) at which time both plaintiff and defendant had appealed from an order modifying the original interlocutory decree of divorce. The record on that appeal revealed that the original decree of divorce had been granted to plaintiff upon the failure of defendant to appear; and that the custody of the two children, then two and three years old, had been awarded to plaintiff. Subsequently, on petition of defendant for a modification of said decree so as to award the custody to her, the trial court amended same to provide that defendant have the custody and control of the children during the summer vacation period in the months of May, June, July and August. This order was made January 10, 1942, and recited among other things: "From the testimony it appears that defendant is a teacher in the grade schools of California and employed at present, and it appears to me that both plaintiff and defendant are proper persons to have the custody and control of the children. I see no reason why defendant should be denied the association and custody of her children for a portion of the year." From this order both parties appealed. The arguments then advanced by plaintiff in his brief before this court were that defendant was not in a position to take care of the children as she was living with her sister and occupying one of the only two bedrooms in the house, that she was teaching full time, and, particularly, that there had been no change of circumstances during the period that had elapsed between the entering of the original decree and the order changing it, to justify the alteration, and that the trial court abused its discretion in granting the custody and control of the children to their mother during a portion of each year.

This court sustained the order of the trial court because, as we stated, it had impliedly found that the best interests of the children would be served by dividing their custody between the parents, and we were not prepared to say that it had abused its discretion in refusing to give the custody solely to the mother, though we expressed the opinion that, in view of the tender years of the children, and the finding that both parents were fit and proper persons to have such custody, the trial court, in the exercise of its discretion, should have awarded their custody to the mother.

Coming now to the present appeal, the record shows that on May 18, 1942, some four months after the order amending the interlocutory decree, the trial court made and entered a final decree, providing therein that it should not in any manner affect or modify any order made with respect to the custody of the children of the parties. It also shows that plaintiff, on May 6, 1944, filed an affidavit in the trial court praying for an order modifying the existing order of January 10, 1942, so as to give the "unrestricted full time custody" of the two children to plaintiff. In this affidavit plaintiff complained of the manner in which defendant had conducted herself in attempting to visit the children in that she had refused to enter the home of plaintiff's mother with whom he and the children were living, and that she had not evidenced an affectionate manner toward them; that she had proven herself to be an unfit and improper person to have custody and control of them; that the children were attached to plaintiff and his mother and that it would require force to take them from the custody of plaintiff; that defendant had remarried and was living near Tomales in Marin County, in which home there were two stepchildren; that the climatic conditions along the Marin County coastal regions differed from those in Calaveras County; that the Marin County population had increased and sickness was prevalent there, and if the children were taken there they would be in grave danger of contracting sickness; and, therefore, it would be for their best interests that the previous order be modified to give plaintiff the full time custody. An order to show cause issued and the matter came on for hearing on May 24th, and on June 1st the court made its order awarding the sole custody to the father, it having, in the intervening period, refused the mother the custody for the vacation period under the existing order. Defendant has again appealed, and urges that plaintiff has totally failed to substantiate his charge that defendant is not a fit and proper person to have the custody of her children, that no change of circumstances has been shown justifying the change of custody, or justifying depriving the mother of the custody during the vacation period each year, and that the trial court abused its discre tion in awarding the full custody to plaintiff.

[1] We are of the opinion that appellant's contentions must be sustained. The only change of circumstances that appears in the case is that since the former order defendant has remarried and is now living in a home of her own with her husband and his two children by a former marriage—a change for the better. There is no evidence that defendant is not still a fit and proper person to have custody of her children, and in fact respondent's counsel, during the course of the proceeding, stated that her character was not being questioned. There is uncontradicted evidence that her new husband is a substantial citizen and an entirely respectable and industrious person, earning a livelihood for his family, that his home is a comfortable place of residence, it being a house with four bedrooms, with a large yard, and a separate room available for these children.

No evidence was adduced to substantiate plaintiff's charge that the climate of Marin County where defendant resides is not salubrious, or that a change of climate from the mountains to the seaside in summer would be likely to prove detrimental to the health of the children. At the hearing plaintiff's evidence consisted largely of an attempt to justify custody in himself by showing that the children are well cared for and happy with their father and grandmother, and that defendant, on her visits to the children, had not evidenced sufficient affection for them, and had been unwilling to enter the grandmother's home to visit with them. He also called some witnesses who, without knowing appellant or her home surroundings, expressed the opinion that taking the children out of their present environment would be detrimental to their nervous systems, and health. But such testimony is entitled to no consideration, the subject not being one upon which opinion evidence is proper (Sec. 1870, Code Civ.Proc.; Moore v. Norwood, 41 Cal.App.2d 359, 366, 106 P.2d 939); and no qualifications of the witnesses to render such opinions were shown.

As is not unusual in such cases the evidence before us and that presented on the prior appeal shows that the relations between defendant and plaintiff's mother, who has the care of the children, are strained; that one of the reasons for the separation of the parties was that plaintiff refused to provide a separate home for his family but required them to live with his mother and sister; that defendant's visits to see her children have not been encouraged, that she has been able to see them only in the presence of the grandmother or other members of her household, and that she has not been permitted to take them from plaintiff's home even for an hour; that the attitude of the children toward their mother is one of fear and even of spite, and that, to say the least, they are not being taught to like or respect her. Even in the court room the younger child kicked his mother without reproof from his father, and when he finally consented to sit by her told her that her new husband was a Jap, and that her babies would be Japs, a notion which could hardly have originated with a four year old child.

Recognizing as he must in view of his previous contentions, that to justify a change of custody some change of circumstances since the making of the existing order had to be shown by him, respondent urges in his brief that the children have grown two years older, that they have become accustomed to their present environment and the persons in it; that they are of sensitive dispositions and that if taken to defendant's home would have to compete with defendant's present husband and his daughters for their mother's love and affection, and face new situations; that the religious background would be different and there would be different training and methods of discipline for them in appellant's home.

[2] We are unable to agree that the foregoing constitute such a change of circumstances as justified the order of the trial court. As far as defendant's home is concerned, it is not denied that she now has a fit and proper home of her own, and the objection previously made by plaintiff that she was living in one room with her sister and had no place to take the children has been obviated. The only other changes are that the children have grown a little older and, due to the conditions under which they have been living, have not had an opportunity to know their mother, and have become to some extent estranged from her.

In Moon v. Moon, 62 Cal.App.2d 185, 186, 187, 144 P.2d 596, 598, in reversing an order which had given custody of a child to its father, the court said: "Undoubtedly the trial court had authority to change its order respecting the custody of Charla (Civil Code, sec. 138.) Because of her tender years, 'other things being equal' she should be in the custody of the plaintiff, her mother. Civ.Code, sec. 138. The court having originally determined that she should be in her mother's custody, some change in conditions or some unusual circumstance had to be shown to justify an alteration of that provision. Foster v. Foster, 1937, 8 Cal.2d 719, 726, 68 P.2d 719; Washburn v. Washburn, 1942, 49 Cal.App.2d 581, 587, 122 P.2d 96. One who seeks a modification of an existing custody order has the burden of proving that conditions have so changed that a modification is justified (Prouty v. Prouty, 1940, 16 Cal.2d 190, 193, 105 P.2d 295), and the paramount purpose of the whole proceeding is to serve the best interests of the child. Prouty v. Prouty, supra, 16 Cal.2d page 195, 105 P.2d 295. The sum of the matter is that the evidentiary support for the order taking three year old Charla from her mother's custody and placing her in that of her father, must be adequate, if the order is to stand."

Also see Prouty v. Prouty, 16 Cal.2d 190, 193, 105 P.2d 295; Foster v. Foster, 8 Cal.2d 719, 726, 727, 68 P.2d 719; Olson v. Olson, 95 Cal.App. 594, 597, 272 P. 1113; Gavel v. Gavel, 123 Cal.App. 589, 11 P.2d 654; Washburn v. Washburn, 49 Cal.App. 2d 581, 587, 122 P.2d 96; In re Inman, 32 Cal.App.2d 130, 134, 89 P.2d 421.

[3] But aside from the fact that plaintiff has failed to show a change of conditions justifying a change in the prior order of the court we are also still of the opinion expressed in our former decision in this case, that in view of the tender years of these children, and the provisions of section 138 of the Civil Code, their custody should have been awarded to their mother. If, as plaintiff argues, a divided custody is likely to prove unfavorable, this could be avoided by giving the sole custody to the mother. As was said in Washburn v. Washburn, supra, and has in substance been stated over and over again by the courts of this state and elsewhere [49 Cal.App.2d 100, 122 P.2d 100], "it is not open to question, and indeed it is universally recognized, that the mother is the natural custodian of her young. This view proceeds on the well known fact that there is no satisfactory substitute for a mother's love. So true is this that in this state the code exacts that she shall have custody of her child, everything else being equal, unless the child has reached the age which necessitates a particular education or preparation for its life work. Civ.Code, § 138. In the case of girls it is obvious that they are particularly in need of the sympathy, affection, consideration and tender care which only a mother can give—and so normally they should be in her custody." And in Estate of Lindner, 13 Cal.App. 208, 212, 109 P. 101, 103, it was said that "A mother who is both capable and anxious to rear her own offspring should not be deprived of the opportunity to thus discharge the duty she owes to the child, without a clear showing of unfitness for the trust."

In the case before us the children, a boy and a girl, were, at the date of the order appealed from, respectively, about four and five years of age, and the grandmother who has their care was sixty-five, while their mother was but thirty-two. It must be obvious, then, that before many years the time will come when the grandmother, even if she survives, will hardly be fitted to give proper care and attention to these children, even assuming that she can do so now; and when that time arrives, their care must inevitably pass to strangers, especially if they are permitted to become entirely estranged from their mother.

[4, 5] While as between parents claiming custody neither parent is entitled to it as of right, and the welfare of the children is the paramount consideration in determining custody, the rights of the mother are not less than those of the father; and in determining what is best for the welfare of children not only their immediate welfare but their future should be taken into consideration; and where the ability, willingness and eminent fitness of a mother to take custody of her infant offspring are unquestioned, as is the case before us, we believe that in denying these children an opportunity to know, to learn to respect and to receive the care and affection of their mother for at least a part of each year, the trial court abused its discretion. Its order appealed from is therefore reversed.

PEEK, J., concurs.

THOMPSON, Justice.

I concur in the reversal of the order appealed from, awarding the exclusive custody of the children to the father, on the ground that there is no substantial evidence of a change of conditions affecting their welfare since the previous order was made January 10, 1942, awarding them to the custody of the mother during the months of May, June, July and August of each year. The fitness of neither parent is seriously disputed. The court previously found that both parents were fit and proper persons to assume the custody of the children. On a motion to change the custody of children from one parent to another, the court should give effect to the former order and refuse to modify it unless there is evidence adduced showing a change of conditions detrimental to the welfare of the children. Foster v. Foster, 8 Cal.2d 719, 726, 68 P.2d 719. No such change appears on the present appeal.

70 Cal.App.2d 65

PEOPLE v. HINES et al.

Cr. 564.

District Court of Appeal, Fourth District, California.

July 3, 1945.

1. Conspiracy ⚿47
Larceny ⚿65

Evidence was sufficient to support convictions of grand theft and conspiracy to commit theft of hay.

2. Criminal law ⚿1105

Where original transcript was lost, copy thereof was filed and used on appeal by stipulation, and appellants did not deny assertion in respondent's brief that original clerk's and reporter's transcripts bore notations, signed by two of appellants' attorneys, that they received copies thereof on same day as district attorney, nor claim that either transcript contained misstatements which might have been called to trial court's attention, no misuse of judicial functions by appellate court in failing to give appellants' attorneys notice which would enable them to examine transcript before settlement thereof appeared.

3. Criminal law ⚿959

Denial of defendants' motion for new trial, without hearing argument thereon, after conviction of crime charged, was discretionary.

4. Criminal law ⚿959, 1176

The trial court's orders, vacating its order setting hearing of defendants' motion for new trial for date over three weeks after rendition of jury's verdict of conviction, resetting hearing for six days earlier date, and denying motion on such date, were not void for lack of jurisdiction, nor prejudicial to defendants, in absence of showing that hearing on later date would have enabled defendants to raise points or reasons for new trial not available to them at earlier date.

◆

Appeal from Superior Court, Imperial County; Elmer W. Heald, Judge.

Eddie Lee Hines, Roger Davis, Hazel Cooper, James Henry Brooks, Geneva Brooks, and John Doe Number One were charged with, and defendants Cooper and James Henry Brooks were convicted of grand theft and conspiracy to commit theft, and convicted defendants appeal.

Affirmed.

Matot & Seelig, of Los Angeles, for appellant Hazel Cooper.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., C. G. Halliday, Dist. Atty., of El Centro, and L. J. Mouser, Chief Deputy Dist. Atty., of Holtville, for respondent.

BARNARD, Presiding Justice.

The defendants were charged, in two counts of an information, with conspiracy to commit theft and with grand theft. The defendant John Doe, who was referred to at the trial as a man named Roberts, seems to have been a mysterious stranger whom none of the others knew and who was never apprehended. The defendants Hines and Davis pleaded guilty. The jury acquitted Geneva Brooks and found James Henry Brooks and Hazel Cooper guilty. The latter two have appealed from the judgment and from an order denying a motion for a new trial. No briefs have been filed for Brooks, and we will refer to Cooper as the appellant.

There is no dispute as to the general facts. All of the defendants lived in or around Los Angeles, Brooks living two doors from Cooper. On Saturday, September 23, 1944, all of the defendants, except Cooper, went to Brawley in two trucks. One of these, referred to as the "bob-tail", was rented from the Mercury-U-Drive. The other, a truck and trailer, referred to as the "semi", was owned by Cooper. They arrived at Brawley early Sunday morning and waited for night. After dark that night they went out to two near by ranches and stole 322 bales of hay. 214 bales were loaded on the "semi" at one ranch and 108 bales were loaded on the "bob-tail" at another. They returned to Los Angeles, arriving there Monday forenoon, and both loads of hay were taken to the ranch of a Mr. Mushagian, near Downey. They had given fictitious names at weighing and inspection stations. Mushagian agreed to buy the hay on the "semi" but refused to buy that on the "bob-tail", saying it was inferior in quality. The "bob-tail" and its load was driven to Cooper's house and Cooper was informed that Mushagian would not buy that hay. Cooper ordered the "bob-tail" driven back to Mushagian's and went there himself. He tried to persuade Mushagian to buy that load of hay and when he again refused Cooper suggested other places where he thought it could be sold. Although it is claimed that Mushagian was buying the hay from Brooks he paid Cooper $208 as part of the purchase price on Monday, September 25. Mushagian testified that Brooks was not there when he paid Cooper, that nothing was said as to why he should pay Cooper rather than Brooks, and that: "I tried to stall him (Cooper) on paying the money there, and he needed the money bad, and I let him have some of it and let the rest of it go for a little while." Cooper testified that he kept $50 out of the $208 for the rent of his truck and that he gave the rest to Roberts. A day or two later, Cooper's truck was located at the Mushagian ranch, where it had been left, and most of the defendants were arrested.

[1] The appellant's main contention is that the evidence is not sufficient to sustain his conviction on either count. While it is conceded that it is sufficient to establish the guilt of Brooks it is argued that there is nothing to connect Cooper with any criminal act; that all that appears is that he rented his truck to Brooks and collected some of the money for the hay in order to accommodate Brooks and to collect the rental for his truck; and that it is obvious that if he had been a party to the illegal acts he would have had his truck ready and available when the others first started out. The argument thus made ignores much of the evidence and other inferences which could well have been drawn.

Cooper testified that Roberts asked him on Saturday morning if he wanted to make a trip; that he replied in the negative, as his truck was loaded, and also told Roberts "I will rent it but I won't be responsible"; that later that morning Brooks talked to him "about the same business"; and that he told Brooks that he would rent the truck to him for $50 "providing I got unloaded in time." It appears that the others started out on Saturday afternoon in the "bob-tail", having arranged that they would drive slowly so that Cooper could catch them if he got his truck unloaded soon enough. Cooper, driving an automobile, caught up with them after they had gone some 14 miles and had a talk with Brooks. Brooks then returned to Los Angeles with Cooper, secured Cooper's truck, caught up with the other truck at Colton and the two trucks proceeded to Brawley. Hines testified that on the return trip they stopped at Colton where Brooks called Cooper on the telephone and then told Hines that Cooper would meet them at Mushagian's; that Cooper was not at Mushagian's when they arrived there; that he went to Cooper's house and reported that Mushagian would not buy the hay on the "bob-tail"; that Cooper took him back to Mushagian's but Mushagian still refused to buy that load; that Cooper then instructed him to take that load to another man whom he thought would buy it; that he and Davis then sold the hay on the "bob-tail" to various parties; and that they then returned to Cooper's house where they picked up the sideboards belonging to the "bob-tail" truck and returned certain hooks and ropes belonging to Cooper. Brooks admitted that the hay was stolen and his testimony is much the same as that of Hines, except that he denied that he telephoned to Cooper from Colton. Cooper's testimony is the same on many of the facts although he testified that he did not know the hay was to be stolen; that he rented his truck to Brooks for $50; that he was told that his truck had broken down at the Mushagian ranch; that he went there to repair it; and that he took the $208 payment on account because Mushagian did not want to pay Brooks since he knew the truck belonged to Cooper. Cooper's testimony was thoroughly impeached by statements he made immediately after his arrest, at which time he did not know that the officers had located his truck. At that time he told a story which was greatly at variance with the one he told on the stand. In addition to many other inconsistencies and contradictions he said, immediately after his arrest, that his truck was at home on this Monday; that he had not driven east of Los Angeles to catch up with the other truck on Saturday; that he did not know his truck had been at Mushagian's; that he did not know Mushagian; that he did not know the location of Mushagian's place; and that he did not receive $208 from Mushagian.

The fact that Cooper's truck was used on this occasion is not the only evidence which tends to implicate him in the commission of these crimes. He admits that he talked to Roberts on Saturday morning about this trip and later to Brooks about "the same business." While he claims he was not anxious to rent his truck he hurried to unload it and then caught up with the others who were on their way. The sideboards from the other truck were stored at his home and extra ropes and hay hooks were taken from his home and returned after the mission was completed. He met the trucks at Mushagian's when they arrived there or came soon after, and the evidence justifies the inference that he had directed where the loads of hay should be taken. The evidence as to why he went there is conflicting and the jury may well have refused to accept his explanation therefor. Much of the testimony indicates that Cooper had considerably more to do with selling the load of hay to Mushagian than merely accommodating Brooks and getting his rental for the truck. He offered no explanation for the fact that while he rented the truck to Brooks who sold the hay to Mushagian, he gave the rest of the money he received to the unknown man Roberts. It is argued that the fact that he did not try to collect the balance of the selling price from Mushagian strongly indicates that he was not interested in the proceeds from the hay, other than in collecting the rental for his truck. The fact that he was arrested so soon thereafter suggests a more plausible explanation. Cooper not only took a very active part in the Mushagian deal but he showed considerable activity and interest in disposing of the other load of hay. Moreover, his testimony was thoroughly impeached by the story he told immediately after his arrest. The difference between his stories is not only highly suggestive but indicates why some of the other evidence was not believed by the jury. Some suggestion is made that testimony of the accomplices Hines and Brooks was not sufficiently corroborated. Ample corroboration appears not only in the testimony of other witnesses but in that given by the appellant himself.

The evidence, with the reasonable inferences therefrom is amply sufficient to support the jury's conclusion that the appellant was an active participant in these crimes and to support the verdict and judgment.

[2] The appellant next complains of what he terms "misuse of judicial functions by the court". It is first contended that no notice was given to the attorneys for the appellant which would enable them to examine the transcript, and call any misstatements therein to the attention of the court, before the same was settled. There is nothing in the record to support this contention and it is asserted in respondent's brief that the original clerk's and reporter's transcripts bear the notation, signed by two of the attorneys for the appellant by one of them, to the effect that a copy thereof was received on January 10, 1945, the same day on which copies were received by the district attorney. This is not denied by the appellant. The original transcript was lost and by stipulation a copy thereof was filed and used on this appeal. No prejudice appears and it is not even claimed that either transcript contains any misstatements which might or could have been called to the attention of the court.

[3, 4] It is further argued that the court having set the hearing of the motion for a new trial for December 22, 1944, vacated that order and reset the hearing for an earlier date, and that the court was without jurisdiction to vacate its previous order in this regard. It appears in this connection that the verdict was rendered on November 30, 1944; that an application for probation was made and the hearing thereon and the imposition of sentence was continued to December 15, 1944; that on that day the application for probation as to Cooper was denied, whereupon his counsel moved for a new trial; that on the same day the motion for a new trial was set for hearing on December 22, 1944; that later the same day, in the presence of the appellant and his counsel, that order was set aside and the hearing of the motion reset for December 16, 1944; and that on the latter date this motion was denied. There is no showing that any prejudice resulted to the appellant and there is nothing to indicate that a later hearing of that motion would have had any possible effect on the granting or denial of a new trial. Not only was it within the discretion of the trial court to deny the motion for a new trial without hearing argument thereon (People v. Norton, 45 Cal.App.2d 789, 115 P.2d 44), but counsel for the appellant had then had more than two weeks after the verdict was rendered, and it is not even contended that a later date would have enabled them to raise points or reasons for a new trial which were not then available to them. Neither lack of jurisdiction nor possible prejudice appears.

The judgment and order denying a new trial are affirmed.

MARKS, J., concurs.

69 Cal.App.2d 781

PEOPLE v. DRAPER.

Cr. 633.

District Court of Appeal, Fourth District, California.

June 27, 1945.

1. Criminal law 🔑528

In burglary prosecution, a confession of a defendant implicating codefendants as active participants was properly excluded as hearsay as to codefendants who were not present when confession was made.

2. Criminal law 🔑327

Accused, no matter how untrustworthy he may be, is not required to prove his innocence but the people must prove him guilty.

3. Criminal law 🔑424(6)

Where defendants were not together when approached by police officers, that one defendant ran could have no bearing on case against other defendant.

4. Criminal law 🔑351(3)

In burglary prosecution, that accused ran when officer approached him, could be considered as suspicious circumstance against accused.

5. Burglary 🔑41(1)

In burglary prosecution, evidence which merely showed that accused had opportunity to participate in commission of crime and that he was not a truthful witness, did not sustain burden of proving him guilty beyond reasonable doubt since evidence which merely raises suspicion, no matter how strong, of guilt of a person charged with crime, is insufficient to sustain conviction.

6. Burglary 🔑41(1)

Evidence did not sustain conviction of burglarizing filling stations.

◆

Appeal from Superior Court, Riverside County; R. A. Moore, Judge.

Elmer Draper was convicted of burglarizing three service stations and he appeals.

Reversed and remanded.

Gladys Towles Root and Eugene V. McPherson, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Walter L. Bowers, Asst. Atty. Gen., for respondent.

MARKS, Justice.

This is an appeal from a judgment pronounced on defendant after he had been convicted of burglarizing three service stations in the city of Indio. He admitted the prior conviction of a felony.

The sole question presented is the sufficiency of the evidence to support the verdict and judgment. The burglary of the service stations is established but Draper argues there is no sufficient evidence connecting him with the crimes.

The three stations are on Highway 99. The furthest east belongs to the Standard Oil Company. About one-half mile to the west is the station of the Valley Recap and Tire Company. About two blocks further west is the Elco Service Station. The three stations had been put in order and locked on the evening or night of September 25, 1944. They were broken open and entered some time shortly after 12 o'clock midnight, probably between 2 and 2:30 o'clock of September 26th. Nothing was taken from the Standard or Elco stations. One new tire, three recapped tires and several tire certificates were taken from the Valley Recap and Tire Company Station. The three recapped tires were returned by some undisclosed person a short time after the burglary and after Draper and his two traveling companions and codefendants, Thomas Bass and Ted George Daniels, had been arrested and confined in jail. The new tire and the certificates were never found. The recapped tires were probably found along Highway 99 about three quarters of a mile west of Indio.

Policeman Dan Lesley was patrolling the streets of Indio in a police car. He saw Daniels leaving the door of the Elco Service Station which was open. Lesley alighted from the car and asked Daniels what he was doing there, receiving the reply, "I was in the rest room". Lesley asked for his identification and Daniels ran down the street disappearing between some buildings. Lesley ran after him but abandoned the chase as he could not determine the direction Daniels had taken. Lesley then returned to the car, drove to the home of C. H. Cunningham, the chief of police, and the two returned to the Elco

Service Station. Lesley alighted and saw a man who proved to be defendant Draper standing beside a building which Cunningham fixed at between 50 and 75 feet away. Lesley walked towards the man who started to run across the street. Cunningham headed Draper off and placed him under arrest.

[1] Daniels and Bass were arrested in Banning which is on Highway 99 west of Indio and were returned to the latter place. According to the testimony of Cunningham, Daniels made a complete confession of the three burglaries and implicated Draper as an active participant with him in the commission of the crimes. Neither Draper nor Bass were present during the conversations so these extrajudicial statements were admitted in evidence against Daniels alone. They were properly excluded as to Draper and Bass as they were hearsay as to them.

At the trial the three defendants denied any part in the burglaries. Daniels denied making the confession and maintained his innocence. The jury found Draper and Daniels guilty of the three burglaries but acquitted Bass. Draper alone appealed.

The story of the movements of the three men before their arrest is found almost entirely in what they severally told the arresting officers and their testimony while witnesses at the trial.

The three defendants lived in Los Angeles. Daniels owned some property there and was in business. Draper and Bass were war workers. Bass owned a light colored two-door 1941 Pontiac sedan. Daniels had some business to transact in Imperial Valley and hired Bass for $15 to drive him there. Draper went along for the ride.

The three left Los Angeles between 4 and 5 o'clock on the afternoon of September 25th. They reached Imperial Valley at an undetermined hour ending the trip in Calexico. They went into Mexico, bought and consumed some liquor, recrossed the border into the United States a few minutes before midnight. They secured the automobile from the lot where they had parked it, bought twelve gallons of gasoline and drove to the home of a Mrs. Brown where they remained about twenty minutes. They then started the return trip to Los Angeles with Daniels driving. He became sleepy and Bass took the wheel. He also became sleepy and Draper then took over. They were stopped by United States Immigration Officers at a road junction on Highway 99 18 miles east of Indio. One of the officers fixed the time at about 12 o'clock midnight, and not later than 12:30.

Defendants all testified they had trouble with the car; that it was overheating; that it stopped and refused to start in Indio. This is supported by the evidence of Officer Lesley who testified that he and Bass started the return from Banning to Indio in the Pontiac; that it did not work right so they had to leave it in a service station about two miles east of Banning and make the rest of the trip in the police car with Cunningham and Daniels.

When Draper was interrogated at the police station in Indio he told the officers he had been hitch-hiking from El Centro to Los Angeles; that "two colored fellows" had let him out in Indio promising to return and pick him up; that they did not do so and he was hoping to get another ride when arrested as he was afraid they would not return; that he did not commit any of the burglaries and knew nothing about them. He described the Pontiac automobile sufficiently so that officers in Banning had no trouble in locating it but he gave no sufficient description of the two colored men who were riding in it.

When a witness at the trial he described the entire trip with the other men. He admitted he was driving the car when it was stopped by the immigration officers and testified that the engine stopped in Indio and that he could not start it again; that he got out of the car to look for a lavatory and went to the railroad tracks; that when he returned, Bass, Daniels and the Pontiac had disappeared.

The testimony of Bass and Daniels generally agreed with that of Draper as to the trip from Los Angeles to Mexicali and the return to Indio. Both agreed that Draper left the car at Indio and that they did not see him again until they were returned to the jail in that city. They also testified that Daniels alighted from the car and went across the street. Daniels testified that he asked a police officer with a police car to give the Pontiac a push so the engine would start but that the police officer declined saying there was something wrong with the bumper of his car. Bass finally started the engine of the Pontiac and they proceeded on their way to Banning where they were arrested. They testified that Daniels had business in Los Angeles and that Bass had to go to work which was the reason they continued the journey without waiting for the return of Draper.

As we have already observed Daniels told Officer Cunningham the details of the burglaries. As this evidence cannot be considered against Draper there is no need to detail it here except to point out that he told Cunningham that when Officer Lesley spoke to him as he was leaving the Elco Service Station, Draper was then inside. With the numerous other unexplained features of the case against Draper it would not seem unreasonable to suppose that, after seeing the officer and the police car there, he would have gotten as far away from the service station as possible instead of waiting along the highway 50 or 75 feet from the scene of the crime, assuming he had broken into the station as claimed by Daniels.

[2] Another unexplained feature of the case is how the three men could have been stopped 18 miles east of Indio between 12 and 12:30 o'clock if they crossed the international border many miles away a few minutes before 12 and did not leave Calexico until about or shortly before 12:30. It is very evident that none of the three defendants were entirely truthful when testifying in their own behalf. While this may have furnished sufficient reason for the jurors refusing to believe the testimony of any defendant, it did not relieve the People from the obligation of proving Draper guilty. A defendant, no matter how untrustworthy he may be, is not required to prove his innocence. The People must prove him guilty. With these observations we must proceed to consider the sufficiency of the evidence against Draper.

The attorney general argues that while the evidence against Draper is entirely circumstantial it is sufficient to do more than point the finger of suspicion at him and proves his participation in the crimes. He summarizes this evidence as follows: "(1) There is the fact that appellant and his co-defendants, with whom he drove to Indio, were found at the burglarized premises at the time or shortly after the burglary must have been committed. (2) There is the fact that during the period that the burglary must have been committed between midnight and 2:25 A.M., appellant and his co-defendants do not account for their time other than that they were driving to Indio from the place where they were stopped by the Border Patrol, a distance of only eighteen miles. (3) There is the fact that both appellant and his co-defendants ran and sought to elude the police officers when the latter appeared. (4) There is the fact that when apprehended appellant, although he made the entire trip from Los Angeles to Calexico and return with his co-defendants, told a story to the police of having hitch-hiked with strangers from El Centro and having been let out at Indio." (Numbers added.)

The statement numbered 1 is not entirely correct factually. Bass was not found there. Draper was 50 or 75 feet away several minutes after the door of the service station was observed to be open. Daniels was the only one found on the premises. The fact that Draper was near the scene of the burglary might be a suspicious circumstance. On the other hand the fact that he was seen near the service station might support the inference that he knew nothing of the burglary as he claimed, as the time elapsing between the discovery of the burglary and his apprehension would have permitted him to have left the locality if he had participated in the crime.

The second circumstance relied upon might be explained by the fact that the Pontiac was not operating normally. If that reason be rejected then it is clear that the statements of Draper and his co-defendants in that and other respects cannot be accepted as true. This last observation also applies to the story Draper told of his hitch-hiking from El Centro.

[3] It is true that both Daniels and Draper ran when approached by police officers. They were not together and the fact that Daniels ran can have no bearing on the case against Draper.

[4] In People v. Goodwin, 202 Cal. 527, 261 P. 1009, 1014, in discussing an instruction on the flight of a defendant, the Supreme Court quoted with approval the following from People v. Jones, 160 Cal. 358, 117 P. 176: "The instruction here given is typical. In the first place, it omits the essential qualifications that, where flight can be indicative of a guilty conscience, the defendant must know that he is charged with the crime." If that quotation be considered applicable to the facts of this case little weight can be given to the fact that Draper ran when the officer

approached him. However, it does seem to us that it should be considered as a suspicious circumstance against him. See People v. Sanchez, 35 Cal.App.2d 231, 95 P.2d 169. In fact it seems to be the most suspicious circumstance established in the case.

[5, 6] The foregoing evidence points the finger of suspicion at Draper, shows that he had an opportunity to participate in the commission of the crimes and proves that he was not a truthful witness. This is not sufficient to sustain the burden resting on the People of proving him guilty beyond a reasonable doubt for it is the rule here that evidence that merely raises suspicion, no matter how strong, of the guilt of a person charged with a crime is not sufficient to sustain a verdict and judgment against him. People v. Robbins, 171 Cal. 466, 154 P. 317; People v. Kempley, 205 Cal. 441, 271 P. 478; People v. Davis, 210 Cal. 540, 293 P. 32.

The judgment against Elmer Draper is reversed and the case against him is remanded to the superior court for retrial.

BARNARD, P. J., and GRIFFIN, J., concur.

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69 Cal.App.2d 794

FORBES v. LOS ANGELES RY. CORPORATION.

Civ. 14777.

District Court of Appeal, Second District, Division 2, California.

June 28, 1945.

1. Appeal and error 🔑1067
Carriers 🔑321(10)

In action against streetcar company for injuries sustained by plaintiff when crowded from a streetcar, instructing jury that under statute a carrier must not overcrowd or overload his vehicle, but refusing to instruct that a violation of the statute constitutes negligence as a matter of law, was error requiring reversal, notwithstanding transportation difficulties in wartime.

2. Carriers 🔑321(1)

In action for injuries sustained by plaintiff when crowded off a street car, instructing jury relative to statutory duty of carrier to transport passengers and property and its liability for failure to do so was error, in that it permitted jury to infer that it was defendant's duty to carry as many passengers as cared to board its cars without liability for overloading, especially where defense of contributory negligence was emphasized.

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Action by Anna E. Forbes against Los Angeles Railway Corporation for personal injuries sustained by plaintiff when crowded from a streetcar operated by defendant. Verdict and judgment for defendant, and plaintiff appeals.

Reversed.

Harold D. Kraft, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher, of Los Angeles (E. H. Chapman, of Los Angeles, of counsel), for respondent.

W. J. WOOD, Justice.

Plaintiff, an elderly lady, commenced this action to recover for injuries which she received when she was crowded from a street car operated by defendant. A jury returned a verdict in defendant's favor and plaintiff has appealed from the resulting judgment.

Plaintiff boarded defendant's southbound street car at the corner of 4th Street and Broadway in the City of Los Angeles about 3:15 p.m. on January 9, 1943. She placed her suitcase at a place which the conductor indicated was a proper location for it. At that time the car was not crowded but there were vacant seats. Before the car arrived at plaintiff's destination, 30th and Main Streets, it became "terribly crowded". There were approximately 25 people standing on the rear platform in the neighborhood of the conductor's station. As plaintiff edged her way toward the rear exit she was informed by the conductor that her suitcase had been removed and placed in the corner of the car opposite the entrance. The suitcase was lifted by the other passengers and passed over their heads, the conductor assisting. At this time the car had come to a stop and plaintiff was about eighteen inches from the top of the first step leading down from the platform. There was no door at this exit. As plaintiff received the suitcase she was unable to turn around with the suitcase in her hand because the passengers had contacted her body on both sides and in front of her but not at her rear. As the passengers settled down after passing the suitcase they crowded plaintiff so that she was pushed out of the exit. She attempted to grasp the railing for support but could not hold on. She fell to the pavement, receiving the injuries for which recovery is sought.

[1] The instructions given by the court to the jury were so unfair to plaintiff that the judgment must be reversed. Although many instructions were given, most of them referred to general rules which are applicable to all personal injury actions. On the vital question of negligence of the defendant in crowding its car the court gave this brief instruction to the jury: "It is the law of the State of California, by statute, that a carrier of persons for reward must not overcrowd or overload his vehicle". The jury was not instructed that a violation of this statutory provision constitutes negligence as a matter of law. Plaintiff requested such an instruction and was unquestionably entitled to have it given. In attempting to justify the court's refusal to give such an instruction defendant states that the vehicles of every carrier of passengers in California have been overcrowded, claiming that the responsibility is "in the laps of Hitler et al." Defendant further states that it is an every day occurrence in the metropolitan area of Los Angeles for passengers to be "not only standing in the street cars and motor buses, but riding on the steps and clinging to the fenders". Notwithstanding transportation difficulties during war time, the statute in question was and is in force and plaintiff was entitled to have her conduct and that of defendant measured by its provisions. We need not pass upon the question of ethics involved, whether carriers are justified in overloading their vehicles during the present emergency. The enforcement of the rule in cases like the present one does not work undue hardship upon the carriers for doubtless they receive additional fares from the great number of passengers carried in sufficient sums to compensate for any losses resulting from the overcrowding.

[2] Of its own motion the court instructed the jury: "Every such corporation must start and run its cars, for the transportation of persons and property, at such regular times as it shall fix by public notice, and must furnish sufficient accommodations for the transportation of all such passengers and property as, within a reasonable time previous thereto, offer or are offered for transportation, at the place of starting, at the junction of other railroads, and at siding and stopping places established for receiving and discharging way passengers and freight; and must take, transport, and discharge such passengers and property at, from, and to such places, on the due payment of tolls, freight, or fare therefor. In case of refusal by such corporation or their agents to take and transport any passengers or property, or to deliver the same, at the regular appointed places, such corporation must pay to the party aggrieved all damages which are sustained thereby, with costs of suit." The court erred in giving this instruction. We need not pass upon the disputed question whether or not the code provisions embodied in the instruction are applicable to street railways. It is sufficient to point out that there was no evidence whatever upon which such an instruction could be presented. Moreover, as the instructions as a whole were given, the jury could well have received the impression that it was the duty of defendant to receive as many passengers as cared to board its cars, without any liability for overloading.

The errors of the court in giving the last mentioned instruction and in refusing to give an instruction that overloading the cars was negligence as a matter of law, become more conspicuous when it is noted that the court was careful to emphasize the defense of contributory negligence, which was pleaded by defendant. The court gave to the jury this instruction: "If you believe from the evidence in this case that at the time plaintiff was alighting from defendant's street car plaintiff failed to use the care and caution which an ordinarily careful and cautious person under the same or similar circumstances would use, and as a result thereof either made a misstep or lost her balance and fell, then I instruct you that plaintiff was guilty of negligence. If you further believe that such negligence, if any, on her part proximately caused or contributed to her injuries in the slightest degree whatsoever, then, irrespective of whether you believe the defendant was negligent or not, your verdict must be against the plaintiff and in favor of the defendant." Although it is difficult to perceive how plaintiff could reasonably be held to be negligent, the trial court repeatedly referred to defendant's assertion of negligence on her part, stating in one part of the instructions: "It is only in the event that you believe from a preponderance of the evidence that plaintiff's injuries were caused as a direct and proximate result of negligence on the part of the defendant alone and were not in the slightest degree contributed to by negligence if any on the part of plaintiff that you may consider the nature or extent of the injuries and damages, if any, sustained by plaintiff in accordance with the rules which I have given you."

A reading of the instructions as a whole compels the conclusion that plaintiff was not given a fair trial.

The judgment is reversed.

MOORE, P.J., concurs.
McCOMB, J., concurs in the judgment.

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69 Cal.App.2d 654

SMREKAR v. BAY & RIVER NAVIGATION CO. et al.

Civ. 12809.

District Court of Appeal, First District, Division 1, California.

June 22, 1945.

Hearing Denied Aug. 16, 1945.

1. Workmen's compensation 🔑2085, 2089

Under federal enactments relating to maritime workers injured on navigable waters, all such workers are covered by the exclusive provisions of the Longshoremen's Compensation Act except the master or member of a crew and the others mentioned in section 902 of such act and those excluded by that section may still sue under the Jones Act and all other maritime workers must sue under the Longshoremen's Compensation Act. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–60; Longshoremen's and Harbor Workers' Compensation Act, §§ 1 et seq., 2(3, 4), 3, 5, 33 U.S.C.A. §§ 901 et seq., 902(3, 4), 903, 905.

2. Workmen's compensation 🔑2141

Whether plaintiff was a member of a crew of the vessel on which he was injured and therefore might properly sue under the Jones Act was a question of fact and if the evidence was conflicting thereon, the finding of the trier of the facts would not be set aside. Jones Act, 46 U.S.C.A. § 688.

3. Workmen's compensation 🔑2141

Where reasonable minds might reasonably differ as to whether employee injured on navigable waters and in scope of his employment was a member of the crew so as to be excluded from operation of the Longshoremen's Compensation Act or was a maritime worker within the ambit of that Act was a question of fact for the trier of the facts. Longshoremen's and Harbor Workers' Compensation Act, § 1 et seq., 33 U.S.C.A. § 901 et seq.; Code Civ.Proc. § 597.

4. Workmen's compensation 🔑2136

Findings of trial court that plaintiff suing to recover for injuries while on a vessel in navigable waters and while acting in scope of employment, was not a member of the crew but a worker whose primary duty was to load and unload the boat and to supervise work of others so engaged so as to preclude the maintenance of an action under the Jones Act were supported by evidence. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–60; Longshoremen's and Harbor Workers' Compensation Act, § 1 et seq., 33 U.S.C.A. § 901 et seq.; Code Civ.Proc. § 597.

5. Workmen's compensation 🔑262

Duties of employee whose primary function was to participate in loading and unloading of boat do not as a matter of law make employee a "member of the crew" as those words are used in Longshoreman's Compensation Act excepting from the operation of the Act a member of the crew. Longshoremen's and Harbor Workers' Compensation Act, § 1 et seq., 33 U.S.C.A. § 901 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Member of the Crew".

Appeal from Superior Court, San Francisco County; Elmer E. Robinson, Judge.

Action by Frank Smrekar, Jr., a minor, by Frank Smrekar, Sr., his guardian, against the Bay & River Navigation Company and another to recover for injuries received by plaintiff while on a vessel in navigable waters and while acting in the course and scope of his employment. Judgment for defendants, and plaintiff appeals.

Affirmed.

A. L. Crawford and Ralph Bancroft, both of San Francisco, for appellant.

W. N. Mullen, of San Francisco, for respondents.

PETERS, Presiding Justice.

Plaintiff, while on a vessel in navigable waters, and while acting in the course and scope of his employment, received injuries for which he brought this action against his employer under the Jones Act, 46 U.S.C.A. § 688. This act made applicable to seamen injured in the course of their employment the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. §§ 51—60, which gives to railroad employees a right of recovery from their employer for injuries resulting from the negligence of the employer, its agents or employees. O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 63 S.Ct. 488, 87 L.Ed. 596; Occidental Ind. Co. v. Industrial Acc. Comm., 24 Cal.2d 310, 149 P.2d 841. Thus, under the Jones Act, an injured seaman, if negligence exists, may maintain an action in the state courts to recover the damages caused by such negligence. It is such an action that plaintiff herein brought against his employer. The latter raised the special defense that plaintiff's exclusive remedy was for compensation under the Longshoremen's and Harbor Workers' Compensation Act, first passed in 1927. 33 U.S.C.A. § 901 et seq. This special defense was tried separately under § 597 of the Code of Civil Procedure. The trial court found that "plaintiff herein was not an able seaman or a member of the crew of the S. S. 'M. V. Komoku,' but a stevedore and worker whose primary duty aboard said S. S. 'M. V. Komoku' was to load and unload such boat when in the various ports at which it docked and supervise the work of others hired to do such loading and unloading, and the primary reason for his being aboard such steamship was not to aid or facilitate such steamship in its navigation, and that at the time of his injury * * * on July 22, 1941, he was not engaged in navigation." Based on this finding the trial court held that plaintiff had no legal right to sue under the Jones Act, and entered its judgment in favor of the defendant. From this judgment plaintiff appeals contending that the above finding is not supported by substantial evidence, and that the record shows, as a matter of law, that he is of the class mentioned in the Jones Act.

The Jones Act, passed long before the Longshoremen's and Harbor Workers' Compensation Act, purports to grant the rights therein conferred to "any seaman who shall suffer personal injury in the course of his employment * * *." 46 U.S.C.A. § 688. Because the United States Supreme Court had held that state compensation acts could not constitutionally apply to stevedores and longshoremen injured while engaged in maritime work on navigable waters (Southern Pacific Co. v. Jense, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086, L.R.A.1918C, 451, Ann.Cas.1917E, 900) prior to 1927, it was held that such workers had the status of "seamen" within the meaning of the Jones Act in order to enable them to bring actions under that statute. International Stevedoring Co. v. Haverty, 272 U.S. 50, 47 S.Ct. 19, 71 L.Ed. 157; Northern Coal & Dock Co. v. Strand, 278 U.S. 142, 49 S.Ct. 88, 73 L.Ed. 232. In 1927 this situation was changed by the passage of the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C.A. § 901 et seq. By § 905 of that act the liability of the employer created by the statute is made exclusive of all other liabilities of the employer in all cases to which the act applies. The statute does not affirmatively enumerate the persons covered by it, but does so negatively. Section 902, Subd. (3), states that the term "employee" as used in the act "does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." The vessel here involved was far in excess of eighteen tons net. Subd. (4) of the same section states that the term "'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)."

Section 903 is the section that defines "coverage." It states:

"(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

"(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net * * *."

[1] The result of these enactments is that all maritime workers injured on navigable waters are covered by the exclusive provisions of the federal compensation act except the "master or member of a crew" and the others mentioned in § 902. Those excluded by that section may still sue under the Jones Act. All other maritime workers must sue under the compensation act. Frankel v. Bethlehem-Fairfield Shipyard, D.C., 46 F.Supp. 242, affirmed 4 Cir., 132 F.2d 634, certiorari denied 319 U.S. 746, 63 S.Ct. 1030, 87 L.Ed. 1702; for a good discussion of the history of these sections, see Nogueira v. New York, N. H. & H. R. Co., 281 U.S. 128, 50 S.Ct. 303, 74 L.Ed. 754; South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 60 S.Ct. 544, 84 L.Ed. 732; O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 63 S.Ct. 488, 87 L.Ed. 596; Norton v. Warner Co., 321 U.S. 565, 64 S.Ct. 747, 88 L.Ed. 931.

[2] It is plaintiff's theory that he was a member of the crew of the vessel on which he was injured and therefore may properly sue under the Jones Act. It is quite clear that this is a question of fact, and that, if the evidence is conflicting, the finding of the trier of the fact will not be set aside. There are cases where the nature of the employment is such that any reasonable person must conclude that the person involved is a member of the crew. Such is the case of Norton v. Warner Co., supra, so heavily relied upon by plaintiff. In that case the Supreme Court reversed the finding of the trier of the fact that one Rusin was a harbor worker. Rusin was in complete charge of a barge traveling on navigable waters. It was his duty to take general care of the barge, repairing leaks, pumping it out, putting out navigation lights and signals, taking lines from tugs and tending lines at docks. He took orders from the tug boat officers while being towed. He had no shore duties and did not handle cargo. The Supreme Court held that the finding of the trier of the fact was binding if supported by substantial evidence, and that the appellate court has no power to set aside such a finding even if deemed by it to be against the weight of the evidence. The court then went on to hold that under the evidence the only possible conclusion was that Rusin was a member of the crew. In so holding the court stated (321 U.S. 565, 64 S.Ct. at page 751, 88 L.Ed. at page 937):

"A crew is generally 'equivalent to ship's company' as Mr. Justice Story said in United States v. Winn, CC., Fed.Cas.No.16,740, 3 Sumn. 209. But we pointed out in the Bassett case that the word does not have 'an absolutely unvarying legal significance.' 309 U.S. at page 258, 60 S.Ct. 544, at page 548, 84 L.Ed. 736. We know of no reason why a person in sole charge of a vessel on a voyage is not as much a 'member of the crew' as he would be if there were two or more aboard. We said in the Bassett case that the term 'crew' embraced those 'who are naturally and primarily on board' the vessel 'to aid in her navigation.' Id., 309 U.S. page 260, 60 S.Ct. 544, 549, 84 L.Ed. 737. But navigation is not limited to 'putting over the helm.' It also embraces duties essential for other purposes of the vessel. Certainly members of the crew are not confined to those who can 'hand, reef and steer.' Judge Hough pointed out in The Buena Ventura, D.C., 243 F. 797, 799, that 'every one is entitled to the privilege of a seaman who, like seamen, at all times contribute to and labor about the operation and welfare of the ship when she is upon a voyage.' And see The Minna, D.C., 11 F. 759; Disbrow v. The Walsh Bros., D.C., 36 F. 607, 608 (bargeman). We think that 'crew' must have at least as broad a meaning under the Act. For it is plain from the amendment exempting a 'master or member of a crew' that ship's company was not brought under the Act. And we are told by the Senate Report, as already noted, that the purpose of the legislation was to provide compensation for those who 'are mainly employed in loading, unloading, refitting, and repairing ships.' S. Rep. No. 973, supra.

"Rusin, unlike the employee in the Bassett case, did no work of the latter variety. He performed on the barge functions of the same quality as those performed in the maintenance and operation of many vessels."

[3] There are other cases where the nature of the employment is such that any reasonable person must conclude that the person involved is not a member of the crew but a maritime worker of a type that clearly falls within the compensation act. In between these two extremes are the cases where reasonable minds may reasonably differ on the question. In such a case whether or not the particular employee is a member of the crew so as to be excluded from the operation of the compensation act, or is a maritime worker within the ambit of that statute is a question of fact for the trier of the fact. Bowen v. Shamrock Towing Co., 2 Cir., 139 F.2d 674; Carumbo v. Cape Cod S. S. Co., 1 Cir., 123 F.2d 991; Pacific Employers Ins. Co. v. Pillsbury, 9 Cir., 130 F.2d 21; Puget Sound Freight Lines v. Marshall, 9 Cir., 125 F.2d 876; Norton v. Warner Co., supra; South Chicago Coal & Dock Co. v. Bassett, supra. Such is the present case.

Plaintiff was employed as a clerk and was attached to the ship "M. V. Komoku." This vessel was used by the employer to transport sugar from the refinery at Crockett to various points on San Francisco Bay. Plaintiff had formerly been employed by the same employer on the same boat as a laborer to assist in loading and unloading the cargo. In that position he was admittedly not a member of the crew. Prior to his injury he was appointed to the position of clerk to help the mate in handling the cargo. The mate was also assisted by the supercargo who was considered to be a member of the crew, but whose duties were somewhat different from those of plaintiff. Plaintiff's primary duty was to discover sacks of sugar that had been damaged and to replace such sacks with undamaged sacks. When a bag of sugar was torn he would draw another bag from the reserve and replace the damaged bag. He was required to fill out reports on the damaged bags, and he did this paper work while the vessel was in motion between stops. The ship returned to Crockett each night. After the vessel had docked at Crockett he would secure the recapitulation for the next day's load and order the stock for the next day's work. After performing this duty he had no other duties in connection with the vessel until the next morning. His time was then free time. He slept aboard the vessel every night except Saturdays, ate with the officers, and was paid a monthly wage. He participated in both the loading and unloading of the vessel by checking the sacks, and did his paper work while the boat was in motion. While the unloading was in progress he saw to it that the sugar was placed in the proper railroad cars by the "jitney" drivers and directed these drivers to the proper car. While working as a laborer he was paid by the mate, but after his promotion to clerk he was paid by the captain. He had a Seaman's Certificate of Identification and a Seaman's Certificate of Service, but no A. B. Seaman's License, and was not required to have such a license.

At the time of his injury the vessel was tied to the dock. Plaintiff had observed some damaged sacks during the unloading process, and had taken these damaged sacks back to the boat. He was bringing undamaged sacks up on the ship's elevator when his heel caught, causing most serious injuries to his foot. He has been paid compensation since his injury.

[4] Under these facts it seems quite clear that the findings of the trial court that plaintiff was not a member of the crew, but a worker whose primary duty was to load and unload the boat and to supervise the work of others engaged in loading and unloading, and that his primary purpose in being on board was not to aid or facilitate the navigation of the vessel, are amply supported.

None of the cases cited by plaintiff compel or even suggest the conclusion that plaintiff, as a matter of law, was a member of the crew. Reference has already been made to the case of Norton v. Warner Co., supra. The case of O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 63 S.Ct. 488, 87 L.Ed. 596, is also cited. That case simply held that a seaman and a member of the crew injured on shore while in the service of his ship was entitled to recover under the Jones Act. The same is true of Occidental Ind. Co. v. Industrial Acc. Comm., 24 Cal.2d 310, 149 P.2d 841, where it was admitted that the injured person was a member of the crew, the sole question being whether such a crew member was covered by the Jones Act or the

State Compensation Act when he was injured on shore while getting nets at his employer's direction.

No useful purpose would be served by citing cases that have passed on various factual situations. Each case must, of course, turn on its own facts. The cases already cited definitely establish that the problem here involved is one of fact and that since such finding is amply supported the appellate court has no power to disturb it. There is one case, however, that involves this same employer and the same type of vessel, that should be mentioned—the case of Pacific Employers Ins. Co. v. Pillsbury, 9 Cir., 130 F.2d 21. That case involved a sister ship of the one here involved, that was likewise engaged in transporting sugar from Crockett to various points on San Francisco Bay. The injured employee was hired as a deckhand at a monthly wage. He was required to live aboard the vessel five days a week. During most of his working time he was storing sugar on the boat or assisting in the discharge of such cargo. He helped to sweep up sugar spilt on the decks, and occasionally assisted in handling the lines in tying and untying the vessel. Ordinarily he slept while the boat was in motion, but could be called in an emergency. He had no shore duties and all orders were taken from the mate or captain. The trier of the fact found that the injured employee was not a member of the crew. On appeal it was urged that in assisting in loading and unloading the vessel the employee was carrying out the very purpose of the vessel and was therefore assisting in its navigation. Among other cases referred to by the court was the case of Puget Sound Freight Lines v. Marshall, 9 Cir., 125 F.2d 876, concerning which the court stated (130 F.2d at page 23):

"This court was called upon to decide whether or not one Jondro was a 'member of a crew', within the intendment of the Act. He had been employed to do loading and unloading work aboard a vessel which carried cargo to and from various ports on Puget Sound. The nature of his work required that he travel with the vessel, on board which he was provided with meals and sleeping quarters. He lived ashore for an average of about four days out of each month, and was paid on a monthly basis. His duties included putting the cargo plank out upon arrival at a dock and taking it in upon departure. His sole duties were in relation to loading and discharging cargo, although on occasion he might handle a line as an incident to his main work, or might take the wheel occasionally, but was not required to do so. He had no duties while the boat was underway, and could do anything he pleased during that time. We held that Jondro was not a 'member of a crew.' The following quotation is from the opinion (125 F.2d at page 879):

"' * * * The distinction between a longshoreman and a crew-member seems to hinge upon whether or not the employee is "naturally and primarily on board (the vessel) to aid in her navigation". The work done by the claimant had no more ralation to navigation than does that performed by a regular longshoreman engaged at a port to assist in loading or discharging the cargo of a boat. As was so well stated in Carumbo v. Cape Cod S. S. Co., 1 Cir., 123 F.2d 991, 995, "The requirements that the ship be in navigation; that there be a more or less permanent connection with the ship; and that the worker be aboard primarily to aid in navigation appear to us to be the essential and decisive elements of the definition of a 'member of a crew'."'

"At this point we may remark that a review of the many cases cited by the litigants here would unnecessarily extend this opinion and would be of no great assistance; for as stated in the Puget Sound Freight Lines case, supra, 125 F.2d 876, 878, each claimant's classification as a crew-member or harbor worker 'must be determined by the circumstances of his own, individual case' and 'the deputy commissioner's determination of the employee's status [is] conclusive and not subject to judicial review if supported by substantial evidence'.

"From a consideration of claimant Slawson's 'primary' and 'actual duties' aboard the 'Crockett' it is at once apparent that the reasoning of the opinions rendered in the South Chicago and Puget Sound Freight Lines cases, supra, applies to, and governs, the instant case; and we may state, without rehearsal of the facts, that there is substantial evidence to support the finding of the deputy commissioner that claimant was not a 'member of a crew', but rather a harbor worker or longshoreman."

The court then went on to hold that the finding the injured employee was not a member of the crew was amply supported.

[5] It is obvious that in the instant case the plaintiff's duties were of the same general character as those involved in the Pacific Employers case, supra. While plaintiff's duties were more supervisory than those in the Pacific Employers case, and dealt with a specified part of the cargo, it is obvious that in both cases the primary function of the employees was to participate in the loading and unloading of the boat. Such duties do not, as a matter of law, make the employee a "member of the crew" as those words are used in the federal compensation act.

The judgment appealed from is affirmed.

WARD, J., and DOOLING, J., pro tem, concur.

69 Cal.App.2d 717

GLICK v. SCUDDER, Real Estate Com'r.

Civ. 14854.

District Court of Appeal, Second District, Division 1, California.

June 26, 1945.

1. Brokers 🔑3

Evidence before Real Estate Commissioner from which inference could be drawn that petitioner had knowledge of criminal frauds practiced by agents of corporation of which he was president justified commissioner's refusal to issue petitioner a real estate broker's license on ground that petitioner did not meet requirements as to truthfulness, honesty, and good reputation required by statute. St.1943, p. 838, § 10152.

2. Brokers 🔑3

All that is required to justify denial of real estate broker's license is that Real Estate Commissioner has reasonable grounds to conclude that applicant does not meet requirements as to truthfulness, honesty, and good reputation set forth in statute. St.1943, p. 838, § 10152.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Petition by Edward Glick against Hubert B. Scudder, Real Estate Commissioner of the State of California, for a mandate directing the Real Estate Commissioner to issue petitioner a real estate broker's license for the fiscal year 1943–44. From a judgment denying petition, the petitioner appeals.

Affirmed.

Samuel W. Newman, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice pro tem.

Petitioner and appellant was for many years a licensed real estate broker in the State of California. In 1943 the Real Estate Commissioner instituted a proceeding requiring petitioner to show cause why his license as such real estate broker should not be revoked. In this proceeding it was found that the petitioner had been president of two corporations which made misrepresentations and false promises, by agents and salesmen, and that petitioner at all times engaged in such conduct. Based upon these findings an order was made revoking petitioner's license. From this order petitioner applied to the Superior Court for a review, which application is still pending and undetermined. The order revoking the license was entered June 17, 1943.

On May 10, 1944, petitioner filed his application with the Division of Real Estate of the State of California requesting that there be issued to him a real estate broker's license for the fiscal year 1943–44. Hearing was had by the Commissioner, evidence was adduced, and on June 20, 1944, an order was made denying this petition.

Thereupon, petitioner applied to the Superior Court for a Writ of Review of this latter order and prayed for mandate directing the Real Estate Commissioner to issue him a license. This petition was denied by the Superior Court for the reason as found that the petitioner did not meet the requirements as to truthfulness, honesty, and good reputation required by Section 10152 of the Business and Professions Code, St. 1943, p. 838.

Petitioner has appealed from this decision upon the ground that there was not sufficient evidence before the Real Estate Commissioner or the Superior Court to justify denying his application for a broker's license. Petitioner's principal argument is that there is no evidence in the record to substantiate the finding in the first hearing that he had knowledge of the fraud and misrepresentations of the agents of the corporations of which he was president. Whether this be true or not, it is not a matter for determination in this case, inasmuch as there is still pending and undetermined a judicial review of the first hearing.

In the present case the transcript of testimony taken before the Commissioner discloses the following:

"Q. Do you recall, Mr. Glick, how many times you visited this Department in connection with complaint matters over the past five years? A. No, I don't.

"Q. Was it several times? A. Oh, yes.

"Q. You were called to this office, were you not, by various deputies on numerous occasions during that time in connection with complaint matters that had come to the Division? A. As an officer of the corporation, yes.

"Q. What degree of supervision did you exercise over the agents of the Desert Club as an officer of that club? A. Well, I from time to time instructed the salesmen in the course of conduct.

"Q. Did you hold sales meetings? A. I. never held sales meetings.

"Q. Did you attend any sales meetings? A. On one or two occasions in the history of our business—very little.

"Q. Was it part of your duty to adjust any complaints that might come to your office, caused by the conduct of your salesmen? A. Whether caused by conduct of our salesmen or not, any complaints that came in to my desk for attention, I would adjust them, yes.

"Q. Did you have any such complaints? A. Personally, to my desk for attention?

"Q. Yes, to your attention. A. No, not very many."

From this testimony the inference may well be drawn that petitioner had knowledge of the criminal frauds practiced by agents of the corporations of which he was president.

It also appeared that the petitioner pleaded nolo contendre in a criminal proceeding in the Federal Court growing out of the transactions of the corporations above mentioned, was fined $1,000, and placed on probation for a period of five years.

[1, 2] There was substantial evidence before the Real Estate Commissioner reflecting upon the truthfulness, honesty, and reputation of the petitioner to justify his findings, conclusions, and order; as there was also substantial evidence before the Superior Court to support the judgment denying the petition for a Writ of Mandate to compel the Commissioner to grant him a license. In these cases all that is required is that the Commissioner have reasonable grounds to conclude that the applicant does not meet the conditions set forth in the statute. McDonough v. Goodcell, 13 Cal.2d 741, 91 P.2d 1035, 123 A.L.R. 1205; Newport v. Caminetti, 56 Cal.App.2d 557, 132 P.2d 897.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

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69 Cal.App.2d 721

BARRY v. BOWDLE et al.

Civ. 14999.

District Court of Appeal, Second District, Division 2, California.

June 26, 1945.

Appeal and error 🔑371

Where record showed that the clerk of the superior court had in fact mailed to appellant notice of the estimated cost of preparing record on appeal and appellant had not made necessary arrangement for payment of the cost of obtaining transcript within time allowed, appeal was dismissed. Rules on Appeal, rule 10(a).

◆

Action by Milo Barry against R. S. Bowdle and others. From the judgment, plaintiff appeals. On respondent's motion to dismiss the appeal and on appellant's motion to dismiss respondent's motion.

Appellant's motion denied, and respondent's motion to dismiss appeal granted.

Milo Barry, in pro. per., for appellant.

Robert W. Kenny, of San Francisco, and Bayard Rhone, of Los Angeles, for respondents.

McCOMB, Justice.

These are two motions.

1) A motion of appellant to dismiss respondent's motion upon the ground that the clerk of the superior court did not furnish appellant with an estimate of the cost of preparing a transcript.

2) A motion by respondent to dismiss the appeal upon the ground that appellant has failed within the time provided by law to have prepared and certified to this court a record on appeal.

It appears from the certificate of the clerk of the superior court that notice of appeal and notice to the clerk to prepare a transcript was filed by appellant on March 29, 1945; that pursuant to the provisions of rule 5 of Rules on Appeal, a notice by the clerk of the superior court designating the estimate of the cost for the preparation of the clerk's transcript was mailed April 9, 1945 to appellant at 14653 Roscoe Boulevard, Van Nuys, California (the address of appellant), and that no arrangements were ever made with the clerk for the payment of said cost to and including the fifth day of June, 1945.

In view of the foregoing facts, there is no merit in appellant's motion attacking the motion to dismiss the appeal filed by respondent, since it appears from the record that the clerk in fact mailed appellant notice of the estimated cost of preparing a record on appeal and appellant did not within ten days after notification by the clerk make arrangements for the payment of such cost. (Rule 5(c), Rules on Appeal.)

It is likewise evident that since appellant has not made the necessary arrangements for the payment of the cost of obtaining a transcript within the time allowed, the appeal should be dismissed pursuant to the provisions of rule 10(a),* Rules on Appeal.

For the foregoing reasons (1) appellant's motion to dismiss respondent's motion is denied and (2) respondent's motion to dismiss the appeal is granted.

MOORE, P. J., concurs.

69 Cal.App.2d 694

RUSSI v. BANK OF AMERICA.

Civ. 12857.

District Court of Appeal, First District,
Division 2, California.
June 25, 1945.

1. Appeal and error 🔑901

An executor appealing from judgment recovered upon rejected claim for money loaned to decedent had burden of showing error.

2. Mines and minerals 🔑99(2)

A judgment against executor upon rejected claim for money loaned to decedent and evidenced by mutual, open and current account was not erroneous on theory that claimant and decedent were engaged in mining partnership and that claimant's remedy was a suit for accounting, where only showing in support of theory was a reference to letters which showed no more than that partnership existed between decedent and claimant and that some obligations were incurred by each as result of operations of the partnership.

3. Appeal and error 🔑931(1)

On appeal from judgment against executor upon rejected claim for money loaned to decedent and evidenced by mutual, open and current account, appellate court must presume that finding of trial court that moneys represented in judgment were loaned to decedent was supported by substantial evidence, and that in all probability such loans were made outside partnership business.

4. Appeal and error 🔑907(2)

Where evidence is not included in record, reviewing court will treat finding of fact on material issue as conclusive.

Appeal from Superior Court, San Francisco County; Franklin A. Griffin, Judge.

Action by Frank B. Russi against Bank of America N. T. & S. A., as executor of the last will and testament of Francisco Bertolli Rossi, also known as F. B. Russi, also known as F. C. Rossi, deceased, to recover upon a rejected claim for money advanced and loaned to decedent and evidenced by a mutual, open and current account. From a judgment for plaintiff, defendant appeals.

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* Rule 10(a), Rules on Appeal reads in part as follows:

"If the appellant shall fail to perform any act necessary to procure the filing of the record or to pay the filing fee within the time allowed therefor or within any valid extension of that time, and such failure is the fault of the appellant and not of any court officer or any other party, the appeal may be dismissed on motion of the respondent or on the reviewing court's own motion."

Affirmed.

J. M. Inman, of Sacramento, for appellant.

Dreher, McClellan & McCarthy, of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued upon a rejected claim to recover money advanced and loaned to the decedent and evidenced by a mutual, open and current account. A claim for the sum due was presented to the executor in due form and within time but no action was taken by the executor for more than three years. Thereupon the claimant elected to treat the claim as having been rejected and commenced this suit. The executor answered admitting all the material allegations of the complaint except that any money was due the plaintiff, and also setting up a special plea of the statute of limitations. The trial court found adversely to defendant on all issues and the defendant appealed on the clerk's transcript, including exhibits used on the trial, but excluding all oral testimony. On the appeal the sole ground urged for a reversal of the judgment is that the parties were engaged in a mining partnership and that accordingly the plaintiff's remedy was a suit for an accounting rather than an action on the debt.

After the cause was briefed the appellant made a motion for an order of augmentation of the record "whereby the clerk's transcript of the testimony taken at the trial of said cause may be augmented by including in said transcript of testimony all oral testimony received and admitted at the trial of said cause." The motion was denied upon the grounds stated in the opinion that the Rules on Appeal did not permit augmentation of the record under these circumstances where the appellant had voluntarily elected to appeal on the judgment roll alone. Russi v. Bank of America, 69 Cal.App.2d 100, 158 P.2d 252.

The question now raised is not properly presented in the record before us. The parties concede that during the trial the issue was raised as to the relationship of the parties. How it was raised does not appear. Certainly it was not raised in any of the pleadings. There is nothing in the findings which would indicate any specific determination of the issue. The trial court found that "decedent became indebted to the plaintiff upon a mutual, open and current account * * * for moneys loaned and advanced" to decedent by plaintiff. It is conceivable that transactions may be had between partners, outside the business of the partnership, through which one may become indebted to the other on his personal obligation. This seems to have been what occurred here. The record includes a contract between respondent and decedent whereby the former undertook to drive a tunnel, at his sole cost and expense, in the mining property owned by decedent and decedent agreed to convey to respondent a one-half interest in the property upon completion of the tunnel. A deed to such interest was executed July 6, 1935. The account upon which appellant relies is headed: "Advances Made by F. B. Russi, For Account of Rossi & Russi In Development of Mine." Many of the items of the account appear to cover outlays of respondent to cover expenses which were incurred in the operation of the mining property. But there are also included numerous entries dating from July 6, 1935, to April 12, 1938, which appear as "advances" to Frank Rossi. These advances total $17,800 which is more than the amount of the judgment. It does not appear that respondent was at any time in charge of the operation of the property or that he had any part in the distribution of the income, if any. It is fair to infer that all these "advances" were made to the decedent from the personal funds of respondent.

[1-3] But, whatever inference we may draw from the meager record, the answer to appellant's argument is that the burden is on him to show error in the judgment, and that such burden is not sustained by reference to letters which show no more than that a partnership existed between decedent and respondent, and that some obligations were incurred by each of the partners as a result of the operations of the partnership. We must presume on the record before us that the finding of the trial court that the moneys represented in the judgment were "loaned and advanced" to decedent is supported by substantial evidence, and that, in all probability, these loans were made outside the business of the partnership.

[4] Another statement of the same proposition is that, where the evidence is not included in the record, the reviewing court will treat a finding of fact on a material issue as conclusive. 2 Cal.Jur. p. 689.

The judgment is affirmed.

GOODELL, J., and DOOLING, J. pro tem., concur.

EDWARDS v. HOLLYWOOD CANTEEN.*

Civ. 14742.

District Court of Appeal, Second District, Division 2, California.

June 8, 1945.

Hearing Granted Aug. 6, 1945

1. Theaters and shows 🔑9

A recreation center known as canteen, operated by corporation for entertainment of men in armed forces, with dance floor and orchestra as its principal features, was a "public dance hall", and a dance, during which a hostess employed by corporation was injured while dancing with a boisterous marine, was a "public dance", within city ordinance declaring any person permitting a boisterous or disorderly person to be in public dance hall or at public dance guilty of misdemeanor.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Dance" and "Public Dance Hall".

2. Theaters and shows 🔑9

Jitterbug dancing on crowded dance floor of armed forces recreation center by a marine, who violently forced hostess to perform dance perversions against her will and protest, constituted boisterous conduct, and such marine was "boisterous person" within city ordinance declaring any person permitting boisterous person to be in public dance hall guilty of misdemeanor.

See Words and Phrases, Permanent Edition, for all other definitions of "Boisterous Person".

3. Master and servant 🔑107(2)

A corporation, violating city ordinance by permitting a boisterous marine to remain in canteen operated by it for entertainment of men in armed forces and to conduct himself rudely and boisterously toward a hostess therein by jitterbug dancing with her against her wishes, was negligent in failing to provide her with safe place to dance or safe dancing partner, and hence liable in damages to her for injuries proximately contributed to by such violation.

4. Appeal and error 🔑1122(3)

On appeal from judgment for plaintiff pursuant to trial court's finding in her favor on only one of five charges of defendant's negligence, plaintiff's motion for new findings of ultimate facts by appellate court on ground that trial court's findings adverse to plaintiff were purely evidentiary and erroneous will be denied.

5. Appeal and error 🔑1071(5)

Where trial court's finding of single material act of negligence on defendant's part will support judgment for plaintiff, such court's failure to find for plaintiff on other issues is immaterial to decision, and appellate court is not concerned with whether trial judge disbelieved plaintiff's testimony or found against plaintiff from all evidence with respect to all issues except one.

6. Master and servant 🔑88(4)

A young woman, duly appointed by corporation's agent as junior hostess to entertain armed forces enlisted men without pay at recreation center operated by corporation, was "employee" of corporation within labor code, and hence entitled to recover damages from corporation for injuries sustained while dancing with a boisterous marine at such center. St.1937, pp. 202, 258, 261, §§ 350, 2750, 3000; Civ.Code, § 1550.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee".

7. Master and servant 🔑88(4)

One volunteering service without agreement for or expectation of reward may be a "servant" of one accepting such services.

See Words and Phrases, Permanent Edition, for all other definitions of "Servant".

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* Subsequent opinion 167 P.2d 729.

8. Master and servant 🔑88(1)

One may be a "servant" without having promised to give his service.

9. Master and servant 🔑88(1)

The relationship of "master and servant" may exist, though servant neither expects nor deserves compensation.

See Words and Phrases, Permanent Edition, for all other definitions of "Master and Servant".

10. Master and servant 🔑88(1)

To constitute a person an "employer", he need not actually exercise right of control over employee.

See Words and Phrases, Permanent Edition, for all other definitions of "Employer".

11. Master and servant 🔑88(1)

Whether injured person was acting as another's "servant" when injured depends on whether he was subject to employer's orders and control and whether employer had right of control over such person and might have discharged him for disobedience or misconduct.

12. Master and servant 🔑88(4)

A young woman's time, energies, and talents in entertaining servicemen at recreation center, operated by corporation employing her for such purpose, constituted good consideration for corporation's implied promises to exercise reasonable care in protecting her from injury in performing services. Civ.Code, §§ 1605–1607.

13. Master and servant 🔑88(4)

An employee, rendering gratuitous service for employer, is not deprived of right to be indemnified for losses caused by employer's want of ordinary care, though employee without contract of hire cannot recover industrial compensation under Workmen's Compensation Act. St.1937, pp. 202, 258, 267, 308, 309, §§ 350, 2800, 3351, 6400, 6401.

14. Master and servant 🔑203(1)

A hostess at armed forces recreation center did not assume risks of injury attendant on her employment. St.1937, p. 258, § 2801.

15. Master and servant 🔑101(1), 180½, 204(1), 265(14)

Negligence 🔑97

The fact that services of hostess at armed forces recreation center were performed gratuitously did not render inapplicable to her statutory provisions that injured employee's slight contributory negligence shall not bar recovery of damages from employer guilty of gross negligence, that employee whose injury was contributed to by employer's violation of law enacted for employees' safety shall be conclusively presumed not guilty of contributory negligence, that employee's assumption of risk of hazard complained of or fellow servant's negligence causing injury is no defense, and that employer must furnish safe employment and place of employment. St. 1937, pp. 258, 308, 309, §§ 2801, 6400, 6404.

16. Master and servant 🔑236(4)

A girl, injured as result of jitterbug dancing with boisterous marine in performance of her duties as hostess at servicemen's recreation center operated by her employer, was not guilty of contributory negligence, barring recovery of damages from employer, in failing to flee from marine promptly on discovering his zeal for boisterous behavior.

17. Workmen's compensation 🔑255, 2089

A girl rendering gratuitous services as hostess at servicemen's recreation center, instead of being employed for wages under contract of hire, could not recover compensation under Workmen's Compensation Act for injuries sustained while dancing with a boisterous marine, but was required to seek remedy under common law by action against her employer in superior court for damages. St.1937, pp. 265, 267, 269, 271, §§ 3202, 3351, 3601, 3706; Const. art. 20, §§ 17½, 21.

18. Workmen's compensation 🔑238

While payment of compensation for services is not necessary to render one a master, such payment is necessary to bring employee within Workmen's Compensation Act. St.1937, p. 267, § 3351.

19. Workmen's compensation 🔑238

While there may be contract service without stipulating wages, there can be no employee under Workmen's Compensation Act, unless wages are made criteria of compensation paid to injured employee. St. 1937, p. 267, § 3351.

20. Master and servant 🔑101(1)

While employee, not acting under contract for hire, is excluded from benefits of Workmen's Compensation Act so far as having her claim for compensation for injuries adjudicated by Industrial Accident Commission, but may seek recovery for her losses only in court of law, employer is not relieved from statutory obligation to provide such employee a safe place to work. St.1937, pp. 265, 267, 269, 271, 308, 309, §§ 3202, 3351, 3601, 3706, 6400, 6404.

21. Master and servant ⚿88(4)

An employee, not under contract for hire, does not forfeit common-law rights to compensation for injuries received in course of employment because of employer's negligence. St.1937, p. 267, § 3351.

22. Negligence ⚿97

An employee not under contract for hire is not denied benefits of statutory provisions that employee's recovery from employer for injuries suffered in course of employment shall not be barred because of employee's contributory negligence, where such negligence was slight and that of employer gross in comparison. St.1937, p. 258, § 2801.

23. Master and servant ⚿231(1)

An employee has right to assume that his employer has exercised amount of care demanded by circumstances in providing employee a safe place to work, though he is not under contract for hire. St.1937, pp. 267, 308, 309, §§ 3351, 6400, 6404.

24. Appeal and error ⚿1011(1)

In action for injuries to hostess while dancing with boisterous marine at servicemen's recreation center operated by corporate defendant, amount or degree of defendant's negligence, if any, was fact question for trial court, whose findings on conflicting evidence will not be disturbed on appeal from judgment for plaintiff.

25. Appeal and error ⚿931(1)

In action against employer for injuries to employee found free from negligence immediately before accident, appellate court must assume, on appeal from judgment for plaintiff, that trial court, in assessing damages, considered and was guided by applicable statutory provisions. St.1937, p. 258, § 2801.

26. Damages ⚿132(3)

An award of $5,000 damages for dislocated coccyx, wrenched vertebra, severe shock, and great pain and suffering, to young woman whose earning capacity as radio artist was impaired because of such injuries, was not excessive.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Florida Edwards against the Hollywood Canteen, a corporation, for personal injuries suffered at a recreation center operated by defendant. Judgment for plaintiff, and defendant appeals.

Affirmed.

Stanton & Stanton, of Los Angeles, for plaintiff and respondent.

Schell & Delamer, of Los Angeles, for defendant and appellant.

MOORE, Presiding Justice.

Plaintiff sued on account of personal injuries suffered by her at a recreation center operated by defendant. The court awarded her judgment in the sum of $5,000 general damages and for loss of earnings she was awarded the additional sum of $2,870.00. Despite the numerous assignments and voluminous briefs only two questions are presented for decision, namely, (1) whether plaintiff was an employee of defendant in operating the recreation center and as such entitled to recover for injuries suffered through the negligence of defendant in permitting a boisterous and disorderly man to dance with her in its dance hall, and (2) whether the superior court had jurisdiction of the action.

The defendant is a corporation organized for the purpose of maintaining a recreation center for men in the armed forces of the United States and to engage the services of competent women artists and professional dancers to assist defendants in furnishing entertainment to such enlisted men as might be admitted. Pursuant to its purpose the corporation established such recreation center in the heart of the Hollywood district of Los Angeles and it became known as the "Hollywood Canteen." Its principal feature was a dance hall with orchestra. Its hardwood dance floor was 33 by 50 feet. On each side of it were eight loose tables each of which was surrounded by three chairs for the accomodation of those partaking of refreshments. Adjacent to the west end of the dance floor was the stage, two feet above the floor. On its north side and at the east end were open aisles about five feet wide separating the dance floor from the "snack bar" and other quarters of the building.

About September 1, 1942, a group of 300 young women of the American Federation of Radio Artists volunteered to assist defendant in its canteen by acting as junior hostesses in the entertainment of the enlisted men. None received pay. Their efforts were rendered as a contribution to the war effort on behalf of the local entertainment industry. Every evening at the canteen they were engaged in dancing with the guests of defendant. Plaintiff regularly attended as a lieutenant of the junior hostesses and performed all duties assigned to her. While the canteen was estimated to accommodate only 500 men at one time, a system was established whereby groups of that number were successively permitted to enter with a view to the admission of all desiring to attend. To insure safety as to the personnel of the men each group before entering was inspected by members of the military police and of the shore patrol.

About 10:45 o'clock p. m. of October 31, 1942, while plaintiff was on the floor in the performance of her office a new group of service men was admitted. They promptly engaged in partaking of refreshments and in dancing with the young women. Fifteen minutes later plaintiff was introduced by another junior hostess to a marine who expressed his preference to dance with respondent. At the commencement of their dance together the marine began to perform the antics of the "jitterbug" without plaintiff's consent and against her wishes emphatically expressed. He executed queer, weird and unusual steps and figures. This performance continued "fast and furious" down the two sides and across one end of the dance floor while respondent protested to him and vainly screamed for help to be released. As they approached the stage at the east end the marine gave her a violent spin in which she slipped, struck the edge of the stage and fell in a sitting position to her serious injury.

For the purpose of charging defendant with liability for her injuries, plaintiff alleged the negligence of defendant in its conduct of the canteen in five respects, to-wit: (1) Maintained loose tables on the floor and permitted them to be pushed about thereby exposing the dancing couples to the hazard thereby created; (2) permitted its floors to be polished and covered with slippery substances to such extent as to make it dangerous to dance thereon; (3) granted to its guests the privilege of purchasing and imbibing liquors while in the canteen; (4) allowed a greater number of dancers on the floor than it could safely accommodate; (5) entertained rough and boisterous men who were careless in their treatment of junior hostesses. The court found contrary to all of the allegations except the last. It was determined that the dancing partner of plaintiff was a disorderly and boisterous marine and that his behavior was a proximate cause of the injuries.

As a predicate for such finding the court found from the evidence that the city of Los Angeles had in force at the time plaintiff received her injuries ordinances which made it a misdemeanor for any person "to permit any intoxicated, boisterous, or disorderly person to enter, be, or remain in or to assist in any such public dance hall, public dance or club dance." Ordinance 38456, Sec. 6; 41.34(b) Municipal Code.

[1-3] The court found that the canteen of defendant was a public dance hall and that the dance on the occasion of plaintiff's accident was a public dance. In such finding the court is fortified by universal usage and by legal decisions. Webster's International Dictionary; The Oxford English Dictionary; 50 C.J. 844, 845. Defendant had no invited guests but admitted any member of that part of the public included in the armed forces. While the court found that the excess of dancers on the floor was not a proximate cause of plaintiff's accident, nevertheless it determined that the dancing of the jitterbug by the marine on such a crowded floor constituted rough and boisterous conduct within the meaning of the city ordinances. That the "jitterbug" on a crowded dance floor, led by a boisterous man who with violence forces a dainty young lady against her will and protest to perform perversions of the terpsichore, is boisterous conduct and that he is a boisterous person is established by excellent authority. Boisterous is defined as violent; rough in operation; violent and rough in behavior; coarse in quality. The Oxford English Dictionary; Webster's International Dictionary. That defendant's violation of the cited ordinances proximately contributed to the fall of plaintiff and to the injuries she received is abundantly supported by the evidence. By thus violating city ordinances in permitting the marine to remain in the canteen and to conduct himself rudely and boisterously toward plaintiff contrary to her wishes defendant failed to provide plaintiff with a safe place to dance or with safe dancing partners and failed to do

everything reasonably necessary to protect her against injuries.

Inasmuch as the court below found respondent to have been free from negligence, in order for her to be entitled to recover it must be determined that she was an employee of appellant as defined by the law of this state. But before discussing that question we must dispose of an extraordinary demand of respondent.

Respondent's Demand

[4, 5] Respondent contends that the trial court erred in finding against her with respect to the four charges of negligence determined adversely to her. For a recorded demonstration of her disappointment, at the last moment she urged this court to make new findings of the ultimate facts upon the ground that those made by the court below were purely evidentiary. This motion will be denied. Where the finding of a single material act of negligence will support the judgment failure to find for plaintiff upon other issues is immaterial to the decision. French v. Freeman, 191 Cal. 579, 590, 217 P. 515. In such event the appellate court will not be concerned as to whether the trial judge disbelieved certain testimony offered by the respondent or found from all the evidence against respondent with respect to all the issues except one. See 24 Cal.Jur. p. 947.

Respondent Was an Employee of the Canteen

Prior to 1911 the relationship of master and servant was governed by the common law and the courts were the only agencies for the settlements of justiciable claims of employees against employers. In that year the legislature adopted the "Roseberry Act" "relating to the liability of employers for injuries or death sustained by their employees, providing for compensation for the accidental injury of employees, establishing an industrial accident board * * * defining its powers and providing for a review of its awards." Statutes 1911, p. 796. In 1913 a new law was enacted "to promote the general welfare * * * as affected by accident causing the injury or death of employees in the course of their employment, by creating a liability on the part of employers to compensate such employees * * * irrespective of the fault of either party * * * and creating a 'state compensation insurance fund' * * * providing for its administration * * * requiring safety in all employments and places of employment * * * and creating an industrial accident commission * * *." Statutes 1913, p. 279. That statute is commonly referred to as the "Workmen's Compensation Act." The evident purpose of the law was to create a method of insuring the wage earner and his family by a system of industrial insurance, and to establish a commission for determining the amount due and a means for enforcing its judgments. In 1915 and in 1917 the Act of 1913 was amended (Stats.1915, p. 1079; Stats. 1917, p. 832) in several particulars, and as amended it and the Roseberry Act defined all relationships of master and servant and governed all controversies arising out of claims for compensation due for injuries to employees "under any appointment or contract of hire * * *." Sec. 14 of Act of 1913; Sec. 6 of Act of 1917. The labor laws of California were thus delimited until the adoption of the Labor Code in 1937, St.1937, p. 185 et seq.

For the purposes of this discussion the Labor Code may be divided into two parts. Part one, comprising Divisions I, II, and III and embracing sections 1 to 3091 inclusive, includes the provisions of the Roseberry Act, defines the respective rights and duties of labor and industry, establishes the Industrial Accident Commission and prescribes rules for the government of immigrants, employment agencies, sanitation, etc. Divisions IV and V embrace the major portion of the Workmen's Compensation and Insurance Act," and include sections 3201 to 7601 inclusive. They have special reference to the compensation of the industrial classes under contract for hire, Labor Code, § 3351, for death or injuries suffered in the course of employment, insurance for their protection, methods of computing the amount of the liability of the employer or his insurance carrier, proceedings before the commission, safety, etc.

[6-11] Respondent's action was not founded upon the theory that she was an industrial employee and as such entitled to compensation. On the contrary she proceeded on the hypothesis that she was a gratuitous employee and therefore obliged to seek her remedy against appellant according to the common law. That she was an employee is clearly established by the Labor Code. Section 350 defines employee to mean "every person * * * rendering actual service in any business for an

employer, whether gratuitously or for wages * * *." Section 3000 defines a servant as one "employed to render personal service to his employer * * * and who in such service remains entirely under the control and direction of the * * * master." Section 2750 declares that a person is employed when he is engaged by another "to do something for the benefit of the employer or a third person." Such legislative declarations reflect the pronouncements of courts and text writers. One volunteering service without an agreement for or expectation of reward may be a servant of the one accepting such services (Restatement of Agency, Sec. 225), and one may be a servant without having promised to give his service. 39 C.J. 36. The relationship of master and servant may exist although the servant neither expects nor deserves compensation. Tucker v. Cooper, 172 Cal. 663, 158 P. 181. In order to constitute a person an employer it is not necessary that he actually exercise the right of control. 172 Cal. 668, 158 P. 181. The real test by which to determine whether a person is acting as the servant of another is to ascertain whether at the time of his injury he was subject to the orders and control of his employer, whether the employer had the right of control, and whether he might discharge the employee for disobedience or misconduct. Press Publishing Co. v. Industrial Accident Commission, 190 Cal. 114, 210 P. 820; Hillen v. Industrial Accident Commission, 199 Cal. 577, 581, 250 P. 570; Fearn v. Ralph Hamlin, Inc., 215 Cal. 211, 214, 8 P.2d 1015; Berkowitz v. Pelton, 9 Cal.App. 2d 80, 81, 48 P.2d 756.

[12] That a contract of employment existed between respondent and appellant is established also by section 1550, Civil Code. Both parties were capable of contracting. Respondent consented to perform a service required by appellant's business. The corporation accepted her service performed under the eye of its manager. The entertainment of the service men was a lawful object of the contract. Civil Code, 1607. It was supported by a sufficient consideration. Civil Code, 1605. Respondent's time, energies and talents in entertaining the service men were conferred upon defendant to its benefit and were a good consideration for the implied promises of appellant to exercise reasonable care in protecting her from injury. Civil Code, 1606.

[13, 14] The trial judge could hardly have found that respondent was not subject to appellant's orders. Surely, she would have been properly discharged upon her refusal to comply with the rules of the canteen. It is equally clear that if respondent had sought industrial compensation through the commission she would have been required to prove that she was serving under an "appointment or contract of hire * * *." Labor Code, 3351. Having no "contract of hire" her cause must rest upon the fact of her rendering actual service gratuitously for her employer. Sec. 350.

But such gratuitous service does not deprive the employee of her right to be indemnified for her losses caused by her employer's want of ordinary care, Sec. 2800, and in an action by an employee for damages for a personal injury suffered "while engaged in the line of his duty or the course of his employment * * * contributory negligence shall not bar a recovery" where such negligence is slight and that of the employer is gross, but "it shall be conclusively presumed that such employee was not guilty of contributory negligence in any case where the violation of any law enacted for the safety of employees contributed to such employee's injury." Sec. 2801. It is no defense that the employee assumed the risk of the hazard complained of or that his injury was caused in whole or in part by the want of ordinary or reasonable care of a fellow servant. Id. While the court found that respondent was not negligent immediately before the happening of the accident, appellant contends to the contrary and insists that she assumed the risks attendant upon her employment. The last cited sections definitely dispose of such contention. In addition to the employee's exemption from the defenses named in section 2801, his safety is further secured by section 6400 which requires the employer to furnish safe employment, while by section 6404 no employer shall "maintain any place of employment that is not safe."

[15] Appellant contends that the quoted sections are not applicable because the services of respondent were gratuitously performed. In support of that contention it cites Gabel v. Industrial Accident Commission, 83 Cal.App. 122, 256 P. 564; Los Angeles County v. Industrial Accident Commission, 123 Cal.App. 12, 11 P.2d 434;

Campbell on Workmen's Compensation Insurance; Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 814, 159 P. 721; Flickenger v. Industrial Accident Commission, 181 Cal. 425, 184 P. 851, 19 A.L.R. 1150. These authorities do not support appellant. In the first cited case Gabel ws held liable by the Commission for industrial injuries suffered by his neighbor who was burned while assisting Gabel to fight a fire and who customarily exchanged services with him. In the case of County of Los Angeles, the heirs of a deputy marshal were awarded compensation for his death because he was killed while engaged in apprehending a person engaged in a felonious assault, although the act occurred after the usual work hours of the decedent. In the Flickenger and Pillsbury cases the award against the defendant in each instance was annulled because the only evidence bearing upon the relationship of the applicant and the defendant for compensation showed that the applicant was an independent contractor. The quotation from Mr. Campbell's work is the declaration of a broad principle applicable to cases where industrial compensation is sought. The cases cited by appellant originated with the Industrial Accident Commission in proceedings to recover industrial compensation under Division IV of the Labor Code where the employee was under contract of hire. Sec. 3351.

That Miss Edwards was duly appointed to her position by the agent of appellant is not denied. That her services were accepted and that she was dealt with as an employee is amply established. She had a fixed time to appear, designated hours to work, a definite shift on which to serve and a specified hour for her departure. She registered on the rolls prescribed by appellant and conducted herself in the manner defined by the management. Her work was a part of the very business of the defendant in maintaining "a place of recreation for the men in the armed services" as provided by its articles of incorporation, which business was also "to direct, assign, and regulate the activities" of persons retained to assist in the recreation of soldiers, sailors and marines. In view of the foregoing the conclusion is inescapable that respondent was an employee of appellant and that the proximate cause of her injuries was the negligence of appellant in permitting a boisterous person to be and remain in the canteen and to dance with respondent.

[16] There is no merit in appellant's contention that respondent was negligent in not fleeing from the jitterbugging marine promptly on discovering his zeal for boisterous behavior. Her conduct evidently impressed the trial judge as that of a reasonably cautious young woman who while ready to resent an affront held in high regard the reputation of the house and the happiness of men in the armed service. The canteen was widely acclaimed and enjoyed extensive publicity. It was favorably known to all men of the fighting forces encamped in Southern California. Much effort was exerted to add glamour and attraction to the place. On the very evening of respondent's tragedy the music was provided by an orchestra leader of international fame. Rash indeed would it have appeared to the management as well as to the soldier guests had respondent in time of war suddenly withdrawn from the revelry of a scene in which the prevalent colors were those of the uniforms of service men and the predominant tones were the melodies of patriotic airs. As a reasonably prudent young woman, with due regard for the welfare of her master and for its reputation for hospitality, she was naturally restrained from abrupt action by a consideration of the proprieties.

The Superior Court had Jurisdiction

[17] Appellant contends that if respondent was a servant of appellant then her remedy of necessity must be pursued before the Industrial Accident Commission and not by action in the superior court. The fallacy of this contention will instantly appear upon a consideration of the nature of the relationship between respondent and plaintiff. The Roseberry Act and all subsequent statutes included in the Labor Code were designed to provide a complete system of workmen's compensation and an effective remedy for the servant as against the master in the case of the latter's negligence occurring during the course of the employment. But these statutes regulate the industrial life of the state with reference to losses sustained by workers due to death or injuries suffered in the course of employment. They require that industry maintain a sound economy in the preservation of its manpower. A primary purpose of the Roseberry Act, The Workmen's Compensation Act and their kindred supplemental provisions in the Labor Code was to effect an immediate arbitration without the "law's delays" of claims of

workmen arising in industry. But recovery of compensation by an injured employee in industry must be based upon the rate of pay he received "under * * * contract of hire." Statutes 1913, p. 284; Labor Code, § 3351. There has been no modification of the word employee as there defined. Consequently, he is entitled to the benefits of "Workmen's Compensation and Insurance Act." Division IV. Labor Code, secs. 3202, 3601, 3706; Constitution, Art. XX, secs. 17½ and 21. In the industrial field wages or salary are the criteria of compensation to be awarded to injured employees by the Industrial Accident Commission. Western Indemnity Co. v. Pillsbury et al., 172 Cal. 807, 159 P. 721. Unless, therefore, a person is employed at a wage under a contract for hire there is no basis for computing his compensation in event of his injury in the course of his employment. Respondent not having been so employed, she had no standing before the Industrial Accident Commission.

It follows, in view of the ancient rights of the servant to recover for the negligence of his master under the common law, that a servant working gratuitously must seek his remedy by judicial process. Smith v. Adler's Millinery, 122 N.J.L. 236, 4 A.2d 782; Coviello v. Industrial Commission, 129 Ohio St. 589, 196 N.E. 661; Hollowell v. North Carolina Department of Conservation and Development, 206 N.C. 206, 173 S.E. 603; Kirk v. Department of Labor and Industries, 192 Wash. 671, 74 P.2d 227; Georgia Ry. & Power Co. v. Middlebrooks, 34 Ga.App. 156, 128 S.E. 777.

[18, 19] While paying is not necessary to render one a master, yet paying is necessary to bring an employee within the workmen's compensation act. Georgia Ry. & Power Co. v. Middlebrooks, supra. Such employee is one who works for wages and the right to demand pay for his service is essential to his right to receive compensation under the workman's compensation act in event of injuries sustained by accident in the course of his employment. Hollowell v. North Carolina, Department of Conservation and Development, supra. While there can be a contract of service without stipulating wages, there can be no employee under the workman's compensation act unless wages are made the criteria of compensation paid to the injured employee Coviello v. Industrial Accident Commission, supra.

[20-25] Inasmuch as respondent was an employee not acting under a contract for hire, she was entitled to seek recovery of her losses only in a court of law. While she is excluded from the benefits of Divisions IV and V of the Labor Code so far as having her claim adjudicated by the Industrial Accident Commission, at the same time there is no language of the Labor Code that releases her master from the obligation to provide her a safe place to work. Labor Code, 6400. Because an injured employee is not under a contract for hire he does not for that reason forfeit his common law rights to compensation for injuries received in the course of his employment by reason of the negligence of his employer. Neither is he denied the benefits of those provisions which declare that an employee's recovery against his employer for injuries suffered in the course of employment shall not be barred by reason of contributory negligence, "where his contributory negligence was slight and that of the employer was gross, in comparison." Labor Code, § 2801. Also, he has the right to assume that his employer has exercised the amount of care demanded by the circumstances in providing a safe place to work. Metz v. Southern Pacific Co., 51 Cal.App.2d 260, 270, 124 P.2d 670; Crabtree v. Western Pacific R. Co., 33 Cal.App. 2d 35, 43, 90 P.2d 835; Devaney v. Atchison, T. & S. F. R. Co., 219 Cal. 487, 497, 27 P.2d 635. While these cases arose under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., they are authority here by reason of the similarity of the language of that statute to section 2801 of the Labor Code. The amount or degree of respondent's negligence, if any, was a question of fact for the trial court, and its findings upon conflicting evidence will not be disturbed. Bellman v. San Francisco H. S. District, 11 Cal.2d 576, 581, 81 P.2d 894; In re Estate of Winzeler, 42 Cal.App.2d 246, 108 P.2d 720. Having found respondent free from negligence immediately prior to her accident, we are obliged to assume that in assessing the damages the trial court considered the provisions of section 2801 and was guided thereby. Metz v. Southern Pacific Co., supra, 51 Cal.App.2d at page 270, 124 P.2d 670.

No Error in Fixing the Damages

[26] No error appears in the court's evaluation of the damages suffered. For a dislocated coccyx, a wrenched vertebra, severe shock and great pain and suffering

the finding justifies the award of $5,000 where the victim is a young woman whose earning capacity was by reason of the negligence impaired. The amount of special damage was fixed by the evidence.

The motion to have the court make findings favorable to respondent on all issues is denied.

The judgment is affirmed.

W. J. WOOD and McCOMB, JJ., concur.

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69 Cal.App.2d 737

PEOPLE v. JOHNS.

Cr. 634.

District Court of Appeal, Fourth District, California.

June 26, 1945.

1. Criminal law 🔑620(2)

A defendant, who proceeded to trial without objection to consolidation with another prosecution against another defendant arising out of the same alleged offense, could not, upon resting his case, urge for the first time that error occurred in ordering consolidation. Pen.Code, § 954.

2. Robbery 🔑24(1)

Evidence that defendant and another took a billfold containing money and gas ration coupons from the possession of a third party by force sustained conviction of defendant for robbery. Pen.Code, §§ 950–952.

3. Robbery 🔑17(1)

Information charging that defendant took personal property consisting of gasoline ration coupons and money from the person and presence of a named party, against his will by force and fear, sufficiently charged the offense of robbery, notwithstanding failure to plead ownership of the property. Pen.Code, §§ 950–952.

4. Criminal law 🔑1167(1)

In prosecution for robbery, where the evidence established that property taken was not the property of defendant and the court instructed that evidence that personal property was taken from the person or immediate presence of another without his consent and by means of force and fear does not necessarily prove that a robbery was committed but that the evidence must show a felonious intent to steal, failure to allege in information that property taken was the property of one other than defendant was not prejudicial error. Pen.Code, §§ 950–952.

5. Criminal law 🔑511(4)

Evidence as to defendant's possession of the stolen property, accusatory statements made to and the silence of defendant, and testimony of complaining witness, was sufficient corroboration to warrant conviction of robbery on the testimony of accomplice. Pen.Code, §§ 950–952.

6. Criminal law 🔑742(2)

Where there was dispute as to witness' complicity in robbery charged and the court fully instructed as to the law governing the situation, question whether witness was an accomplice was properly left to the jury.

7. Criminal law 🔑507(1)

A person jointly charged is not as a matter of law an accomplice where there is a dispute as to the witness' complicity.

8. Criminal law 🔑1186(4)

In prosecution for robbery, where the court gave an instruction in the language of statute defining an accomplice, with respect to corroboration, and instruction requested was but a reiteration of the instruction given, defendant was not prejudiced. Pen.Code, § 1111; Const. art. 6, § 4½.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Henry Lee Johns and another were convicted of robbery, and the defendant named appeals.

Affirmed.

Joseph Seymour, of Riverside, for appellant.

Robert W. Kenny, Atty. Gen., and John Neblett, Dist. Atty., and H. M. Dougherty, Deputy Dist. Atty., both of Riverside, for respondent.

GRIFFIN, Justice.

Defendant and appellant Henry Lee Johns was originally charged jointly with defendant Hiram Goodwin with the crime of robbery. It is alleged in the information that on September 10, 1944, they did unlawfully "take personal property, to wit: gasoline ration coupons, and approximately twelve (12) Dollars, lawful money of the United States from the person and immediate presence of Doyle W. Copeland, said coupons and money being then and there in the possession of Doyle W. Copeland, and said taking being against the will of Doyle W. Copeland and accomplished by means of force and fear." Defendants were duly arraigned on the charge. Defendant Johns's attorney demurred to the information and moved to set it aside on the grounds that the facts stated therein did not constitute a public offense, did not comply with sections 950, 951 and 952 of the Penal Code, and that the evidence taken at the preliminary examination was insufficient to hold the defendants to answer on the charge specified. The motion was denied and the demurrer overruled. A motion was made by defendant Johns for a separate trial. This motion was also denied. Defendant Floyd Tatum was later charged in a separate information with the same crime growing out of the same claimed robbery. It alleged the robbery to have occurred on September 11, 1944. After his arraignment and plea of not guilty the district attorney moved to consolidate the two cases for trial. The motion was granted. On the day of the trial the district attorney moved to amend the information to change the alleged date of the robbery from the 10th to the 11th day of September. Over objections, the court ordered the information amended. Counsel for Johns then moved to continue the matter for the purpose of again filing a motion to set aside the amended information and for hearing the demurrer thereto. The motion was denied. On the day fixed for the joint trial of all of the defendants no objection was made to such joint trial. A jury was selected and accepted by counsel for each defendant. After the People rested their case defendants Johns and Goodwin refused to testify. They rested and moved for a directed verdict of not guilty. One of the grounds was that neither Johns nor his counsel were present when his case was consolidated with Tatum's case for trial and that he (defendant Johns) did not consent thereto. The motion was denied. This is the first objection made by defendant Johns to such consolidation. This is one of the points raised on this appeal. In support thereof he cites People v. Davis, 42 Cal.App.2d 70, 108 P.2d 85, and People v. Duane, 21 Cal.2d 71, 130 P.2d 123.

After trial, the jury returned a verdict of guilty of robbery of the second degree as to defendants Johns and Goodwin and a verdict of not guilty as to defendant Tatum. Defendant Johns appealed.

The charge against the defendants was for the same crime, committed on the same day, and all growing out of the same transaction. Section 954 of the Penal Code vests in the trial court the discretion of ordering consolidated for the purpose of trial two or more indictments where the offenses are of the same class.

[1] In People v. Aguinaldo, 3 Cal.App.2d 254, 39 P.2d 505, it was held that a consolidation of two separate informations against different defendants was error but that the error was one of procedure and therefore Section 4½ of Article VI of the Constitution had application. That case was followed by People v. Shepherd, 14 Cal.App.2d 513, 58 P.2d 970, which case involved different defendants separately charged with the same offense. There, no objection to the consolidation of the trials was made and the appellate court reached the same conclusion. Assuming the objection here made to be in proper form, it comes too late to be considered on this appeal. The objection was first made 3½ days after the trial had commenced. It is urged that since defendant Tatum elected to take the stand and testify, and because statements made by Tatum to the officers and court reporter were admitted in evidence, which statements involved the other defendants in the case, it was error to consolidate the cases. The trial court, on five different occasions, admonished the jury that any statements made by a defendant, not in the hearing of his co-defendant, was not binding upon the latter. An examination of the record in the instant case discloses the trial court did not abuse its discretion in making the order of consolidation. Each defendant had a fair and impartial trial. It is clear that the consolidation of the two cases for trial was not prejudicial error. A defendant should not be allowed to proceed to trial without any objection to consolidation and

then, upon resting his case, urge for the first time that an error occurred. The cases cited by defendant are factually different and have no application here.

The next point involves the sufficiency of the evidence to support the verdict and judgment. We will therefore give a resume of the facts established by the evidence supporting the verdict.

The complaining witness, Copeland, testified that he had worked for an oil company as truck driver; that on September 11, 1944, he made deliveries to a Mr. Wallace of gasoline and received "T" and "R" ration stamps therefor. Twenty-six "R" stamps were identified as being a part of the stamps received, which bore Wallace's signature. He then testified that a "C" ration book was personally issued to him; that on that day he went to Checkies Cafe at about 8 p. m. and that he had not checked in the ration tickets which he obtained from Wallace but that he had them with him in his wallet in his hip pocket; that he had with him other ration stamps representing six or seven hundred gallons, consisting of "A," "T" and "R" stamps; that he went into Checkies Cafe and had a beer and while drinking it he talked to a man whom he did not know but identified him as being the defendant Johns; that he bought Johns a beer and took the money out of his wallet where the coupons were; that he and Johns then left Checkies Cafe and went to Danny's Cafe, arriving there about 9 p. m.; that while there both men went out and sat in a car owned by Floyd Tatum; that in this car was Copeland, Johns, and Tatum; that Johns and Tatum wanted to buy some gasoline coupons and that he told them if they would buy him a drink he would sell them some; that Johns thereupon went into the cafe and brought out a glass of wine which the witness consumed; that he then told Johns and Tatum that he would have to have another drink before he would sell any stamps; that an argument then ensued and he stated that if they were going to argue all night he was going home; that he then got out on the right-hand side of Tatum's car and walked over to his car, which was parked eight or nine feet away and started to get in; that he (Copeland) then felt three blows, which knocked him down, one blow striking his mouth, causing it to be split and cut; that while he was on the ground he raised up and heard a motor racing and mentally took note of the license number of the car, which drove away; that he thought the license number was 1-T 1124, or 42, and he told the police officers he might have the numbers shuffled; that he thereupon drove to the police station and made a report; that while at the police station he discovered that two wallets and his watch were missing. In one wallet he had his "C" gasoline ration book and other personal papers; that he carried his wallet and billfold in his left pocket; that in the other wallet he had between eight and eleven dollars, the company's ration stamps, his operator's license, and military pass; that all of his property was taken from him against his will and by force; that he had started drinking that day after 5 p. m. He admitted that at 8 p. m. he was under the influence of liquor. He denied receiving $5 which Floyd Tatum claims he paid him for the gasoline stamps. He further stated that he did not know which one had hit him as he was getting into his car and someone pulled him out and struck him to the ground; that he told the officers that he believed that there were two colored men and a soldier present at the time of the robbery; that he remembered seeing one of his billfolds when he was in the cafe and remembered putting it back in his pocket; that he remembered seeing the other billfold earlier in the evening when he bought some gasoline. Copeland further testified that the night before the trial he received a telephone call from the defendant Johns who told him "Just to get on the stand here and say nothing."

A police officer testified that he saw Copeland at 10 o'clock in the evening at the police station on September 11; that when he saw him there were blood marks on the front of his shirt and his upper lip was swollen quite a bit; that there were marks of blood on the end of his nose and a couple of scratches on his face.

Another officer testified that he went over to Danny's Cafe in the police car and rode around in the vicinity; that he saw a maroon colored car traveling toward them containing the numbers and letter of 1-T 12; that he commanded the car to stop but instead of stopping it speeded up and continued south for a distance of 40 yards; that it then turned into an alley and went west; that he pursued it but was unable to find it; that later an officer returned and found a black fender pant in the alley where the maroon car was traveling; that a short time later the officers observed a dark maroon car parked which had a right fender pant of the same color and description missing; that the license number of that car was 1–T 1242; that the officers went to the Tatum home; that just as they arrived at the house the front door slammed and a man came out; that they turned the flashlight on him and at the point of a gun told him not to move; that this man was the defendant Henry Lee Johns; that the officer then ordered Johns to the police car and placed him in the rear seat with Copeland; that an officer then went in the house and found Floyd Tatum changing his shirt; that from the house the two officers and Tatum went to the police car; that as the parties left in the police car Tatum was seated in the middle of the front seat. In the back seat was Copeland and Johns.

One officer testified that Johns turned to Copeland and out of a clear sky said: "You know I wasn't the one that hit you. You know Damn well I didn't hit you"; that after arriving at the police station all of the parties left the car and went inside; that Johns was searched and there was taken from his left-hand shirt pocket a gasoline ration book which was issued to Copeland; that after the officer took the gasoline ration book, Copeland looked at it and said, in Johns's presence: "This is my gas ration book, my personal coupon book"; that Copeland then looked at Johns and said: "You said you weren't up there, you didn't have anything to do with this * * * what are you doing with my gas coupon book in your pocket?"; that to this accusation Johns did not say a word. The officer testified that in his opinion, when he saw Copeland, that Copeland was sober. After the ration book was found on Johns's person, an officer testified that Copeland said in Johns's presence that Johns was the man who struck him three times; that when this accusation was made Johns did not reply to the statement.

Another police officer testified that when he went to the home of Tatum he told Tatum that he was wanted on suspicion of being involved in a strong-armed robbery; that Tatum told the officer that he did not know anything about it.

A detective lieutenant testified that on October 17, 1944, he went to the Tatum house after having had a conversation with Tatum in the police department; that in the conversation Tatum had first said that he did not know where the stamps were but that he later admitted he had the gasoline stamps at home and said that he had given them to his brother; that these stamps were later produced by his brother and delivered to the police officer; that these stamps were the twenty-six "R" stamps bearing the name of Wallace. The officer then testified that after the stamps were recovered, a statement was taken from Tatum in which he stated that he and Goodwin went to Danny's Cafe; that while they were in the cafe Johns came in with Copeland and that Johns motioned to him and said: "This man has got some stamps; let's get them"; that Goodwin said: "I will hit him"; that Copeland, Johns and Tatum then left the cafe and went to the Tatum house where Tatum procured $5 and that all the men then returned to Danny's Cafe; that when they returned, Goodwin was standing outside of Danny's Cafe; that later Copeland said: "I am going home"; that he started to get in his car; that Tatum saw Goodwin and Johns wrestling with Copeland on the ground but did not see whether or not a billfold was taken at that time; that after they had driven away from Danny's Cafe they parked the car, and the stamps were divided among Tatum, Johns and Goodwin; that later in the evening they saw the police car and made a get-away through the alley; that on the afternoon of September 12, another statement was taken from Tatum, at which time Tatum changed his story by stating that he saw Johns and Goodwin wrestling with Copeland on the ground, and that at that time the men got in his car and it was then that he saw a billfold with some gasoline ration coupons; that he (the detective lieutenant) later located Goodwin and placed him in custody.

The official reporter for the preliminary examination of Floyd Tatum testified that at said examination Tatum said that he saw defendant Johns at the cafe; that Johns told him that Copeland had some gasoline stamps and that Goodwin then stated "We" or "I, will have to hit him"; that later Goodwin hit Copeland three or four times and knocked him down; that Johns reached into Copeland's pocket and took his billfold and they all got into Tatum's car and drove away.

A deputy sheriff testified that a statement was taken from defendant Goodwin to the effect that on September 11, he and Tatum entered the cafe at 8 p. m.; that

Tatum left and said he would be back; that on his return Tatum said to Goodwin: "Come on, this fellow (Copeland) has a lot of gas stamps"; that Goodwin then went over to the car with Tatum; that after some discussion in the car he saw Tatum strike Copeland and then say: "Come on, I have his wallet"; that they divided the stamps among the three, drove to Johns's house, and asked if he should bring a gun but that Goodwin and Tatum advised against it; that they returned to the cafe and saw the police car and Tatum "stepped on it" and drove down the alley; that Goodwin then went to Los Angeles and was apprehended a few days later in that city. The officer then testified that Goodwin was brought back later and made another statement saying that his previous statement was true except that he, Goodwin, struck Copeland after Tatum did.

Witnesses for the defense offered considerable testimony indicating that Copeland was quite intoxicated; that he was endeavoring to dispose of gasoline stamps by sale to several other people; that he was acting disorderly in the drinking place; that defendant Johns was elsewhere on the night of September 11th between 8:30 and 10:15 p. m.; and that witnesses had heard Copeland say that he had given the "C" ration book to Johns.

James Tatum, brother of defendant Floyd Tatum, testified that he was in the cafe on September 11 and saw his brother, Johns and Copeland leave the cafe; that his brother told him he was going home to get some money; that later James returned home and saw the police car leaving; that he went to the police station and heard Copeland say that Floyd Tatum did not hit him as he was too small; that some time later Floyd gave him (James) an envelope and told him to keep it; that the envelope contained twenty-six "R" gasoline stamps and that he returned the stamps to the officer.

The defendant Tatum testified in his own behalf; that he was 18 years of age; that on September 8th he injured his hand and that on the morning of September 11th his hand was swelling up and that on that date he went to the doctor; that on the evening of September 11th he saw defendant Goodwin, took him to the cafe, and that while there Johns and Copeland came in and they all had a conversation; that Johns asked Tatum if he wanted to buy some gasoline stamps; that Goodwin and Johns called Tatum over and said: "This guy had a lot of gas stamps * * *. We ought to hit him," and that to this Goodwin responded: "I will hit him"; that the three then left the cafe, went to Tatum's house and procured $5 and returned; that while at the cafe Tatum gave Copeland $5 for the tickets; that some argument ensued and that Johns told Copeland to give Tatum his money back or the stamps; that Copeland got out of the car, walked over to his car, and that Goodwin jumped out and hit Copeland; that at that time Johns got Copeland's billfold out of the back pocket of his trousers; and that they jumped in Tatum's car and later stopped and divided the gasoline stamps among them.

[2] If believed by the jury, the evidence, both circumstantial and direct, fully supports the verdict and judgment.

The next point to be considered is whether the offense of robbery is sufficiently pleaded in the information by reason of the failure to plead ownership of the property claimed to have been taken.

Defendant relies principally upon People v. Cleary, 1905, 1 Cal.App. 50, 81 P. 753, where it was held that an indictment charging robbery in taking money forcibly from the person of another, which did not allege ownership of the money taken in some person other than the defendant is insufficient and entitled defendant to an arrest of judgment. Several such cases are cited in 22 Cal.Jur. p. 848, sec. 14. Since those decisions, secs. 951, 952 and 960 of the Penal Code have been amended. Stats.1927, p. 1043; Stats.1927, p. 1065; Stats.1929, p. 303.

In People v. Summers, 1930, 107 Cal.App. 250, 290 P. 464, this question was considered. There the defendant was charged as follows: That "on or about the 17th day of April, 1929, * * * they robbed J. H. Brown, etc." The indictment was held sufficient to support the verdict of conviction on the charge of robbery under sec. 951, as amended in 1927. See, also, People v. Fallai, 1929, 99 Cal.App. 297, 278 P. 449; People v. Sampsell, 104 Cal.App. 431, 286 P. 434.

In People v. Sampson, 99 Cal.App. 306, 278 P. 492, it was held that where there was no doubt, either from the averments of the information or from the evidence, as to the identity of the property taken, and it was proved at the trial that the property belonged to the prosecuting witness, the failure of the information to allege the name of the owner of the property was immaterial under section 956 of the Penal Code, as amended in 1927.

In People v. Covington, 1 Cal.2d 316, 34 P.2d 1019, it was held that in a prosecution for robbery, there is a sufficient compliance with section 952 of the Penal Code if the statement of the offense is in the words of the enactment describing the offense or in any words sufficient to give the accused notice of the offense of which he is accused. To the same effect is People v. O'Neal, 2 Cal.App.2d 551, 38 P.2d 430.

[3, 4] We are satisfied that the information here stated a public offense and that the evidence clearly established that the property taken was not the property of the defendant. In addition, it should be here noted that the trial court gave an instruction, at the request of the defendant, to the effect that "proof of the commission of a robbery requires proof of a voluntary intent to steal personal property. Evidence that personal property was taken from the person or immediate presence of another, without his consent, and by means of force and fear, does not necessarily, as a matter of law, prove that a robbery was committed. The evidence must show a felonious intent to steal." We cannot see how defendant can claim prejudicial error by failure to allege in the information that the property taken was the property of the complaining witness or of one other than the defendant.

[5] Defendant Johns's argument that the testimony of defendant Tatum was not corroborated is equally untenable. It has been repeatedly held that possession of stolen property may be sufficient corroboration to warrant a conviction on the testimony of an accomplice. People v. Rice, 29 Cal.App.2d 614, 620, 85 P.2d 215. The accusatory statements made to and the silence of defendant, possession of the stolen property, the testimony of the complaining witness, and circumstances above related, were sufficient to corroborate the testimony of the co-defendant Tatum. People v. King, 40 Cal.App.2d 137, 141, 104 P.2d 521. The jury acquitted the co-defendant Tatum. It cannot be said, as a matter of law, that he was an accomplice.

[6, 7] Defendant's argument that the trial court refused to instruct the jury, as a matter of law, that Tatum was an accomplice, but left that question to the jury, is without merit. The jury had the right, either to believe or disbelieve his statements, and having been fully instructed as to the law governing the situation, the presumption must be that it performed its duty conscientiously in rendering the verdict, which in substance declared its belief in the truthfulness of Tatum's testimony. People v. Frahm, 107 Cal.App. 253, 290 P. 678; People v. Howell, 69 Cal.App. 239, 243, 230 P. 991. A person jointly charged, is not, as a matter of law, an accomplice, where there is a dispute as to the witness's complicity. People v. Truax, 30 Cal.App. 471, 158 P. 510; People v. King, 30 Cal. App.2d 185, 197, 85 P.2d 928.

[8] Lastly, defendant complains because the court refused to give certain of his instructions and gave one of the people's instructions. The court gave an instruction in the language of section 1111 of the Penal Code, defining an accomplice. The given instruction complained of is but a reiteration thereof and does not incorrectly define an accomplice, to defendant's prejudice. People v. Howell, 69 Cal.App. 239, 244, 230 P. 991.

Fifteen of defendant's refused instructions are involved in this complaint. They concern the question of the duty of the jury in weighing the evidence, the credibility of witnesses, an instruction that gasoline coupons are not property and have no value recognized by law, the necessity of showing that the money alleged to have been taken was not the property of the defendants and that it was illegal to sell gasoline coupons to defendants.

We have thoroughly examined the instructions, both given and refused. We are firmly convinced that the subject matter has been fully covered by other instructions or that they are not applicable or that they are an erroneous statement of the law as applied to the facts in the instant case. No prejudicial error appears in the instructions, given or refused, or in the entire proceedings which should result in a reversal of the judgment.

Judgment and order affirmed.

BARNARD, P. J., and MARKS, J., concur.

70 Cal.App.2d 134

CORODEMUS et ux. v. BORDEN et al.

Civ. 3372.

District Court of Appeal, Fourth District, California.

July 10, 1945.

Principal and agent ⚿175(1)

Any lack of authority of agent to deliver deed to other parties to an exchange of properties was immaterial, where principal thereafter ratified the delivery and treated the exchange as valid until after innocent third persons had acquired the property covered by such deed from the grantees, who also had made the exchange in good faith.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action to quiet title by George Corodemus and Lois Corodemus, husband and wife, joint tenants, against Florence Borden and others, wherein the defendants Florence Borden Lang and Sidney O. Lang filed a cross-complaint to quiet title and for an accounting against L. G. Wesley, Jesty A. Wesley, Dominic Gross, Ottilia Gross, W. S. Harris, and Lawrence Holzman. From a judgment quieting title in the plaintiffs, and denying any relief to the cross-complainants, such defendants and cross-complainants appeal.

Judgment affirmed.

Joseph E. Daly, of San Diego, for appellants.

George R. Baird, John T. Holt, Luce, Forward, Lee & Kunzel, and Wright, Thomas & Dorman, all of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action to quiet title to certain real property in Oceanside, improved and used as a hotel.

This property was acquired by Sidney O. Lang in October, 1938, and conveyed by him to Florence Borden in January, 1939. These parties worked together in the transactions here involved and were married April 1, 1941, and for convenience Florence Borden will be referred to as Mrs. Lang. This property was incumbered with mortgages and assessment liens, with certain payments long overdue, and early in 1940 the Langs advertised it for sale in several papers and then became interested in trading their equity for farm land in Imperial County. W. S. Harris, a real estate broker, became their agent in an attempt to accomplish this purpose.

On April 14, 1940, Mrs. Lang signed a written offer in which she offered to exchange the hotel property, subject to incumbrances to be adjusted to $5000, for certain real property near El Centro owned by Dominic Gross, subject to incumbrances of $3000. This offer had attached to it a form of acceptance to be signed by Gross. Gross rejected the offer and refused to sign the acceptance, although the date of his rejection does not appear.

About this time Harris approached the Wesleys, who agreed to exchange three parcels of land near Alpine which they owned, together with a $2000 note and trust deed covering adjoining property, for Mrs. Lang's equity in the Oceanside property. On April 18, 1940, the Langs, Harris and the Wesleys met in Oceanside where certain instruments were executed. It clearly appears that the Wesleys knew nothing of the proposed Gross deal and that they were trading the Alpine trust deed and the Alpine realty for Mrs. Lang's equity in the Oceanside property. The Langs testified that they knew that the Wesleys were taking over the Oceanside property and that some sort of a three-way deal was being worked out by Harris. This is borne out by what was done then and later, but the Langs' further contention that they understood that their deal with the Wesleys was not to be effective unless and until their deal with Gross was consummated is not so well supported.

On that day, April 18, Mrs. Lang signed and acknowledged a grant deed conveying the Oceanside property, subject to incumbrances of record, to the Wesleys. Wesley and Harris testified that after it was signed and acknowledged Mrs. Lang handed this deed to Wesley. The Langs testified that after it was acknowledged Harris put the deed in his pocket. In any event, before these parties left the notary's office, and without the knowledge of the Wesleys, Harris gave to Mrs. Lang a paper acknowledging his receipt of this deed "to be used as per agreement dated April 14th, 1940." There also appears on the bottom of the written offer to exchange properties with Gross, above referred to, a notation written in longhand dated April 18, addressed to Harris and signed by Mrs. Lang, which reads: "I herewith hand to you a deed from Florence Borden to L. G. Wesley and Jesty A. Wesley which you are *arthraused* to use when you can comply with above agreement."

The Langs, Harris and the Wesleys went from the notary's office to the Oceanside property, where the Wesleys, under the instructions of Harris, assigned the Alpine trust deed and note to one Harrison and delivered them to Harris. This was apparently done with the idea, and on the representation of Harris, that they would be used in obtaining something from Harrison that would aid the Langs in acquiring Gross' property near El Centro. It appears that this trust deed and note were exchanged by Harris for Harrison's equity in certain other property in El Centro, which equity was later lost through some foreclosure proceeding. On the same day, April 18, the Wesleys took possession of the Oceanside property and began operating the hotel, paying the taxes and bills and reducing the incumbrances. The Langs remained at the hotel for about a month assisting the Wesleys in learning the business, and then moved away.

On April 20, 1940, the second day after most of these instruments were signed, Mrs. Lang entered into an escrow agreement, at a title office in El Centro, which was signed by her and also by Gross and his wife. This provided that the Gross' agreed to sell their land free from incumbrances, except current taxes and a certain lease, to Mrs. Lang for $4000 and that she agreed to buy the same and to pay that amount by paying $1000 on July 1, 1940, and $3000 on August 1, 1940. This agreement also contained a provision instructing the escrow holder to secure, before the close of the escrow, a deed from the Wesleys conveying the Alpine property to a grantee approved by Harris, and authorizing the escrow agent to deliver this deed to Harris on receipt by the escrow holder of "the $1000 called for from the purchaser on July 1, 1940." This provision called for something on the side which was desired by Mrs. Lang, but which did not affect the Gross deal except as it may have been designed to enable her to get the money with which to make one of the payments to Gross. This escrow matter dragged along for months and that transaction was never completed.

The deed to the Oceanside property was recorded by the Wesleys on April 29, 1940. The court found on ample evidence that the Langs had actual knowledge of such recording at that time. While the Langs denied this they admitted that by July, 1940, they knew that this deed had been recorded. The Wesleys discovered that the liens against the Oceanside property exceeded the amount represented to them by $325 and demanded payment of that amount. On June 22, 1940, the Langs gave to the Wesleys a note for that amount, payable in six months. On June 23, 1940, the Wesleys executed a deed conveying the Alpine realty to Mrs. Lang and delivered it to Harris as her agent. Harris deposited this deed in the escrow in El Centro, above referred to.

On April 7, 1941, the Wesleys filed suit against the Langs on the $325 note which had not been paid, and attached Mrs. Lang's interest in the Alpine property. The Langs employed counsel who endeavored to settle this suit and also pressed a claim against Harris, on the ground that the Alpine trust deed and note had been lost to them through his fault. Some investigation of Harris was made by the district attorney and there was some effort made to have his real estate broker's license revoked. Finally, Mrs. Lang's counsel arranged a settlement with Harris and he was given a written release by the Langs dated October 27, 1942. This release provided that Harris was to obtain: a dismissal of the suit on the $325 note and a cancellation of that note; a release of the Wesleys' attachment on the Alpine property, and a return to the Langs of the deed to that property, which was still held in the escrow in El Centro; and a release from all obligations to Gross arising out of that escrow agreement. It was then provided that if Harris would obtain these things the Langs would release him from any and all claims "growing out of the said transactions involved in said escrow," and any claim involving the trust deed on the Alpine property. Harris obtained all of these things, the suit was dismissed and the note returned, the escrow was abandoned, and the deed to the Alpine property was delivered to the Langs on October 27, 1942, and they retained it until it was placed in evidence at the trial of this action, although it was not recorded. They never offered to return this deed to the Wesleys, and made no demand upon them or complained against them until the cross complaint was filed herein.

In the meantime, on August 5, 1941, the Wesleys deeded the Oceanside property to George Corodemas, taking in exchange certain real property in San Diego owned by the latter. This deed was recorded on September 12, 1941.

Preceding all of these matters and on February 10, 1940, Mrs. Lang had executed and delivered a deed conveying the Oceanside property to one Winterstein. The evidence shows and the court found that this deed was, in fact, a mortgage given to secure a loan. This deed was not recorded at the time but for some reason was recorded on June 26, 1943. That loan was, however, fully repaid and on August 30, 1943, Winterstein gave a grant deed to the Oceanside property to Mr. Lang who later deeded to himself and Mrs. Lang, as joint tenants. These last two deeds were not recorded until after this action was filed. The Corodemases, being in escrow with a sale of the Oceanside property, discovered, when search of the title was made, that the deed to Winterstein had been recorded on June 26, 1943, and as a result brought this action to quiet their title on September 14, 1943.

In this action the Langs and Winterstein were named as defendants. The Langs filed a cross-complaint adding the Wesleys, the Gross', Harrison and Harris as cross-defendants. They sought to quiet title in themselves and asked for an accounting of all income, with treble damages for unlawful entry. The court found the facts in general to be as above stated, and further found that on April 18, 1940, Mrs. Lang delivered the deed to the Oceanside property into the hands of Harris, her agent, but limited his authority to deliver it to the Wesleys; that his delivery of the deed to the Wesleys on April 18, 1940, was beyond the scope of his authority; that this act did not, of itself, effect a valid or legal delivery of this deed; that the Wesleys had no knowledge of the offer of exchange with the Gross' dated April 14, 1940, nor of the receipt for the deed given by Harris to Mrs. Lang, nor of Harris' lack of authority to make a valid delivery of the deed; that the negotiations by which the Wesleys agreed to purchase the Oceanside property were conducted with Harris, as the agent of Mrs. Lang; that on April 18, 1940, the Wesleys took full and complete possession of that property with the acquiescence and consent of the Langs and thereafter made payments upon the liens thereon and treated said property as their own; that this deed to the Wesleys was recorded on April 29, 1940, with the full knowledge and consent of the Langs and without objection on their part; that the Wesleys and Corodemases were wholly without knowledge or notice of any claims on the part of the Langs against their title to the property until the filing of the answer and cross-complaint herein; that from and after October 2, 1940, the Langs were represented by counsel and had become apprised of all facts in connection with all transactions involved herein; that thereafter they made claim against Harris and later gave him a full release, receiving through him the instruments and matters above mentioned; that the receipt of these considerations from or through Harris on October 27, 1942, including the acceptance of the grant deed to the Alpine property which was taken with the full knowledge that the Wesleys claimed to be the owners of the Oceanside property, constituted a ratification of Harris' delivery of the deed from Mrs. Lang to the Wesleys; that the acts, declarations and conduct of the Langs subsequent to April 18, 1940, constituted a ratification of the faulty delivery of the deed, and a recognition of the fact that title to that property had passed to the Wesleys and their successors; that such acts, declarations and conduct of the Langs established their laches and constituted a representation to the Corodemases that the Wesleys were entitled to sell the Oceanside property insofar as any claims of the Langs might be concerned; and that by their acts, declarations and conduct the Langs are estopped to assert the invalidity of the respective and successive titles of the Wesleys or of the Corodemases to that property.

Judgment was entered quieting title to the Oceanside property in the plaintiffs and denying any relief to the Langs on their cross-complaint. From this judgment the Langs have appealed.

The appellants' main contention is based on the court's findings to the effect that Harris' delivery of this deed to the Wesleys was beyond the scope of his authority, and that such purported delivery did not, of itself, effect a valid or legal delivery of that deed. It is argued that in the face of those findings a judgment in favor of the respondents is contrary to law; that title cannot pass where a deed is not delivered by the grantor or someone duly authorized by the grantor; that no valid delivery having taken place it conclusively appears that this deed is void; and that the Wesleys, having obtained no title to this property, could convey none to the respondents. It is then argued that the further findings of ratification, laches and estoppel on the part of the appellants are entirely without evidentiary support; that it clearly appears that the appellants were at all times claiming to be the owners of the Oceanside property and entitled to the immediate possession thereof; that at all times the appellants were asserting that the purported possession of the property by the Wesleys and the Corodemases was fraudulently obtained and constituted a forcible entry and a forcible unlawful detainer; and that since all parties were brought before the court it was within the power of the court and the duty of the court to restore them all to their original position.

Although there is no evidence of any fraud or unfair dealing on the part of the Wesleys or their successors, the Corodemases, who knew nothing of the appellants' private dealings with Harris or the Gross', and although the appellants at all times knew that the Wesleys had recorded their deed and were claiming title, and although the appellants, through their agent and with full knowledge, received at the beginning and immediately used a part of the consideration paid by the Wesleys, and later received and retained the rest of that consideration, they now contend that all of these things are immaterial, and that the fact, as found by the court, that the original delivery of this deed was at that time unauthorized conclusively establishes that the Wesleys, and their successors, acquired no title to the property. While the facts are somewhat involved, the more they are examined and understood the less understandable the contention of the appellants becomes. The only reasonable explanation of appellants' acts and conduct, as thoroughly established by the evidence, would seem to be that they got just what they thought they were getting from the Wesleys, but that they were disappointed in their expectation of being able to use that consideration for the purpose of getting what they wanted from Gross. They knew that the deed had been delivered to the Wesleys and recorded and that they were in possession and claimed the property as their own, and they made no objection but continued to try to work out their deal with the Gross'. When that deal fell through they still used part of the proceeds received from the Wesleys, through their claim against their agent Harris, to obtain a cancellation of their $325 indebtedness and of their obligation to Gross, and to get back the deed to the Alpine property, which was a part of the consideration they had received from the Wesleys, cleared of the attachment thereon. And even then they remained silent, while continuing to hold the deed to the Alpine property. The offer of exchange for the Gross property and the escrow agreement entered into a few days later, when examined together, indicate that the appellants at that time valued their equity in the Oceanside property at $1000, and the evidence indicates that they received a value much greater than that from the Wesleys. The well known fact that, due to war conditions, the value of buildings in that neighborhood which contain living quarters greatly increased, during the intervening three and one-half years before any complaint was made, is very suggestive.

While the matter is not involved here, since the respondents did not appeal, it is not clear why the court found that the original delivery of this deed was unauthorized. The weight of the evidence would seem to be to the contrary not only because of the acts and conduct of the parties in respects which are otherwise unexplainable, but because of Mrs. Lang's statements when her deposition was taken. At that time, while being questioned with respect to the delivery of this deed, she was asked: "Q. They were supposed to have it. You told Mr. Harris to give it to them, didn't you? Is that right?" And she replied: "A. Yes, well, it must have been, because they were supposed to have it."

In any event, whether or not the original delivery of this deed to the Wesleys was duly authorized is not a conclusive element in this case. The mere statement of the appellants' contentions is a sufficient answer to them, and the legal principles are so well established that no citation of authority is called for. Assuming that the original delivery of this deed was unauthorized at the time, there is evidence of the strongest possible nature supporting the other findings which are attacked. There not only appears a complete case of the ratification of the delivery of this deed but an unusually strong case of laches and estoppel. The Corodemases were innocent purchasers of this property for value and the appellants knowingly created a situation, and permitted it to long remain, upon which these respondents were fully justified in relying. The Wesleys are in a similar position and the appellants have fully settled with their agent Harris, who was originally blamed for their troubles. The essential findings are not only amply supported by the evidence, but it is difficult to see how the court could have found the other way.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

69 Cal.App.2d 665

PEOPLE v. LETT.

Cr. 2336.

District Court of Appeal, First District, Division 2, California.

June 22, 1945.

1. Infants ⇨20

Lewdness ⇨10

Defendant's minor daughter's testimony, sufficiently disclosing defendant's commission of unnatural lascivious acts on witness' body, was sufficient to prove lewdness, charged in first count of information, as well as charge of contributing to such daughter's delinquency in second count, though she made inconsistent statements on witness stand as to manner in which acts were committed. Pen. Code, § 288; St.1937, p. 1033, § 702.

2. Criminal law ⇨1158(4)

Where defendant did not plead guilty to charges of lewdness and contributing to his minor daughter's delinquency, defendant's testimony that police inspector promised not to charge other sex crimes claimed to have been committed by defendant against his children, or require them to testify against him, if he would plead guilty of crimes charged, did not affect admissibilty of his confession thereof, but at most raised conflict for court and jury, so that finding on such fact question was not reviewable on appeal from conviction. Pen. Code, § 288; St. 1937, p. 1033, § 702.

3. Criminal law ⇨1209

A judgment, sentencing defendant to state penitentiary on conviction under first count of information charging lewdness and to county jail for one day on conviction under second count for contributing to his minor daughter's delinquency, was not erroneous as subjecting defendant to double punishment for same offense. Pen. Code, § 288; St. 1937, p. 1033, § 702; St. 1939, p. 3027, § 700.

Appeal from Superior Court, Alameda County; Edward J. Tyrrell Judge.

Fred Lett was convicted of lewdness and contributing to a minor's delinquency, and he appeals.

Affirmed.

Leo A. Sullivan and Everett E. Power, both of Oakland, for appellant.

Robert W. Kenny, Atty. Gen. and Clarence A. Linn, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

In a trial to a jury the defendant was convicted on two counts of an information—the first charging a violation of section 288 of the Penal Code, the second charging a misdemeanor under Section 702 of the Welfare and Institutions Code, St. 1937, p. 1033, and specifically that he did "expose his private parts and place his private parts and hand against the bare body and private parts of Eleanor Lett." The complaining witness under each count was the ten year old daughter of the defendant. By the judgment following the verdict the defendant was sentenced to the state penitentiary on the first count, and to the county jail for one day on the second count. He has appealed from the judgment and from the order denying his motion for a new trial.

The grounds of appeal are: insufficiency of the evidence, error in admission of appellant's confession, and double punishment.

[1] The testimony of the child sufficiently disclosed the unnatural acts committed by her father and it is not necessary to repeat that testimony. Appellant's argument is not that there was insufficient evidence of the offense charged, but that the child, becoming confused on the witness chair, made inconsistent statements as to the manner in which the acts were committed. On this information it was not necessary to prove that a rape had been committed or attempted. Proof of the lascivious acts, of which there was ample, was sufficient to prove the "lewdness" charged under the first count, as well as the charge of contributing to the delinquency of the minor under the second.

[2] The objection to the admission of the "confession" presents no legal difficulty. After appellant was placed in custody by the arresting officers in Alameda County he was informed by a police inspector that the authorities had evidence of nineteen other sex crimes committed by appellant against his three children—some in San Francisco County, some in Humboldt County. Appellant testified that the inspector promised that if he pleaded guilty these charges would not be made and his children would not be required to testify against him. The inspector testified that he told appellant he would do nothing about the other charges because the acts were not committed in Alameda County. The appellant did not plead guilty to the charges in the information. Hence his testimony as to "inducement" would not affect the admissibility of the confession, if it had been accepted as true. The most that could be said is that it raised a conflict for the court and jury. Hence the finding on this question of fact is not open to review. People v. Madsen, 93 Cal. App. 711, 714, 270 P. 237.

[3] The argument that the appellant has been subjected to double punishment for the same affense is not sound. Acts of lewdness denounced in section 288 of the Penal Code were acts "appealing to, or gratifying" the passions of the appellant. Other acts, though committed at approximately the same time, were acts tending to cause the child to lead a "dissolute, lewd, or immoral life" within the meaning of section 700 of the Welfare and Institutions Code, St. 1939, p. 3027. A complete answer to appellant's argument is found in People v. Bevans, 19 Cal.App.2d 288, 65 P.2d 92, where the court in a case involving the precise point said: "Section 288 of the Penal Code provides for the punishment of certain described acts committed on the body of a child under the age of fourteen years. The Juvenile Court Law provides for the punishment of acts which contribute to the delinquency of persons under the age of twenty-one years. The acts punishable under the Juvenile Court Law include many not included within the provisions of section 288 of the Penal Code. The two statutes do not attempt to define identical offenses."

The judgment and the order ore affirmed.

GOODELL, J., and DOOLING, J., pro tem., concur.

CONSOLIDATED VULTEE AIRCRAFT CORPORATION v. UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 904 (two cases).*

Civ. 14637.

District Court of Appeal, Second District, Division 3, California.

June 4, 1945.

Rehearing Denied July 3, 1945.

Hearing Granted Aug. 3, 1945.

1. Master and servant 🔑3(2)

In determining whether labor contract permitted referee to order an amendment to contract adding a maintenance of union membership clause thereto, court was not concerned with whether such a clause would tend toward a better employer-employee relationship, but must determine merely whether contract admitted of such amendment.

2. Contracts 🔑147(1)

Court, when construing contracts, must take a broad view of the contract, place themselves as nearly as may be in position of contracting party, consider purposes sought to be accomplished by contract, and give effect to them to fullest extent the writing will allow.

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* Subsequent opinion 167 P.2d 725.

3. Master and servant 🔑3(2)

Where employer, under labor contract, reserved exclusive right to employ and discharge employees, referee, under arbitration provisions, had no authority to make order for addition to contract of maintenance of union membership clause which would deprive employer of such reserved right.

4. Master and servant 🔑3(2)

In labor contract, special clause in provision relating to arbitration limiting powers of referee controlled over general provision for arbitration. Code Civ.Proc. § 1859.

5. Master and servant 🔑3(2)

Where employer moved that award made by referee under arbitration provisions of labor contract be vacated upon ground that grievance, consisting of union's wish to amend contract, was not an arbitrable dispute within contract, and that referee exceeded jurisdiction, it was court's duty to determine from agreement extent of the referee's powers and to annul any provisions of award as to matters which had not been submitted to him for decision. Code Civ.Proc. §§ 1288(d), 1289(b).

6. War 🔑4

State court had jurisdiction of proceeding to vacate award in arbitration proceeding under labor agreement as being in excess of arbitrator's jurisdiction, since War Labor Board did not have exclusive jurisdiction. Executive Order Jan. 12, 1942, No. 9017, 50 U.S.C.A.Appendix § 1507 note; War Labor Disputes Act § 7(a) (2), 50 U.S.C.A.Appendix, § 1507(a) (2).

7. War 🔑4

State courts may exercise co-ordinate powers in labor dispute matters where War Labor Board has not acted or where no conflict of authority or action would result. Executive Order Jan. 12, 1942, No. 9017, 50 U.S.C.A.Appendix § 1507 note; War Labor Disputes Act § 7(a) (2), 50 U.S.C.A.Appendix, § 1507(a) (2).

8. Master and servant 🔑3(2)

Provisions of state law relating to procedure in arbitration matters were to be considered as part of labor agreement containing provisions for arbitration. Code Civ.Proc. §§ 1280–1293.

On Motion for Rehearing.

9. Master and servant 🔑3(2)

Where labor union proposed amendment of labor contract by adding provisions for maintenance of union membership and check-off of initiation fees and dues, and check-off was an integral part of one entire proposed amendment and referee made award adding both provisions as one amendment and trial court treated proposed amendment as single proposal, District Court of Appeal could not confirm award as to check-off provision when it held that referee had no authority to order maintenance of membership clause added.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Arbitration proceedings between Consolidated Vultee Aircraft Corporation and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 904. From a judgment of the superior court confirming an award made by permanent referee, the Consolidated Vultee Aircraft Corporation appeals, and from an order purporting to correct and amend the judgment and from the judgment as amended and corrected, United Automobile, Aircraft and Agricultural Implement Workers of America, Local 904, appeals.

Judgment reversed and appeal from the order dismissed.

Gibson, Dunn & Crutcher and Ira C. Powers, all of Los Angeles, for appellant and respondent Consolidated Vultee Aircraft Corporation.

Katz, Gallagher & Margolis and Milton S. Tyre, all of Los Angeles, for appellant and respondent United Automobile, Aircraft and Agricultural Implement Workers of America, Local 904.

SHINN, Justice.

Consolidated Vultee Aircraft Corporation has appealed from a judgment of the superior court dated January 25, 1944, confirming an award made by a permanent referee, who was acting as such pursuant to appointment under the Company's labor contract with the Union, United Automobile Aircraft and Agricultural Implement Workers of America, Local 904. The Union also has appealed from an order made purporting to correct and amend the judgment, and from the judgment as amended and corrected on February 25, 1944.

The award of the referee consisted of an order that the Company and the Union should add to their contract an amendment reading as follows:

"In order to secure the increased production which will result from greater harmony between workers and employers and in the interest of increased cooperation between union and management, which cannot exist without a stable and responsible union, the parties hereto agree as follows:

"All employees who, 15 days after the date of this amendment to the contract are members of the Union in good standing in accordance with the constitution and bylaws of the Union and those employees who may thereafter become members shall, during the life of the agreement as a condition of employment, remain members of the Union in good standing.

"The union shall promptly furnish to the Company a notarized list of members in good standing 15 days after the date of the amendment to the contract. If any employee named on that list asserts that he withdrew from membership in the Union prior to that date and any dispute arises, the assertion or dispute shall be adjudicated in accordance with the arbitration procedure of this agreement and the decision of the arbiter shall be final and binding upon the Union, the Employer and the employees."

After the award was made, the Company, upon notice, moved that it be vacated by the superior court upon the ground that the grievance, consisting of the Union's wish to amend the contract, was not an arbitrable dispute within the meaning of the contract, and that the referee acted in excess of the jurisdiction conferred upon him by the contract. The Union made a counter-motion that the award be confirmed. After the judgment confirming the award was entered, the Company made a motion to vacate it upon the ground that it was made and entered inadvertently and erroneously and that it was contrary to the memorandum for decision of the trial court and the findings and conclusions of the court contained in said decision. The Company also moved in the alternative for an order correcting nunc pro tunc the judgment, by adding thereto a new paragraph, reading as follows:

"It is further ordered, adjudged and decreed that the foregoing amendment does not and shall not be construed to impose any obligation upon the employer to discharge any employee for failure to maintain in good standing his membership in the Union according to the Constitution and By-laws of the Union, and does not impair and shall not be construed to impair the exclusive right to hire and discharge employees given by Article I, Section 6, of the contract to which the amendment relates."

The Company also moved that if the judgment should not be vacated or amended, as requested, that it be amended by adding substantially the above language by way of recital. The judgment was amended by adding the paragraph we have quoted, commencing, "It is further ordered," etc.

We shall consider first the appeal of the Company. Its position taken before the referee, and since maintained, is that the referee was without jurisdiction to act upon the Union's proposal for amendment of the contract, and that the subject matter of the amendment was one which affected a vital right of the Company, as to which the referee, by the terms of the contract, was denied jurisdiction.

The provisions for arbitration in the agreement follow immediately those which provide grievance procedure. The grievance procedure calls for a written complaint, action thereon by a department head, appeal to the plan grievance committee of the Union and the Company's labor relations committee, each of which votes as a unit, and it provides for an appeal to the permanent referee when the Union committee and the Company committee fail to agree. The arbitration procedure is set out in section 6 of Article II, and reads as follows:

"Section 6

"Arbitration Procedure

"If it is desired to appeal a decision from step two (2) of the Grievance Procedure to arbitration, such appeal must be made in writing within five (5) working days after receipt of the written decision in step two (2) of the Grievance Procedure. It is understood that an appeal may be withdrawn at any time. The Arbitration Procedure shall be conducted in the following manner:

"A permanent referee shall be chosen by the Union and the Company to consider all matters submitted to arbitration. Said permanent referee shall hear all grievances or disputes brought before him, and his decision shall be accepted as final and binding by both parties. The decision of the permanent referee shall be rendered not more than five (5) days after the close of testimony and final argument pertaining to said grievance or dispute. Any expenses of arbitration shall be borne by and divided equally between the Union and the Company.

"The permanent referee shall not have the jurisdiction to arbitrate provisions of a new agreement or to arbitrate away, in whole or in part, any provisions of this Agreement."

It is the contention of the Company that the amendment in question would deny it a substantial right saved to it by the contract, specifically stated in section 6 of Article I, as follows:

"Section 6

"Management

"The Company has and will retain the unquestionable and exclusive right and power to manage the plant and direct the working forces, including the right to hire, classify, suspend, discharge, promote, demote or transfer its employees, provided it does not conflict with the provisions of this Agreement."

The Union replies, first, that the amendment does not have the effect of taking from the Company or impairing its unquestionable and exclusive right and power to hire and discharge its employees, and it says further that this at most was a conditional right because the contract was subject to amendment under section 3 of Article I, which reads as follows:

"Section 3

"Amendment

"This Agreement may be amended at any time by the written consent of the parties hereto. If mutual consent for amending Agreement is not given, the desirability of amendment may be referred to the grievance procedure."

The reply of the Company to this argument is that the agreement may be amended only by written consent of the parties; that the only matter relating to amendment that may be considered by means of the grievance procedure is the "desirability" of an amendment, and it says further that even if a question of desirability is considered in the grievance procedure, there is no provision for carrying the matter to arbitration, which is a separate procedure.

Considering first the meaning of the provision for amendment, we find that both the referee and the trial judge were of the opinion that the provision "the desirability of amendment may be referred to the grievance procedure" means that any proposal for amendment may be carried through the grievance procedure to arbitration and that the referee may order the contract amended. We shall not undertake to decide how this language should be construed in a case where the amendment propose did not take away from either the Union or the Company a substantial right which it had reserved to itself by the contract and which would not have been excluded from the scope of the grievance procedure and arbitration procedure by the last clause of section 6 of Article II. It is perfectly clear to us that the effect of the proposed amendment would be to take away from the Company the exclusive right reserved to hire and discharge which it was given by section 6 of Article I. The referee was of the opinion that where the proposed amendment would only add new provisions to the agreement, his powers were not limited by the last clause of the arbitration procedure. His views were stated as follows: "It also appears to the referee that it is a rather tortured construction of language to maintain that the addition of a new provision in an agreement is, in fact, arbitrating something away from the agreement." It may be that this statement had reference to the particular amendment, for the referee quoted the last clause of the arbitration provision, and we do not read his opinion as holding that the limitation upon his powers could be removed by means of the procedure for amendment, in which he would have the final decision. His opinion did not discuss whether the amendment would deprive the Company of a substantial right reserved by the agreement. He assumed that it would not and he ordered the maintenance of membership clause added to the contract as something which was considered desirable under the policy of the National War Labor Board.

The learned trial judge came to the conclusion that the amendment was wholly innocuous in its effect upon the Company's exclusive right to hire and discharge employees, and that it was therefore within the jurisdiction of the referee to order the parties to add it to their agreement. In his opinion he quoted section 5 of Article III, as follows: "The Company may discharge an employee for good and sufficient reason" and he expressed the opinion that failure to maintain membership in good standing would give the Company an additional reason for discharging an employee, that is to say, that failure to maintain membership would be made a good reason where otherwise it would not be, but that the Union would have no right to insist upon a discharge. It is clear from his written opinion that he did not construe the provisions for amendment as a means by which the rights of the parties could be materially altered and that he found that the referee had acted within his jurisdiction only because the amendment, as he construed it, did not infringe upon the exclusive right of the Company in the matter of hiring and discharging employees.

[1-3] Counsel for the Union stoutly assert that the purpose of the amendment was to give to the Union the right to demand the discharge of any Union member who failed to maintain his membership in good standing, and they further assert that the failure of the Company to comply with the demand would be a breach of the contract. This unquestionably is a proper interpretation of the amendment, for maintenance of membership is made a condition of employment and, as counsel say, if it did not give the Union the right to demand discharge of employees, it would be meaningless and wholly ineffectual to accomplish the purposes of the Union. But at the same time they argue that even then the Company's unquestionable and exclusive right in the matter of hiring and discharging employees is not affected. They say the amendment would not give the Union the right to discharge employees but only the right to demand that the Company discharge them and that the Company would still retain its original right. This we cannot see. Under the amendment the Company would not retain the uncontrolled and exclusive right to hire and discharge all of its employees; that right would be limited to those employees who were not members of the Union and to those who, if members, retained their memberships in good standing. This would not be the contract which it made with the Union. It matters not whether the Company might be obliged under the amendment to discharge one or a thousand employees. If it had to discharge one because of his failure to maintain Union membership, the amendment would have operated contrary to the spirit and the letter of the original agreement. In fact, the addition of the amendment to the agreement would amount to a material alteration, even though no employee should ever be discharged by reason of it. Counsel for the Union, in discussing the desirability of a maintenance of membership clause in a labor contract, quote from learned discourses upon the subject, in which the advantages of such a clause are discussed from the viewpoint of a better employer-employee relationship. However sound these views may be, and whatever weight should be attributed to them in the negotiation of a new contract, we have only for consideration the interpretation of an existing contract. It is not for us to decide whether it would be desirable to add the amendment, but only whether the contract admits of the particular amendment. Being a court and vested with no administrative powers, but only judicial powers, and those well defined by the Constitution, statutes, and sound precedent, we must approach our problems and solve them from the standpoint of law and not of economic expediency. The principles which furnish a guide for the construction of contracts are fundamental; they do not change with the times. They are liberal; they direct courts and judges to take a broad view of the contract, to place themselves as nearly as may be in the position of the contracting parties, to consider the purposes sought to be accomplished by the agreement, and to give effect to them to the fullest extent the writing will allow, but it is forbidden by high principle and precept that a judge should place his convictions as to desirable economic and social relationships above his reverance for the law, and so we deem it to be irrelevant whether a maintenance of membership clause in a labor contract tends toward a better employer-employee relationship. If it does, any employer engaged as Vultee is, in a tremendous contribution to the war effort, should know it and take advantage of it. But the court cannot substitute its judgment for that of either party to the contract, as we would have to do in order to hold that the exclusive right to employ and discharge retained by the Company under its contract should be modified despite the Company's opposition. It was a right which the Company intended to reserve and did reserve in clear language. If it had not been considered an important feature of the contract, the Com-

pany would not have insisted upon it and the courts would not have had a case over it. It is in the agreement and its removal by amendment under the arbitration procedure was not permitted.

Counsel for the Union contend that the point of jurisdiction was conclusively settled by the arbitrator's decision that the matter was one in which he was authorized to act. It was competent, they say, for the parties to submit to arbitration not only disputes arising out of the contract but also the question of the extent of the arbitrator's powers with reference to amendments. And they say that his decision that he had authority to order the amendment is a part of the award and is not subject to review. They rely upon the general provisions for arbitration, contending that these are broad enough to submit to the arbitrator any question as to the extent of his powers. Under this construction his authority would be unlimited. He could order the contract amended as either party might request and in any manner which he thought desirable, regardless of the effect upon the original agreement. This is far from a suggestion that he would do so, for it is manifest from his opinion, which stated his conclusions, that it was his purpose to respect the limitation placed upon his powers. This limitation was in the interest of both parties. They clearly stated in their agreement that they did not intend to alter the framework of their negotiated relationship except by their further agreement: arbitration was to operate within the basic terms of the agreement, not to build a new and different one. The certainty and security which the parties had arranged for the duration of the war would have been seriously disturbed or lost if matters of substance were subject to constant change through arbitration procedure.

[4, 5] It seems clear that the special clause limiting the powers of the referee was inserted for the specific purpose of qualifying the general provisions for arbitration and it is therefore controlling. Sec. 1859, Code of Civ.Proc.; Smith & Wesson, Inc., 10 War Labor Reports, 148, 151; B. Fernandez & Hnos., S. En. C. v. Rickert Rice Mills, Inc., 1 Cir., 1941, 119 F.2d 809, 816, 136 A.L.R. 351; Merchant v. Mead-Morrison Mfg. Co., 1929, 252 N.Y. 284, 169 N.E. 386, 391, 393; J. F. Fitzgerald Const. Co., Inc. v. Southbridge Water Supply Co., 1939, 304 Mass. 130, 23 N.E.2d 165, 167; Conway v. Roth, 1917, 179 App. Div. 108, 166 N.Y.S. 182, 184. It was the duty of the court to determine from the agreement the extent of the referee's powers and to annul any or all of the provisions of the award as to matters which had not been submitted to him for decision. Secs. 1288(d) and 1289(b), Code of Civ.Proc.

We now come to a question as to the jurisdiction of the trial court. On December 16, 1943, within 30 days after the referee's decision, the Company gave notice of a motion to vacate the award as in excess of the arbitrator's jurisdiction and the Union gave notice of a motion to confirm it. The Union caused the dispute over the award to be certified to the Tenth Regional War Labor Board, and the court was advised of the certification before the trial. On March 23, some two months after the entry of the original judgment, the War Labor Board issued its order which read in part as follows:

"1. The above-named parties shall carry out the terms of the award of the permanent referee, issued November 17, 1943, in the above-entitled matter, until such time as a court of competent jurisdiction shall rule otherwise, provided, that the requirement of the maintenance of membership clause of the award, that the company discharge an employee who fails to maintain his union membership in accordance with that clause, shall be placed in effect only if and when the judgment heretofore entered in the litigation between the parties by the Superior Court of the State of California, in and for the County of Los Angeles, is vacated by said court or reversed by a higher court as to such requirement."

The Union challenges the jurisdiction of the court in the trial proceeding upon the ground that the matter was at all times within the exclusive jurisdiction of the Board by virtue of Executive Order No. 9017, January 12, 1942, 50 U.S.C.A.Appendix § 1507 note, establishing the Board, the provisions of which we find it unnecessary to quote at large, and the powers conferred upon the Board by section 7(a), (2), of the War Labor Disputes Act, 50 U.S.C.A.Appendix § 1507(a) (2), reading as follows:

"(2) To decide the dispute, and provide by order the wages and hours and all other terms and conditions (customarily included in collective-bargaining agreements) governing the relations between the parties, which shall be in effect until further order of the Board. In making any such decision the Board shall conform to the provisions of the Fair Labor Standards Act of 1938, as amended [Title 29, §§ 201–219]; the National Labor Relations Act [Title 29, §§ 151–166]; the Emergency Price Control Act of 1942, as amended [sections 901–946 of this Appendix]; and the Act of October 2, 1942, as amended [sections 901, 961–971 of this Appendix, and Title 15, § 713a—8 and note], and all other applicable provisions of law; and where no other law is applicable the order of the Board shall provide for terms and conditions to govern relations between the parties which shall be fair and equitable to employer and employee under all the circumstances of the case."

The Company does not question the jurisdiction of the Board but contends that under the Act, the rules and regulations of the Board, and the practice which it follows, its jurisdiction is not exclusive.

[6, 7] The question here is whether the state courts have been forbidden to act in matters as to which they would ordinarily have jurisdiction but which also are within the jurisdiction of the Board, where the Board has accepted jurisdiction but has taken no decisive action. The trial court, after a careful consideration of the question, answered it in the negative and we think answered it correctly. There is nothing in the executive order or in the War Labor Disputes Act which purports to give the War Labor Board exclusive jurisdiction in the judicial function and nothing inconsistent with the exercise by state courts of co-ordinate powers where the Board has not acted or where no conflict of authority or action would result. The state law in matters of arbitration is consistent with the authorized procedure of the Board, and proceedings under it should often materially aid the Board in the performance of its duties. The executive order reads in part:

"2. This Order does not apply to labor disputes for which procedures for adjustment or settlement are otherwise provided until those procedures have been exhausted.

"3. The procedures for adjusting and settling labor disputes which might interrupt work which contributes to the effective prosecution of the war shall be as follows: (a) The parties shall first resort to direct negotiations or to the procedures provided in a collective bargaining agreement."

[8] The parties have their bargaining agreement and it provides for arbitration. Sections 1280—1293 of the Code of Civil Procedure set out the state law and procedure in arbitration matters and are to be considered as a part of the agreement. The clear implication of section 3 (a) of the executive order is that the Board may refuse to take jurisdiction until the procedures provided in the bargaining agreement have been resorted to and that it may also refuse to take jurisdiction if the results reached by resort to the procedure are deemed by the Board to be a satisfactory disposition of the matter in dispute. Arbitration may be had under state law, where there is a provision for it, or under rules established by the Board. The concluding clause of section 3 of the executive order reads: "After it takes jurisdiction, the Board shall finally determine the dispute, and for this purpose may use mediation, voluntary arbitration, or arbitration under rules established by the Board." If the Board had been asked to take jurisdiction before the instant proceeding was initiated in court, a proper procedure would have been to refuse to do so until the validity of the award had been presented to the court for decision. It may even be assumed that the Board would have insisted that, having gone part way with their arbitration, and being in disagreement as to the validity of the award, the parties should take the next step under the state law and present that question to the court. The order which the Board made recognizes the jurisdiction of the state court in matters which are subject to arbitration under statutory procedure, and its own jurisdiction as well. This accords with the general understanding and practice as to the manner in which the several War Labor Boards exercise their jurisdiction. Statements to this effect will be found in Reader Mail Case, W. L. R., Vol. 8, p. 781; L. A. Railway Co., W. L. R. Vol. 1, pp. 23, 27. In the rules of the National War Labor Board, section 802.32, under the head of Enforcement of Arbitration Awards, it is provided: "Any such directive order of the Board or its agent shall be without prejudice to the right of any party to the case to appeal to a court of competent jurisdiction for a judicial determination of the rights and obligations arising out of the award and, if such a court renders a decision contrary to the conclusions of the Board or its agent, the order, or such part thereof as may be contrary to the deter-

mination of the Court, shall be considered of no force or effect."

If the Union's contention on the point of jurisdiction should prevail, it would follow that the Regional Board should have disregarded the provisions of the contract for arbitration and the state law on the subject, despite the provision of the executive order that resort should first be had to arbitration and in disregard of the quoted rule of the National Board.

It appears to have been recognized in the beginning that the responsibilities and duties of the several War Labor Boards would be heavy and that they should not be required to act until the parties to the dispute had resorted to the means of settlement provided by their bargaining agreement. In the instant proceeding the court was called upon to place an interpretation upon the arbitration provisions of the agreement—a pure question of law. The learned trial judge elected to decide that question notwithstanding the certification of the dispute to the Board. He considered it to be his duty under the federal laws as he interpreted them and as they are administered by the War Labor Board, to determine the question of the validity of the award rather than to leave the question for the decision of the Board. The decision of the court has been accepted by the Board as settling the point of law. There is no conflict between the judgment and the order of the Board and hence no question of supremacy is involved. The review of the award by the court to determine questions as to its validity was calculated to simplify the problem presented to the Board in a matter in which both the court and the Board had jurisdiction.

The briefs contain discussions of other points of law, but the views we have expressed call for a reversal of the judgment in its original form and as amended, and render it unnecessary to decide other points.

The appeal of the Union questions the jurisdiction of the court to amend the judgment. The amended judgment will necessarily fall with a reversal of the original judgment.

The judgment of January 25, 1944, and the amended judgment of February 25, 1944, are reversed. The appeal from the order is dismissed.

DESMOND, P. J., and PARKER WOOD, J., concur.

On Motion for Rehearing.

PER CURIAM.

The petition of the Union for rehearing raises a new point. It is contended that in any event the judgment should be affirmed, insofar as it relates to the check-off of dues by the Company, even though it be reversed as to the provision which requires maintenance of membership. The proposal of the Union was one for amendment of the contract by the addition of a maintenance of membership provision and a check-off of initiation fees and monthly dues of Union members. The award ordered the addition of the maintenance of membership provision, denied the requested check-off of initiation fees and provided for a check-off of dues only as to employees who should give the Company written authorization to make the deduction, such authorization to be subject to revocation at any time.

The ground of our decision was that an amendment of the contract which would require maintenance of membership would deprive the Company of a right which was reserved to it by the contract and that it was not within the jurisdiction of the Referee to order such amendment. The provision for check-off was not mentioned in our opinion for the reason that it was an integral part of one entire proposed amendment and had to stand or fall with the provision for maintenance of membership. It is not to be inferred from what we said of the maintenance of membership feature that our conclusions would have been the same as to the check-off feature. The question whether a dispute with respect to a voluntary and revocable check-off of dues, standing alone, would have been one for settlement by the Referee under his general powers was not presented for decision.

[9] In view of the contention now made, it is appropriate to point out the reason why the award had to be considered as entire and not severable. The evidence that was before the Referee was not before the trial judge. The Union proposed one amendment, not two. The record upon which the matter was heard does not disclose the existence of any dispute between the Union and the Company with respect to a check-off of dues independently of maintenance of membership. The matter in controversy was stated by the Referee in his decision as follows: "Grievance Requesting Amendment to Agreement (No.

B-99934). This case involves the request of Local 904 of the UAW-CIO for the amendment of their present agreement with Consolidated Vultee Aircraft Corporation, Vultee Field Division to provide for the insertion therein of a maintenance of membership and check-off provision." Following the decision of the maintenance of membership feature, the decision continued: "The remaining question is whether or not it is desirable to have a check-off inserted in the agreement along with the maintenance of membership clause," and the decision was for a voluntary and revocable check-off. In the written opinion of the trial judge it was stated: "The foregoing proposed amendment is characterized as a maintenance of membership and check-off provision," and it was treated as a single proposal throughout the opinion. No contention was made in the trial court nor in this court that the proposal of the Union or the award was severable. In order to confirm the award with respect only to the check-off the court would have had to construe the award as one which ordered a check-off independently of maintenance of membership. The Referee did not make such an award, nor does the record show that it was a matter in controversy. Under these circumstances it would not have been proper for this court to direct a modification of the judgment so as to confirm the award as to the check-off provision alone.

The petition for rehearing is denied.

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69 Cal.App.2d 525

MERGENTHALER v. MERGENTHALER.

Civ. 14819.

District Court of Appeal, Second District, Division 2, California.

June 8, 1945.

Hearing Denied Aug. 6, 1945.

1. Husband and wife 🔑**4, 19(2)**

Husband assumes responsibility for the support of his family and upon his failure to provide such support his wife is authorized to purchase on his credit whatever is necessary for her maintenance. Civ.Code, § 174.

2. Husband and wife 🔑**43**

When a wife loans money from her separate estate to her husband she becomes one of his creditors.

3. Husband and wife 🔑**43**

Obligation of husband to repay wife's moneys used for family support arises from distinct agreement to repay.

4. Husband and wife 🔑**151(1)**

A wife is entitled to retain her own separate estate and is under no obligation to support the family. Civ.Code, § 174.

5. Divorce 🔑**249(1)**

Upon dissolution of marriage it is proper for the court to determine all issues arising as a result of such relation.

6. Equity 🔑**39(1)**

A court of equity will, if possible, dispose of all issues between the litigants in one judgment in order to preclude further litigation.

7. Judgment 🔑**204**

All controversies of parties arising out of a particular transaction may be adjudicated in one judgment.

8. Divorce 🔑**203**

Joining of wife's demand for money advanced to husband during her marriage with her action for divorce was proper.

9. Divorce 🔑**203**

In a husband's divorce action, wife is privileged to plead in a cross-complaint claim for restoration of her separate property which husband might have gained unfairly. Code Civil Proc. § 442.

10. Divorce 🔑**250**

On granting a divorce, equity court has power to restore to wife her property which has been appropriated by her husband in conformance with his agreement to do so or where he has taken advantage of marriage relation to gain its possession.

11. Limitation of actions 🔑**157(4)**

Wife who for family support advanced husband money through the four and one half years of their marriage under arrangement that such sums were to be repaid by husband, was authorized to apply repayments made by husband to liquidation of debts in order of their seniority thus leaving undischarged only husband's debt for one year preceding filing of action by wife for divorce and money advanced, and hence action on such debt was not barred by two year statute of limitation. Code Civ.Proc. § 339, subd. 1.

12. Husband and wife ⚿36

Confidential relationship is presumed to exist between husband and wife, and hence if husband obtains an advantage over his wife, the burden is upon him to show that transaction is fair and just and was fully understood by her.

13. Divorce ⚿250

Wife's demand for return of her separate property in divorce action, acquired by husband from her during marriage, was not barred by prenuptial agreement depriving wife of all participation in acquets and gains of marriage. Code Civ.Proc. § 339, subd. 1.

14. Limitation of actions ⚿73(4)

In an action by a wife for recovery of her property from her husband, statutes of limitation do not affect her rights, since wife cannot be expected to treat husband as a stranger. Code Civ.Proc. § 339, subd. 1.

15. Divorce ⚿93(3)

Complaint in wife's action for divorce on ground of cruelty alleging that husband frequently battered her head, kicked and pushed her out of their home and called her obscene names stated cause of action.

16. Divorce ⚿203

A divorce action by wife may be combined with a demand for return of her separate property since equity frowns upon piecemeal.

17. Divorce ⚿203

Where claim is made in divorce action that offending spouse has unjustly appropriated property of plaintiff, the latter may demand that a trust be impressed upon community property or that a lien be fixed upon defendant's separate property or that plaintiff be otherwise made secure.

◆

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Eleanor Mergenthaler against Frank Mergenthaler for divorce, alimony and for recovery of her property. From an adverse judgment defendant appealed, but abandoned the appeal with respect to alimony.

Affirmed.

Morris McLaughlin, of Los Angeles, for appellant.

Hahn, Graf & Ross and A. A. Goldstone, all of Los Angeles, for respondent.

MOORE, Presiding Justice.

As a part of its decree of divorce the court awarded respondent support money and in addition thereto decreed "that the defendant pay to plaintiff the sum of $3,000, advanced by plaintiff to the defendant * * *." On appeal from the quoted order appellant denies liability for the sums advanced, contends that such demand may not be united with an action for divorce, and pleads the two year statute of limitations as a bar to her recovery. Code Civil Proc. Sec. 339, Subd. 1. He abandoned his appeal from the order for respondent's support.

We are to determine first whether appellant incurred an obligation to repay the moneys advanced. The parties had married on March 24, 1938. The action was filed on December 22, 1942. The court found that at the time of the marriage defendant orally agreed to provide respondent with the sum of $250 per month for the support of the household and for her personal expenses; that he had paid only a portion of the promised sums; that the advances had been made upon appellant's oral promise to reimburse respondent by paying her in full the monthly sums promised; that the sums so advanced aggregated $4,575.31, and in addition she paid for the renovation and repair of appellant's separate property the sum of $1,367.25; that of the total advances made the sum of $3,000 is due and unpaid to respondent.

That the parties made the oral agreement for the payment of the monthly sum was established by the testimony of respondent. She testified in detail as to each transaction, each conversation, each sum advanced and each sum repaid. She evidently kept careful accounts of moneys received and disbursed. Her total receipts from appellant in four and a half years aggregated

$9,956.13. Under their agreement he owed her $13,500. In August 1939 when she presented him with a statement of all the moneys she had advanced to him since their marriage appellant made no denial of its correctness or of his obligation to repay the sum. Throughout the period of coverture he made no objection to the advancement of funds by respondent for the maintenance of their home and for respondent's personal expenses; neither did he ever deny his promise to reimburse her.

[1-4] The husband assumes responsibility for the support of his family and upon his failure to provide such support his wife is authorized to purchase on his credit whatever is necessary for her maintenance. Civil Code, sec. 174; Title Insurance & Trust Co. v. Ingersoll, 158 Cal. 474, 492, 111 P. 360. When a wife loans money from her separate estate to her husband she becomes one of his creditors. Littler v. Jefferis, 36 Idaho 608, 212 P. 866; Bast v. Bast, 68 Mont. 69, 217 P. 345; Morrison v. Morrison, 174 Va. 58, 4 S.E.2d 776, 780. His obligation to repay moneys used for family support arises from the distinct agreement to repay. Bast v. Bast, supra. She is entitled to retain her own separate estate and is under no obligation to support the family. Civil Code, § 174. The want of such understanding was the reason for the reversal in the Thomson case cited by appellant. Thomson v. Thomson, 81 Cal. App. 678, 254 P. 644. The Thomsons had commingled their separate properties and Mrs. Thomson consented that her moneys be used to defray family expenses. That case is not support for appellant who had definitely agreed to repay advances to be made by his wife.

[5-9] Appellant vainly contends that respondent's demand for money advanced during her marriage was improperly united with her action for divorce. The obligation had its genesis in the marital status. It was proper upon a dissolution of the marriage for the court to determine all issues arising as a result of that relation. It is a principle of chancery that a court of equity will if possible dispose of all issues between the litigants in one judgment in order to preclude further litigation. Sonnicksen v. Sonnicksen, 45 Cal.App.2d 46, 52, 113 P.2d 495; Rolapp v. Federal Building & Loan Association, 11 Cal.App.2d 337, 53 P.2d 974; Zellerbach v. Allenberg, 99 Cal. 57, 33 P. 786. The same practice has been carried into legal transactions to avoid a circuity of action and multiplicity of suits by adjudication in one judgment of all controversies of the parties arising out of a particular transaction. Dobbins v. Horsfall, 58 Cal. App.2d 23, 136 P.2d 35. Had appellant sued respondent for divorce she would have been privileged to plead in a cross-complaint all claims against her husband originating in the marriage relation. Code Civil Proc. § 442. This would include claims for restoration of her separate property which he might have gained unfairly. What may be claimed in a cross-complaint may with no less propriety be alleged in the original pleading.

[10] In some jurisdictions the court is authorized by statute on granting a divorce to restore to the wife her property which has been appropriated by her husband. Coleman v. Coleman, 180 Okl. 574, 72 P.2d 369; Davison v. Davison, 125 Kan. 807, 266 P. 650. But such a statute is not essential to the power of a court of equity to award a judgment in favor of the wife or necessary to the validity of an order for the return of her own property to her by her husband in conformance with his agreement to do so or where he has taken advantage of the marriage relation to gain its possession. 27 C.J.S., Divorce, § 297, p. 1132.

[11] Respondent's claim for her moneys advanced was not barred by the language of Code of Civil Procedure, § 339, subd. 1. The arrangement for the advance of money by respondent under the agreement that such sums were to be repaid by appellant continued through the four and one half years of their marriage. The sums aggregating $9,956.13 paid by appellant pursuant to his promise were, as paid, properly credited by respondent to the liquidation of the husband's debts in the order of their seniority, and the court was justified in adopting the same procedure. Thus by applying his payments of $9,956.13 to his obligation he had discharged his indebtedness for the years 1938, 1939, 1940, and to July 1941. Clearly his debt of $3,000 for one year preceding the filing of the action was not barred, even if his obligation should be treated as that of a stranger.

[12-14] But upon another substantial ground no portion of respondent's demand

is barred. By virtue of their prenuptial agreement she was deprived of all participation in the acquets and gains after marriage. But such arrangement did not defeat their confidential relationship as husband and wife. Such relation is presumed to exist, and if the husband obtains an advantage over his wife the burden is upon him to show that the transaction is fair and just and was fully understood by her. In every transaction between them equity raises a presumption against its validity. In re Estate of Cover, 188 Cal. 133, 143, 204 P. 583. Therefore the trust continues until repudiated, and the claim of the wife is not barred by the mere passing of time during the years of the marriage. Thomson v. Thomson, supra. In an action by a wife for the recovery of her property from her husband, statutes of limitation do not affect her rights "since she cannot be expected to treat her husband as a stranger." Cary v. Cary, 159 Or. 578, 80 P.2d 886, 895, 121 A.L.R. 1371.

[15-17] Finally, the demurrers were properly overruled. As to the general demurrer the facts alleged state the typical action for divorce on the ground of cruelty: he frequently battered her head, kicked and pushed her out of their home and called her obscene names. As to the special demurrer that she combined an action for divorce with a demand for the return of her separate property, the pleading is in correct form. A complaint for divorce may contain a statement of the appropriate facts, and where claim is made that the offending spouse has unjustly appropriated property of the plaintiff the latter may demand that a trust be impressed upon the community property or that a lien be fixed upon defendant's separate property or that plaintiff be otherwise made secure. Nichols v. Nichols, 135 Cal.App. 488, 27 P.2d 414; Callnon v. Callnon, 7 Cal.App.2d 676, 681, 46 P.2d 988. Equity frowns upon litigation by piecemeal. Borg v. Borg, 25 Cal.App.2d 25, 31, 76 P.2d 218. When it has once obtained jurisdiction of a cause, equity will dispose of the entire controversy. Foy v. Foy, 23 Cal.App.2d 543, 73 P.2d 618; Sonnicksen v. Sonnicksen, supra.

The judgment is affirmed.

McCOMB, J., concurs.

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69 Cal.App.2d 760

In re BALDWIN'S ESTATE.

TITLE INS. & TRUST CO. v. MUNROE et al.

Civ. 14723.

District Court of Appeal, Second District, Division 1, California.

June 27, 1945.

Rehearing Denied July 16, 1945.

Hearing Denied Aug. 20, 1945.

1. Trusts ⚷272(3)

If shares of corporate stock are held in trust to pay income to a beneficiary for life and are thereafter to be conveyed to another beneficiary, the life beneficiary is entitled to ordinary dividends declared and payable during period of the trust.

2. Wills ⚷440

In determining testator's intention, court must stand by words of the will, and no intention should be attributed to testator which cannot reasonably be drawn from language of the document itself. Probate Code, § 106.

3. Wills ⚷684(3)

Where dividend on shares of corporate stock which were held under testamentary trust had been declared and was payable as of July 1, 1943, but it was not available for distribution to life beneficiary of income until it was paid to successor trustee on November 24, 1943, and trust estate by virtue of its terms had terminated prior to latter date upon death of life beneficiary, dividend was payable to testator's granddaughter, as remainderman, and not to estate of life beneficiary, in view of terms of will directing corpus and undistributed income to be distributed to granddaughter upon termination of the trust.

◆

Appeal from Superior Court, Los Angeles County; Wm. R. McKay, Judge.

Proceeding in the matter of the estate of James V. Baldwin, deceased. Upon settlement of the account of Jane D. Baldwin, as executrix of the estate of Andrew E. Baldwin, deceased, the assets of a trust estate created under the will of James V. Baldwin, deceased, were delivered to the Title Insurance & Trust Company, as successor trustee. The Title Insurance &

Trust Company, as successor trustee, filed its first and final account and report, petitioned for instructions and petitioned for discharge, to which answers and objections were filed by Nancy Baldwin Munroe and Minnie B. Guthrie, as administratrix of the estate of Katherine G. Baldwin. From that portion of decree settling first and final account of successor trustee which distributed to the administratrix of the estate of deceased life beneficiary certain net income of trust estate, Nancy Baldwin Munroe appeals.

Reversed, with directions.

Nourse & Jones, of Los Angeles, for appellant.

R. N. Stanfield, of Los Angeles, for respondent Guthrie.

YORK, Presiding Justice.

James V. Baldwin died testate leaving the following survivors: Katherine G. Baldwin, his wife; Andrew E. Baldwin, his son, and Nancy Jane Baldwin, now Munroe, his granddaughter. By the terms of his will he created a trust under which the residue of his estate was distributed to his son, Andrew E. Baldwin, who was named therein as trustee.

The instant appeal has been perfected by the granddaughter, named as remainderman in the testamentary trust, from that portion of the decree settling first and final account of successor trustee, which orders distributed to the administratrix of the estate of Katherine G. Baldwin, deceased, named as life beneficiary under the trust, the sum of $3,460, as the net income from the trust estate for the period from the death of the trustee, Andrew E. Baldwin, to the date of the death of said life beneficiary. It is urged by appellant that, since this amount of income was uncollected by the trustee and undistributed at the time the trust terminated, it vested in her under the terms of the trust.

Directions to the trustee relating to income and its distribution to the beneficiaries of the trust are contained in the order of distribution entered in the estate of James V. Baldwin, deceased trustor, to-wit:

"(b) To receive and collect the principal and income of the trust estate, invest and reinvest moneys available therefor, and, as hereinafter provided, to pay, accumulate, use or apply the income, and manage, administer and distribute the principal of the trust estate.

"(c) *The entire net income available for distribution* shall be paid in monthly, or if that is not possible, as often as is possible, to Katherine G. Baldwin (widow of James V. Baldwin, deceased), until she shall have received in each calendar year an amount in each year equal to the difference between the sum of Six Thousand Dollars ($6,000.00) and the total amount that she shall receive from the J. V. Baldwin Motor Company during said year as a salary, and the balance of said net income shall be paid to said trustee, Andrew E. Baldwin, until he shall have received an amount equal to that received by said Katherine G. Baldwin from the income of the trust estate; and the balance of said income, if any, shall be paid and divided equally between said Katherine G. Baldwin and said trustee, Andrew E. Baldwin.

"If said trustee, Andrew E. Baldwin, should predecease said Katherine G. Baldwin, *then the entire net income shall be paid* to said Katherine G. Baldwin during her life.

"(d) Upon the death of said Katherine G. Baldwin, this trust shall terminate, and the trustee shall then distribute and pay over to himself, the whole of said trust estate, *together with any income therefrom which was undistributed* at the time of the death of said Katherine G. Baldwin; or if said trustee shall not be living at the time fixed for the termination of this trust, as aforesaid, *then the corpus of the trust estate and the undistributed income therefrom* shall be distributed and paid over to Nancy Jane Baldwin (grandchild of James V. Baldwin, deceased)." (Emphasis added.)

The principal asset of the trust estate was 692 shares of stock of the J. V. Baldwin Motor Company, upon which a dividend of $5 per share was declared payable on the first days of April, July, October, 1943, and January, 1944. The April first dividend was paid to Andrew E. Baldwin, who, as trustee, was the holder of said shares of stock. On May 24, 1943, said Andrew E. Baldwin died, and his widow, respondent Jane D. Baldwin, qualified as executrix of his estate. On June 24, 1943, Title Insurance and Trust Company was appointed successor trustee of said trust, but no assets or income were received by it until after November 19, 1943, the date on which the estate of Andrew E. Baldwin, deceased, was distributed.

On September 9, 1943, Katherine G. Baldwin died and respondent Minnie B. Guthrie was appointed administratrix of her estate. The trust by its terms terminated upon the death of said Katherine G. Baldwin, whereupon the corpus and undistributed income accruing therefrom became vested in Nancy Baldwin Munroe.

On November 19, 1943, the account of Jane D. Baldwin, as executrix of the estate of Andrew E. Baldwin, deceased, was settled and the assets of the trust estate were ordered delivered to the Title Insurance and Trust Company, as successor trustee, and on November 24, 1943, the dividend payable July 1, 1943 by said J. V. Baldwin Motor Company amounting to $3,460 was paid to said successor trustee. On February 9, 1944, said successor trustee filed its first and final account and report, petition for instructions and petition for discharge.

In its petition for instructions, said successor trustee requested directions as to the following:

"1. Are costs, fees and expenses of the within trust during the period covered by this account deductible from said dividend of $3,460.00?

"2. Is the net gross amount of said $3,460.00, representing said dividend, to be distributed and paid to the estate of said Katherine G. Baldwin, deceased, or to the remainderman under the within trust upon termination thereof, to-wit, Nancy Jane Baldwin Munroe?"

Respondent Guthrie and appellant Munroe filed answers and objections to said accounting, respondent successor trustee filed answers to the objections and the matter was then argued and submitted to the court which found: "That Katherine G. Baldwin survived Andrew E. Baldwin by three months and sixteen days; that dividends upon said stock of said J. V. Baldwin Motor Company comprised substantially all of the income of the within trust; that said dividend of $3,460.00 per quarter is, in effect, at the rate of $1,153.33 per month; that pro-ration of said dividend as the income of the within trust for the period during which said Katherine G. Baldwin survived said Andrew E. Baldwin amounts to $4,075.11 for said period of three months and sixteen days; that the items of expense chargeable against the assets of the within trust in the hands of said trustee and remaining unpaid comprise said fee to said trustee of $1,200.00 and said fees to attorneys of $1,000.00 as hereinabove set forth and found, together with the items set forth in said supplement to said account, and to-wit, the total sum of $3,070.76; that payment of said $3,070.76 should be apportioned and charged as follows: Against income otherwise payable to said estate of said Katherine G. Baldwin, deceased, $615.11, and the balance thereof $2,455.65 should be apportioned against principal or corpus of the within trust; that there should be allowed and paid to said estate of Katherine G. Baldwin for said net income pursuant to the provisions of said trust as aforesaid the sum of $4,075.11, less $615.11, as aforesaid, and, to-wit, the sum of $3,460.00, and that all of the other expenses and charges, including said items, set forth in said supplement to account as aforesaid and said remaining charges herein should be paid in such manner that said Minnie B. Guthrie, as administratrix of the estate of said Katherine G. Baldwin, deceased, shall receive said sum of $3,460.00."

Based upon said finding, the court rendered that part of the decree from which this appeal is taken, to-wit: "6. That there shall be paid to said Minnie B. Guthrie, as administratrix of the estate of Katherine G. Baldwin, deceased, *as the net income from the within trust for the period following the death of Andrew E. Baldwin* on May 24, 1943, to the date of the death of said Katherine G. Baldwin, to-wit, September 9, 1943, the sum of $3,460.00; that said trustee shall pay to said Minnie B. Guthrie as such administratrix on account of said sum of $3,460.00 said balance of cash remaining in its hands in the within trust in cash after payment of the items set forth in the preceding paragraph 5 of this order and decree, and to-wit, $584.22, and that said Minnie B. Guthrie, as such administratrix, is hereby given and shall have a lien and charge upon all of the assets of the within trust to secure payment of said balance due here in the sum of $2,875.78 * * *." (Emphasis added.)

It is here urged by appellant that upon the termination of the trust, the corpus thereof and the undistributed income were distributable and payable to the remainderman and that no part thereof was payable to the life beneficiary; further, that the finding and decree of the court that the administratrix of the estate of the life beneficiary is entitled to $3,460 is contrary to and not supported by the evidence.

[1] It appears to be established that "if shares of stock are held in trust to pay the income to a beneficiary for life and are thereafter to be conveyed to another beneficiary, the life beneficiary is entitled to ordinary dividends *declared and payable* during the period of the trust. (Rest. Trusts sec. 236, p. 704, comment e.)

* * *

"1. If the dividend is declared during the period of the trust and is payable to shareholders of record at a date prior to the termination of the trust, the dividend is income, although it is payable on a date subsequent to the termination of the trust.

"Illustration: 8. On January 1, 1930, A died bequeathing all his property, including shares of the X Company to B in trust to pay the income to C for life and on C's death to convey the principal to D. On March 1st the X Company declares an ordinary dividend payable on May 1st to shareholders of record at the close of business on April 1st. On April 15th C dies. The dividend paid on May 1st is income and C's personal representatives are entitled to it. (p. 707, comment 1).

"m. If the dividend is declared during the period of the trust and is payable to shareholders of record at a date subsequent to the termination of the trust, the dividend is not income of the trust.

"Illustration: 9. The facts are as stated in Illustration 8, except that C dies on March 15th. The dividend paid on May 1st is principal and C's personal representatives are not entitled to it." (p. 703, comment m.)

The dividend here in question had been declared and was payable to Katherine G. Baldwin on July 1, 1943, a date which was subsequent to the death of the trustee. Section (c) of the trust is clear and unambiguous with respect to income accruing after the death of the trustee, to-wit: "If said trustee, Andrew E. Baldwin, should predecease said Katherine G. Baldwin, *then the entire net income shall be paid* to said Katherine G. Baldwin during her life." This provision gave to Katherine G. Baldwin a vested right to the entire net income of the trust from the date of the death of the trustee to the date of her own death. But, by another provision of his will, testator expressly limited the monthly installments payable under the trust to his wife, Katherine, to "the entire net income *available for distribution*"; and further provided that upon the termination of the trust—i.e., upon the death of Katherine, the trustee should take the whole of said trust estate "together with *any income* therefrom which was *undistributed*" at that time; or, if said trustee was not living when the trust terminated, "the corpus of the trust estate and the *undistributed income therefrom*" should be paid over to appellant granddaughter. (Emphasis added.)

[2] As stated by this court in Re Estate of Somerville, 38 Cal.App.2d 463, 468, 101 P.2d 533, 536, "In determining the intention of the testator we must stand by the words of the will, and no intention should be attributed to the testator which cannot reasonably be drawn from the language of the document itself. Section 106 of the Probate Code directs us in the interpretation of wills to view the testamentary words thereof in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can, from the testamentary language, be ascertained."

There is nothing ambiguous in the language of the trust instrument here under consideration, it appearing to be the intention of the testator that the *entire net income available for distribution* should be divided between his widow and his son and paid to them during their joint lives; that upon the death of the son, *the entire net income* (available for distribution) should be paid to the widow; that upon the death of the widow, at which time the trust would terminate, *the corpus of the trust estate together with the undistributed income* should be paid over to the son, if living, and if he were not living, then *such corpus and undistributed income* should be distributed to the granddaughter. (Emphasis added.)

The accepted meaning of "distribute" is to divide among several or many; to deal out, apportion, allot. (Webster's New International Dictionary, 2d Ed.) Undistributed therefore means not apportioned, not dealt out, not allotted.

[3] While the dividend in question had been declared and was payable as of July 1, 1943, it was not available for distribution as income until it was paid to the successor trustee on November 24, 1943. Prior to that date the trust estate had terminated and the trustee had died, and as a result

the dividend was then payable to appellant as undistributed income, according to the terms of the trust instrument.

Because of the conclusion reached, it is deemed unnecessary to pass upon appellant's second point.

That portion of the decree settling first and final account from which this appeal was taken is reversed, with directions to the trial court to enter its order in accordance with the views herein expressed.

DORAN and WHITE, JJ., concur.

TRUCK INS. EXCHANGE v. INDUSTRIAL ACCIDENT COMMISSION et al.*

Civ. 14929.

District Court of Appeal, Second District, Division 2, California.

July 2, 1945.

Hearing Granted Aug. 27, 1945.

1. Workmen's compensation 🔑731

Generally, under the going and coming rule, injury to employee who has left employer's premises and is returning home after work is not compensable.

2. Workmen's compensation 🔑709

Under the "Bunkhouse" rule, injury to employee on employer's premises, on which employee is required to live or board by terms of contract or necessity of work, may be compensable, though employee was not then at work.

3. Workmen's compensation 🔑1574

Evidence that ranch hand, employed on one of employer's four ranches, voluntarily lived on another several miles away, to which at time of collision he was returning in his own automobile after work, intending to go with wife to town to purchase kerosene for his own use, did not support finding that death arose out of and in course of employment.

◆

Proceeding under the Workmen's Compensation Act by Mrs. Estell Dollarhide, and by James Henry Dollarhide and others, minors, by their guardian ad litem and trustee, Mrs. Estell Dollarhide, for the death of their husband and father, James Dollarhide, claimants, opposed by Elmore W. Peterson, employer, and the Truck Insurance Exchange, an inter-insurance exchange, insurance carrier. To annul an award by the Industrial Accident Commission, the insurance carrier petitions for writ of review.

Award annulled.

Syril S. Tipton, of Los Angeles, for petitioner.

Everett A. Corten and R. C. McKellips, both of San Francisco, for respondent Industrial Accident Commission.

W. J. WOOD, Justice.

Petitioner seeks to annul an award of respondent Industrial Accident Commission whereby death benefits were awarded to the other respondents, the dependent widow and children of James Dollarhide. It is contended by petitioner that the evidence does not support the commission's finding that Mr. Dollarhide's death arose out of and in the course of his employment.

Petitioner is the insurance carrier for Elmore W. Peterson, who had employed Dollarhide as a ranch hand for about two weeks before the accident resulting in Dollarhide's death. Peterson owned four ranches each of which was several miles from the ranch known as the "home place," where decedent was working. On one of these ranches, known as the "Travers" ranch, decedent was living with his family. There was no stock or loose equipment at this ranch requiring the care of decedent, who had no duties whatever to perform there for his employer. On November 23, 1943, decedent finished his day's work at the "home place" and drove his own car toward the "Travers" ranch. The employer paid no part of the expenses or upkeep of the car or for any part of the gasoline or oil. Although several routes were available decedent took the most direct route and was killed in a collision at a dangerous crossing, where other persons had been killed. Decedent intended to return home and then go with his wife to town to purchase kerosene for his own use.

[1, 2] It is conceded that in general, under the "going and coming" rule, an award may not be given an employee who after finishing his work has left the

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* Subsequent opinion 167 P.2d 705.

premises of his employer and is returning to his home. To this rule there is an exception known as the "Bunkhouse" rule, and respondents contend that the facts of the present case bring it within this exception. Under the "Bunkhouse" rule if an employee is required to live or board on the premises of his employer either by the terms of his contract of employment or by the necessity of the work an injury received while on the premises may be compensable, although the employee is not at work at the time of the injury. Larson v. Industrial Accident Comm., 193 Cal. 406, 224 P. 744; Union Oil Co. v. Industrial Accident Comm., 211 Cal. 398, 295 P. 513; Employers' Liability Assur. Corporation v. Industrial Accident Comm., 37 Cal.App.2d 567, 99 P.2d 1089.

Of the cases which have been cited in the briefs the one most like the present one appears to be Associated Oil Co. v. Industrial Accident Comm., 191 Cal. 557, 217 P. 744. In that case the employer conducted a rooming-house for its employees at its plant, which was at a distance of about a mile and one-half from the town of Fellows. After the employee had finished his day's work he went to the rooming-house, and it being a hot day, seated himself on the edge of the porch. The porch railing broke and he was injured. The employee testified that there was "no other place to stay at, only the Associated Oil Company's place. It ain't a matter of choice. Unless you want to walk a matter of a mile and a half in the hot sun at 115 or 120, you got to stay there." The court annulled the award, holding that the employee was not injured when he was at work and was not required to live on the premises, he having the choice of going to the town of Fellows but preferring quarters provided for his convenience by his employer. The court said that "the test is whether or not the workman is given a choice in the matter and is free as possible to come or go as he pleases."

[3] Respondent commission relies upon the testimony of the employer in which he stated that "the only way in which you can get a man to work for you is to pay them and give them a house too." He further testified that he did not require decedent to live in the house provided, and added, "but I usually have a house for them to live in." He stated that he preferred that the employee live in the house furnished and that he figured that was part of the wages, "but they don't have to." This testimony is not sufficient to comply with the requirements of the "Bunkhouse" rule. The use of automobiles has become almost universal and it appears from the evidence in this case that decedent was intending to drive to town to purchase kerosene. The improved and additional highways make it much more convenient for employees to live at some distance from the places of their employment. In the present case there is no evidence that decedent was required to live on the premises of his employer; and the accident took place not on the premises of his employer but on a public highway and after his day's work had been completed. We are satisfied that the evidence does not support the finding that the accident in which Mr. Dollarhide met his death arose out of and in the course of his employment.

The award is annulled.

MOORE, P. J., and McCOMB, J., concur.

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70 Cal.App.2d 99

GRANATH v. ANDRUS et al.

Civ. 14764.

District Court of Appeal, Second District, Division 3, California.

July 9, 1945.

1. Negligence ⚷136(9)

The question of contributory negligence is usually one of fact and becomes a question of law only when evidence is of such a character that it will support no other legitimate inference.

2. Automobiles ⚷245(80)

Evidence presented question for jury as to whether motorist, upon seeing truck and trailer 400 feet from intersection on through highway, was contributorily negligent in attempting to proceed to cross-intersection ahead of truck after having come to a stop before entering intersection. Vehicle Code § 82.5, St.1937, p. 413; Vehicle Code, § 552, St.1935, p. 187.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by Carl S. Granath against Cecil R. Andrus and others, arising out of collision between automobile and a truck with trailer, wherein the defendants filed a cross-complaint. From a judgment in favor of plaintiff, the defendants appeal.

Affirmed.

Joseph A. Ball, of Long Beach, for appellants.

W. N. Deatherage, of Long Beach, for respondent.

DESMOND, Presiding Justice.

In this action arising out of a collision between an automobile and a truck with trailer a jury awarded the plaintiff $5,000 damages against the driver of the truck and the owners thereof; also found in favor of the plaintiff on a cross-complaint filed by the owners. The appeal is from the judgment in favor of the plaintiff and against the defendants "and from the whole thereof."

The accident took place in the city of Long Beach at the intersection of Anaheim Street and Orange Avenue. These streets cross at right angles, Anaheim running in an easterly-westerly direction and Orange Avenue extending in a northerly-southerly direction. Anaheim Street as a "through highway," as defined under section 82.5 of the Vehicle Code of the State of California, St.1937, p. 413, i. e. "* * * a highway or portion thereof at the entrance to which vehicular traffic from intersecting highways is required by law to stop before entering or crossing the same, and when stop signs are erected as provided in this code." The plaintiff testified that on July 14, 1943, at approximately 7:40 a. m., he was driving his Plymouth automobile in a southerly direction on Orange Avenue. As he approached its intersection with Anaheim Street, he came to a stop opposite a sign which had been erected on the northwest corner. He first looked toward the east and noticed two or three automobiles traveling in a westerly direction. He then looked to the west and saw the truck and trailer being driven toward the east by the defendant Andrus. At that time the truck had just cleared the intersection at Anaheim Street and Alamitos Avenue, the next street corner toward the west, and the amber light was on but the trailer was still within the intersection. Looking again toward the east after the west bound automobiles had passed him, and seeing no cars approaching from that direction, plaintiff started straight ahead, looking to the south, and just before he reached a point approximately half-way through the southwest quadrant of the intersection the truck and trailer, which he then saw only ten feet to the west, struck his automobile, the serious damage complained of then ensuing.

Appellants concede that the evidence was sufficient to prove that Andrus, the driver of the truck and trailer, which measured fifty feet in length, was negligent in the operation of those vehicles, but claim that the judgment in favor of the plaintiff should be reversed on the ground that he was guilty of contributory negligence as a matter of law. They argue that respondent, after starting to the south in low gear and at the rate of five to ten miles per hour, had ample time and opportunity "to look again to the west to see whether that fast approaching truck might then constitute an immediate hazard."

Counsel for respondent, however, takes the position that his client, having surveyed the situation before he moved into the intersection in a southerly direction was justified in determining at that time that the truck and trailer did not constitute an immediate hazard because of their great distance from him when he first saw them. (And it may be said, parenthetically, that a witness for the defendants corroborated the plaintiff's statement that the truck and trailer was partly through the intersection when the signals changed.) A diagram filed as an exhibit in this case shows that the intersection of Orange Avenue and Alamitos is over 400 feet west of the intersection where the collision occurred, and we note that section 552 of the California Vehicle Code, St.1935, p. 187, which, at the request of both plaintiff and defendants, was given as an instruction, reads as follows: "The driver of any vehicle which has stopped as required by this code at the entrance to a through highway shall yield the right of way to other vehicles which have entered the intersection from the through highway or which are approaching so closely on the through highway as to constitute an immediate hazard, but said driver having so yielded may proceed and the drivers of all other vehicles approaching the intersection on the through highway shall yield the right of way to the vehicle so about to enter or cross the through highway." Plaintiff, testifying under cross-examination, stated that he made no estimate of the speed of the truck and trailer when he first saw them but he thought they went "a pretty good speed." He explained, however, that as he entered the intersection he did not look to see if the truck and trailer were near enough to possibly cause a collision "*because I thought I had plenty of time to cross the street, while the truck goes from one end of the block to the other,*" and, "I looked before I started out. Then I looked right straight south to see so I would not run up against anybody.

"Q. You looked once and then didn't look again? A. No, not until I heard him.

"Q. When you started into the intersection, didn't you tell us that when you started up at that time, you again looked to the east to see any cars? A. I looked before I started.

"Q. Before you started, you looked to the east to see that there were no cars coming from the east that would block your passage going west? A. Yes.

"Q. When you entered into the east bound lane, across this center line, did you or did you not also look to the west to see if there were any cars or trucks which might be coming? A. No.

"Q. *You didn't look?* A. *Because I was sure there was none more than the truck coming.*

"Q. You found out later you had made a mistake in your judgment. A. I didn't make a mistake because *there ought to be plenty of time to cross the street when a truck goes from one end of the block to the other.* * * *

"Q. You relied upon your judgment, didn't you? A. Yes.

"Q. When you were at the boulevard stop sign? A. Yes.

"Q. *You made up your mind at the boulevard stop sign that you could cross at that time?* A. *Yes.*

"Q. *And you relied upon your judgment at that point in going across the street?* A. *Yes.*

"Q. Do I state that correctly? A. Yes.

"Q. If I am unfair, I want you to say so. A. That is right.

"Q. *That's the reason you didn't look again to see if any traffic was coming, is that right?* A. *Yes.*" (Italics ours.)

The diagram, heretofore referred to, shows that Anaheim Street is only fifty feet wide between curbs at its intersection with Orange Avenue. It is clear from the testimony, as quoted, that plaintiff did not enter the intersection without first looking both to the east and to the west and satisfying himself, from his observations, that without another westward glance he could cross this fifty foot street and not incur the risk of colliding with a vehicle which a moment before he had seen over four hundred feet away. Instead he "looked right straight south to see so I would not run up against anybody."

[1] It is apparent that plaintiff misjudged the speed of the truck and was mistaken as to his ability to cross Anaheim Street in front of it with safety. However, every mistake of judgment is not negligence, for mistakes are made even in the exercise of ordinary care. In a situation like the present, the language of the court in Couchman v. Shelling, 1931, 111 Cal.App. 192, at page 195, 295 P. 845, at page 847, is apropos: "The circumstances under which a court can declare that certain acts constitute contributory negligence as a matter of law are rare. Swartz v. Acme Express & Drayage Co., 102 Cal. App. 615, 283 P. 358. It can seldom happen that the question is so clear from doubt that the court can undertake to say as a matter of law that the jury could not fairly and honestly find for the plaintiff. Schierhold v. North Beach & M. R. R. Co., 40 Cal. 447, 453. The question is usually one of fact and becomes a question of law only when the evidence is of such a character that it will support no other legitimate inference. Zibbell v. Southern Pac. Co., 160 Cal. 237, 116 P. 513."

[2] It was for the jury in the instant case to determine whether plaintiff used ordinary care under the circumstances. While there was room for a difference of opinion upon this point, we cannot say that the conclusion of the jury that plaintiff did exercise ordinary care was altogether unreasonable.

The judgment is affirmed.

SHINN and PARKER WOOD, JJ., concur.

70 Cal.App.2d 28

PEOPLE v. YOUNG.

Cr. 1895.

District Court of Appeal, Third District, California.

June 29, 1945.

1. Criminal law 🔑417(1)

The act or declaration of another in the presence and within the observation of a party and his conduct in relation thereto are facts which may be proven at trial. Code Civ.Proc. § 1870, subd. 3.

2. Criminal law 🔑404(1)

The admission of material objects other than writings is regulated by sound discretion of trial court. Code Civ.Proc. § 1954.

3. Criminal law 🔑432, 1186(4)

In homicide prosecution, refusal to admit writings bearing on victim's illicit relationship with defendant's wife, her pregnancy by victim and victim's obscene sense of humor, which were only cumulative of facts which were testified to at length and which were not contradicted, was not an abuse of discretion, and, in any event, was not prejudicial error. Code Civ.Proc. § 1954; Const. art. 6, § 4½.

4. Witnesses 🔑389

Where attention of witness was called on cross-examination to previous contradictory statements on direct examination and witness merely stated that she did not remember such statements, adversary could properly impeach witness by proving such statements, notwithstanding that witness did not expressly deny having made them. Code Civ.Proc. § 2052.

5. Witnesses 🔑388(8)

In laying foundation for impeachment of witness being cross-examined to prove contradictory statements previously made by witness and taken down and subsequently transcribed by a court reporter, where witness was fully advised as to time, place and parties present and statements were read to witness, it was not necessary that witness be permitted to examine transcript. Code Civ.Proc. § 2052.

6. Criminal law 🔑1186(4)
Homicide 🔑300(5)

In homicide prosecution, where court charged that "the law of self-defense is a law of necessity" and subsequently charged that "the so-called defense of the 'unwritten law' or 'the law of necessity' have no standing in the state," charge was not objectionable as confusing, since the phrase "the law of necessity" in latter instruction, following the word "or," had reference only to the phrase "unwritten law" and, in any event, under the circumstances, ambiguity, if any, was not sufficiently prejudicial to require a reversal. Const. art. 6, § 4½.

7. Homicide 🔑122

The "unwritten law," which means the right to avenge a wrong done a female member of one's family, is not sanctioned in California as a defense in a homicide prosecution.

See Words and Phrases, Permanent Edition, for all other definitions of "Unwritten Law".

8. Homicide 🔑122

The Code section defining the unwritten law as law not promulgated and recorded but which is observed and administered in the courts of the country and collected from the reports of the decisions of the courts and the treatises of learned men had no application to a homicide prosecution arising out of the killing of a man who had allegedly caused defendant's wife to become pregnant. Code Civ.Proc. § 1899.

9. Criminal law 🔑829(1)

Where it was apparent from a reading of charge as a whole that court fully, clearly and fairly instructed jury on all points material to case and necessary for information of jury, denial of defendant's proposed instructions, even if they correctly stated the law, was not error.

◆

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Leonard A. Young was convicted of manslaughter, and he appeals.

Affirmed.

Manwell & Manwell, of Marysville, for appellant.

Robt. W. Kenny, Atty. Gen., James O. Reavis, Deputy Atty. Gen., and Richard H. Fuidge, Dist. Atty., of Marysville, for respondent.

PEEK, Justice.

This is an appeal by defendant from a judgment of conviction of the crime of manslaughter, and from an order of the trial court denying his motion for a new trial.

The testimony discloses that defendant and the deceased, Snow, had been employed for a number of years by the Di Giorgi Fruit Corporation, and at the time of the fatal shooting were working out of the corporation's field office located at the New England Orchard, south of the city of Marysville. Defendant's wife was also an employee of the corporation and worked at the same office. The three had been friendly for some time and were in the habit of frequenting places of amusement together. However, after the deceased was assigned to work in the New England Orchard Company's office, the relationship between the parties became strained. According to the defendant's testimony his wife's attitude toward him became cool and aloof, and for several months prior to the shooting they had not lived together as man and wife. Approximately a month prior to the homicide he found a note in his wife's purse directed to Snow, which manifested intimacies between them. Shortly thereafter he discovered his wife was pregnant. When he confronted her with this fact and named Snow she admitted her relationship with him. That same evening he talked to Snow concerning his wife's condition. Snow denied he was involved and according to defendant told him that if he ever said anything more about it he would "beat Hell out of me." Young made various propositions to his wife relative to their marital affairs, including that of the resumption of their marriage subject to the adoption of the child, but his wife refused to accept any of his proposals. He then instituted an action for divorce. A second note, between his wife and Snow, which intimated that things were not satisfactory between her and Snow, was intercepted by defendant. He further testified that his wife pleaded with him not to sell their home as he had planned, for the reason she had no place to go nor was there any one to take care of her during her confinement. Again he decided to have a talk with Snow concerning the whole affair and what was to be done about his wife and her unborn child. Accordingly he called at the field office at noontime on August 20th.

On the Sunday prior to his calling at the field office he had purchased a revolver which he said he desired to take with him on fishing trips, and until the shooting had kept the gun in the glove compartment of his car. He went to the office twice. The first time he did not have the revolver. Before entering the office the second time he placed the revolver inside of his shirt, stating he did so because of the previous threats made by Snow. He stated further that when he entered the office there were present his wife, Snow and a Miss Oertle; that he talked to the latter a short while and then asked her to leave; that after Miss Oertle closed the door he started to ask Snow what he was going to do concerning Mrs. Young; that Snow said nothing but jumped up from where he was sitting and grabbed him; that he jerked the gun from his shirt; that while they were struggling for its possession he thought three shots were fired but he was not sure; that he remembered talking to persons afterward but because he was so upset he remembered nothing of the conversation. However, one of his superiors testified that immediately following the shooting defendant stated he had shot Snow and was glad of it.

Defendant's wife, when called as a witness in his behalf, substantially corroborated his testimony concerning the actual shooting. She also stated that she remembered talking to persons at the hospital where Snow was taken and in the district attorney's office two days after the shooting, but that she had no recollection of the questions asked or her answers thereto. The only testimony concerning the actual shooting was that given by the defendant and his wife.

Three issues are raised by defendant: (1) That the trial court erred in refusing certain offers of proof; (2) that the court erred in allowing defendant's wife to be impeached as to prior contradictory statements which she neither denied nor affirmed but merely stated she had no recollection of making; and (3) that the court erred in giving certain alleged contradictory instructions, and also in failing to give certain instructions offered by him.

In support of his first contention he argues that as "the characters of the participants are always involved" and "are matters which the jury have a right to know independent of presumptions in order that they can reason how such a person would act under such circumstances" and as he was being driven to a point of "exasperation," the evidence of the facts which were so driving him "into an altercation with Snow" should have been submitted to the jury, and cites Section 1870, Subdivision 3 of the Code of Civil Procedure.

[1, 2] It is true, as defendant contends, that under said Code provision the "act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto;" are facts which may be proven at the trial. However, even if the evidence offered was proper under said section the admission of material objects other than writings are governed by the provisions of Section 1954 of the Code of Civil Procedure, wherein it is provided: "Whenever an object, cognizable by the senses, has such a relation to the fact in dispute as to afford reasonable grounds of belief respecting it, or to make an item in the sum of the evidence, such object may be exhibited to the jury, or its existence, situation, and character may be proved by witnesses. The admission of such evidence must be regulated by the sound discretion of the court."

[3] The first offer consisted of a note which the defendant's wife admitted writing to the deceased and which related to her association with him. At best, said writing was only cumulative as regards her illicit relationship with Snow concerning which she had been allowed to testify at length, and which was not contradicted. Snow's actions and comments when confronted with such facts were likewise testified to at length by both the defendant and his wife. The second writing was of no value other than as illustrative of an obscene sense of humor on the part of the deceased. The third offer related to medicine alleged to have been given by Snow to Mrs. Young in an attempt to procure a miscarriage, and was of value only to substantiate the fact of her pregnancy, which likewise was admitted and not contradicted.

Even if it could be said that the trial court erred in refusing to admit the proffered evidence we cannot say, under the circumstances herein presented, that such refusal was an abuse of discretion under Section 1954 of the Code of Civil Procedure, or that the refusal amounted to such prejudicial error as would demand a reversal. Sec. 4½, Art. VI, Const.

[4] Defendant's next contention is predicated solely upon the fact that as his wife did not deny that she had made certain contradictory statements on previous occasions but upon cross-examination merely stated that she did not remember the same, there was nothing to impeach; while in his reply brief he further contends that in addition she was never confronted with the previous statements attributed to her, and that therefore under such circumstances the trial court erred in overruling his objections to the questions propounded by the district attorney. We likewise find no merit in this contention.

From the record it appears that the district attorney sought to interrogate her concerning statements highly contradictory to her direct testimony which were alleged to have been made (1) at the hospital a few hours after the shooting took place, and (2) in the office of the district attorney two days after the homicide. The questions attacked by the defendant were asked her during her cross-examination and to all of which she replied she did not remember. It is true that although the alleged statements were taken in shorthand and later reduced to writing by an official court reporter, the transcript of such questions and answers was not shown to her when she was first on the stand under cross-examination and prior to being asked concerning the statements so attributed to her. Later during the trial the reporter was called by the prosecution and was allowed to read the questions and answers from his notes. The defendant's objection, both to the questions asked the wife and the reporter, was that "there is no basis for impeachment of the witness. The witness testified that she didn't remember and that isn't the necessary foundation for impeachment", but this objection was overruled by the court. Thereafter the reporter was dismissed and the prosecution recalled the wife for further cross-examination. At this time she was confronted with the transcript and allowed to read the particular questions and answers before being interrogated by the district attorney. No objection was made by defendant to this line of cross-examination.

The rule, that before the contradictory statements of a witness may be properly admitted in evidence for impeachment purposes, a proper foundation must be laid, is found in Section 2052 of the Code of Civil Procedure, which provides in part that "before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them.

If the statements be in writing, they must be shown to the witness before any question is put to him concerning them."

In the case of People v. Singh, 20 Cal. App. 146, 128 P. 420, 421, the defendant was asked upon cross-examination if he did not make certain statements on the day of his arrest in the presence of several deputy sheriffs, to which question defendant failed to give a direct answer, although it was repeated several times. Objections similar to those interposed herein were made. Upon appeal the reviewing court stated:

"It is true generally, as asserted by counsel for defendants, that a witness cannot be impeached by evidence of previous contradictory statements which he does not deny having made; but this rule is subject to the qualification that such evidence is admissible if the witness does not distinctly admit that he made the statements attributed to him. Jones on Evidence, § 845; Stephen on Evidence, art. 131; Stewart v. State, 42 Fla. 591, 28 So. 815.

"In the present case the evidently evasive answers of the assailed witness to several of the questions put to him were tantamount to a refusal to admit the statements therein imputed to him; and this in itself was sufficient to warrant the people in showing, if they could, that he did make those statements."

The court therein further stated that the rule set forth in said section 2052 was designed for the purpose of fully informing the assailed witness of the particulars of the alleged contradictory statements together with the circumstances of the time and place of its making and the persons present, in order that the witness, in justice to himself and the party in whose behalf he was called "might fairly and intelligently deny, affirm, or explain the statements attributed to him." Here, as in that case, it cannot be said that the witness did not understand the nature and purport of the contradictory statements imputed to her, nor does defendant so contend. She was fully informed of the time, place, and the persons who were present on the occasion referred to.

A comparable situation likewise is presented in the case of People v. Vatek, 71 Cal.App. 453, 236 P. 163, 172. There the wife of the defendant testified in his behalf, and upon cross-examination was asked whether or not she had made certain statements to the sheriff and the district attorney on a designated date, to which she replied that she did not remember whether she had or not. Under those circumstances this court stated: "Thus the proper foundation was laid for the introduction of the sheriff's testimony as in impeachment of Mrs. Vatek regarding the matter to which the said testimony related."

[5] Although in view of the record, as previously mentioned, it would seem unnecessary to pass upon the second phase of defendant's second contention, i. e., the alleged failure of the district attorney to confront the witness with the notes taken by the reporter on the two designated occasions, it is interesting to note that such issue was directly before this court in the case of People v. Talman, 26 Cal.App. 348, 146 P. 1063, 1064. It was there observed that the final sentence of section 2052 of the Code of Civil Procedure refers to "written statements" of the witness, and where such is the case "it is highly proper that they should be shown the witness." There as here the questions of the district attorney were predicated upon notes taken by a reporter during a conversation with the witness, the district attorney and the sheriff, which notes were later transcribed. The trial court overruled the objection that the transcript of the questioning should be shown to the witness. In sustaining such ruling this court declared that there is "no reason for requiring the writing to be exhibited to the witness where he has never had anything to do with the execution of it or even has not seen it before. The inspection by the witness of a typewritten transcript, made by a stranger to him, and which he has never seen before, could not assist the witness in his recollection of oral statements which he may have made. At least, it would offer him no greater aid than to have them fully read to him." Again, as in the case last cited, there is no contention made herein that the attention of the witness was not directed to all the circumstances and declarations that had any bearing whatever upon the alleged inconsistent statement. Nor was the writing involved in the present case a transcript of a judicial proceeding as was discussed in People v. Orosco, 73 Cal.App. 580, 239 P. 82.

[6] At the conclusion of the trial the court instructed the jury at length relative to the law of self defense, and during the course thereof, stated in part: "The law

of self defense is a law of necessity, and that necessity may be real or apparently real." Thereafter near the conclusion of the charge the court stated: "No excuse or justification will afford a defense to a person charged with a crime unless such defense is based on a statute or ordinance. The so-called defense of the 'unwritten law' or 'the law of necessity' have no standing in this state."

Defendant argues (1) that not alone was the jury confused by such instructions but (2) the court misinstructed them as well. We do not so construe this charge.

Directing our attention to defendant's first point it is to be noted that in the first instance the court stated that the law of "self defense is *a* law of necessity" while in the second instruction the words "*the* law of necessity" (italics ours) are preceded by the disjunctive "or" and can have reference only to "the so-called unwritten law" as *the* law of necessity. Although such wording may be open to the charge of ambiguity it is not such prejudicial error as to result in a miscarriage of justice. Section 4½, Art. VI, Const. In that section it is specifically provided that no judgment shall be set aside or a new trial granted in any case on the ground of misdirection of the jury unless, after an examination of the entire case including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. People v. O'Bryan, 165 Cal. 55, 130 P. 1042.

[7, 8] Defendant's second point which relates to the "unwritten law" or "the right to avenge a wrong done a female member of one's family", commonly referred to as the "unwritten law", 43 Words and Phrases, Perm. Ed. "Unwritten Law", page 427, has never found sanction in this state, nor have we been referred to any case in support of defendant's contention in this regard. Neither is such defense found among those enumerated in the Penal Code. Defendant further relies upon Section 1899 of the Code of Civil Procedure. Obviously that section has no reference to the situation presented in this case. Such is likewise true of the statement appearing in 15 Cal.Jur. 965, which also is cited by defendant. We are entirely in accord with that statement of the law but we find no application to the facts herein.

[9] The remaining portion of defendant's final contention is directed at the refusal of the trial court to give certain instructions proposed by him. Even if it be assumed that the proposed instructions correctly stated the law it is readily apparent from a reading of the charge as a whole that the court "fully, clearly, and fairly" instructed the jury on all points of law "material to the case, and necessary for the information of the jury." 8 Cal.Jur. 307; People v. Reese, 65 Cal.App.2d 329, 150 P.2d 571. Defendant has thereby suffered no injury from the refusal of the court to give all of his proposed instructions.

The judgment and order are affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

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69 Cal.App.2d 616

BLACHE v. BLACHE et al.

Civ. 12778.

District Court of Appeal, First District,
Division 1, California.
June 21, 1945.

As Modified on Denial of Rehearing
July 21, 1945.

Further Rehearing Denied Aug. 18, 1945.
Hearing Denied Sept. 17, 1945.

1. Husband and wife 🔑248

Community property cannot exist in absence of a valid marriage.

2. Marriage 🔑54

In dividing gains made by joint efforts made by a man and wife living together under a voidable marriage, where parties enter into the relationship in good faith, the rule is the same as when a valid marriage is dissolved.

3. Husband and wife 🔑249
Marriage 🔑54

Husband's share of property acquired during his association with woman with whom he had entered into voidable marriage in good faith under mistaken belief that his marriage to first wife had been dissolved could be community property of husband and first wife, in the absence of evidence that their marital status had been legally dissolved, unless first wife waived, abandoned, or was estopped from asserting her claim to such community interest.

4. Divorce 🔑241, 252

In a divorce action, the court has power to grant alimony in a lump sum, but if the assets consist of community property then the award must be made in accordance with Code provisions.

5. Husband and wife 🔑298¾

Wife's rights in community property are not destroyed by decree for maintenance unless there is an agreed property settlement or the court awards community property in accordance with statutes.

6. Husband and wife 🔑299(1)

In a maintenance action, periodical payments, not an absolute allowance, are ordinarily contemplated, though the court has the right to order otherwise. Civ.Code, § 137.

7. Husband and wife 🔑299(4)

Community property may be resorted to in order to enforce orders for separate maintenance. Civ.Code, §§ 137, 140, 141.

8. Divorce 🔑252
Husband and wife 🔑298¾

Except in instances designated in the Code, community property in either divorce or maintenance actions must be equally divided. Civ.Code, §§ 137, 146.

9. Husband and wife 🔑283(2)

Either failure to provide wife with common necessaries of life when husband has ability to do so, or failure to provide through inability by reason of idleness, profligacy or dissipation may constitute "willful neglect" authorizing a judgment awarding separate maintenance and dividing the community property.

See Words and Phrases, Permanent Edition, for all other definitions of "Willful Neglect".

10. Appeal and error 🔑1122(2)

Where trial court struck out direct finding of willful neglect on part of husband but did not strike the finding that wife was destitute, District Court of Appeal could not resolve the resulting inconsistency by making a finding of willful neglect, where record showed that trial judge was justified in striking finding that wife was destitute. Code Civ.Proc. § 662; Civ.Code, §§ 137, 146.

11. New trial 🔑164

If trial court on motion for new trial in separate maintenance action determined, upon a re-examination of the record, that evidence on wife's part was not substantial or was not worthy of belief, trial court had right to modify its finding that husband was guilty of willful neglect. Code Civ.Proc. § 662; Civ.Code, §§ 137, 146.

12. Husband and wife 🔑299(1)

In action for separate maintenance, trial court's action in striking out finding of willful neglect on part of husband, coupled with insertion of provision giving wife less than one-half of the community property, constituted error. Civ.Code, §§ 137, 146.

13. Judgment 🔑568

A default judgment, if a court has jurisdiction, is a waiver of one's right to subsequently litigate the adjudicated issues.

14. Divorce 🔑172

Where there was a default in original divorce proceeding instituted by husband, but no judgment of divorce was entered, issue as to whether husband deserted wife or vice versa was not previously adjudicated.

15. Husband and wife 🔑295

Where community property award could not be held as security for payment of the community interest, it could not be held as security for payment of fees to wife's attorneys in the absence of a direct order to that effect.

◆

Appeal from Superior Court, San Francisco County; Sylvain J. Lazarus, Judge.

Action for separate maintenance by Anna J. Blache against Maurice J. Blache, also known as Jean J. M. Blache, and Jeanne C. Pedebidou, also known as Jeanne Blache, wherein defendant Maurice J. Blache, also known as Jean J. M. Blache, filed a cross-complaint for divorce and for annulment of the marriage. From judgment entered, the plaintiff and the defendant Jeanne C. Pedebidou, also known as Jeanne Blache, each appeal.

Judgment affirmed in part, and in part reversed, and cause remanded.

Edward J. Lynch, of San Francisco, for defendant and appellant Jeanne C. Pedebidou, also known as Jeanne Blache.

David Livingston, Louis F. DiResta and Max H. Margolis, all of San Francisco, and Milton A. Krug, of Los Angeles, for appellant Anna J. Blache.

Fletcher A. Cutler, of San Francisco, for respondent Maurice J. Blache.

WARD, Justice.

Plaintiff, Anna J. Blache, brought this action for separate maintenance against Maurice J. Blache (sometimes referred to as Jean J. M. Blache) and Jeanne C. Pedebidou, also known as Jeanne Blache. As a matter of convenience the parties will be referred to as Anna, Maurice and Jeanne. They are the components of a marital triangle constructed by Maurice when he married Jeanne under the mistaken impression that he had secured a divorce from Anna. Maurice was relatively poor during his marriage to Anna, but, as appears from the present transcript, after marrying Jeanne, and with her help, he accumulated a substantial amount of real and personal property. Anna is now demanding separate maintenance and a share of the property which she claims is the community property of herself and Maurice. Jeanne is joined as a party defendant because Maurice transferred property to her. The trial court refused to grant Anna separate maintenance but rendered a judgment in her favor for $7,989.13 in lieu of her rights in the community property and allowed her attorney's fees of $6,500.

Anna's first amended complaint alleges that she and Maurice intermarried in the State of Ohio in May of 1912 and that sometime in 1915 Maurice deserted and abandoned her; that for more than one year prior to filing the complaint he neglected to provide the common necessaries of life although Anna was an indigent person, and that for a long period of time Maurice and Jeanne have lived and cohabited together. The first amended complaint also alleges that Maurice was the owner of a certain business venture and of stocks, bonds, real estate, etc., constituting the community property of Anna and Maurice, and that Jeanne had no interest therein other than as a trustee. Anna, as plaintiff, prayed that her share of such community property be set apart for her, and also for separate maintenance, attorneys' fees, and that Jeanne should be debarred from asserting any claim adverse to plaintiff's interest.

Maurice answered alleging extreme cruelty on Anna's part; that she had deserted him in 1914; that for some years Anna and Maurice believed that a divorce had been granted dissolving their union; that during such period no request was made by Anna for maintenance or support notwithstanding that she knew seven years before filing the present complaint that there was in fact no divorce and that a marriage ceremony had been performed between Maurice and Jeanne. Maurice alleged acquiescence and condonation and that the conduct of Anna constituted laches. Maurice filed a cross-complaint for divorce on the ground of extreme cruelty and a further cross-complaint for annulment of the marriage based upon alleged fraud in obtaining the consent of Maurice to the marriage contract. The trial court denied both the divorce and the annulment, and Maurice has not appealed from the judgment.

Jeanne, without waiving her right to object to the jurisdiction of the court to try title to certain property, answered, claiming that the suit filed by Anna was barred by statutes of limitation. The answer in great measure followed the allegations of the answer of Maurice. In addition, Jeanne denied that Maurice was the owner of the property described in Anna's complaint except that he owned a one-half interest in the Blache Film Laboratories.

The judgment, as entered originally, granted Anna a monthly allowance for her separate maintenance. On motion for new trial the superior court struck out the portion of the judgment granting an allowance and the findings in support thereof. The judgment as modified decreed and ordered $6,500 additional fees to one of Anna's attorneys; set aside deeds transferring Maurice's interest in certain real property to Jeanne, and also set aside a transfer by Maurice to Jeanne of stocks and of his joint interest in a bank account of $15,978.26. It was directed that Anna recover from Jeanne the sum of $7,989.13, representing the particular community interest of Maurice and Anna in the bank account, "provided that the amount paid on said judgment shall be paid for the account of Maurice Blache and applied to the payment of any and all amounts due to Anna Blache and her attorneys from Maurice Blache pursuant to the judgments described in the findings herein, and pursuant to the final judgment herein, which amounts are not otherwise or by other means or out of other sources satisfied." The judgment imposed liens on the designated properties and assets to secure the payment of all amounts required by the judgment to be paid. Maurice was enjoined from selling, transferring, encumbering, etc., any of the property, and Jeanne enjoined from accepting Maurice's interest or any part thereof. The judgment also provided: "On payment or satisfaction of this judgment, plaintiff Anna J. Blache shall have no further claim, right, title or interest in or to or recourse against any of the remaining real or personal property herein or in the complaint referred to or any community property of the plaintiff Anna J. Blache and defendant Maurice J. Blache." Costs of suit were awarded to Anna.

Anna appeals from that part of the judgment allegedly failing (a) to assign to plaintiff one-half of the community property; (b) to determine how or under what circumstances the community property shall be hereafter divided; (c) to make provision protecting the rights of plaintiff to the community property; (d) to award support and maintenance; (e) to decide that Maurice for one year prior to the commencement of the action had wilfully failed to provide for plaintiff. Jeanne appeals from the whole of the judgment.

The evidence shows that Anna and Maurice were married in Ohio in 1912. In the following two years the parties made three attempts to live together, each time separating after quarrels. The final separation took place in Edmonton, Canada, where Maurice was arrested on complaint of Anna. The charges against him were dismissed. According to Maurice's testimony, which the trial court disbelieved, upon the termination of the criminal charges he met Anna outside of the courtroom and there entered into an oral agreement with her settling their property rights. He stated that all of their assets, consisting of a small amount of money and jewelry were turned over to Anna, and that she waived support. Anna could remember no such agreement.

Maurice came to California, where in 1916 he sued for divorce, alleging that Anna had deserted him. Upon being served Anna wrote to Maurice's attorney stating that she would not contest the suit. Her default was entered. When the case came on for hearing the trial judge refused to grant the divorce without further corroboration of Maurice's testimony. The case was continued to allow a deposition to be taken in an eastern state. No further action was taken and the record discloses that the case was dismissed by the court. In the present action, however, the court found that Maurice believed in good faith that his marriage to Anna had been dissolved.

During his service in World War I with the "California Grizzlies" Maurice met Jeanne, and in 1918 married her. Jeanne, unlike Anna, appears to have lived in harmony with him. Anna and Maurice did not keep in touch with each other. Anna toured the country in a trailer with a woman companion and settled in Los Angeles in 1927. In 1932 she visited San Francisco and found the name of Blache in the telephone directory. She telephoned the laboratory but was not able to talk to Maurice. Later in the year she wrote Maurice asking him to send her a copy of the divorce decree which she stated was necessary in order to obtain a passport. At this time it was discovered that the decree of divorce had not been filed. Anna at first assured Maurice that she did not want to cause any trouble and suggested that he secure a divorce and remarry Jeanne. Maurice took no steps to straighten out his marital affairs. In 1938 Anna told Maurice that she was destitute and demanded financial assistance. When he failed to help her, she filed the present action for separate maintenance. Not until legal action was threatened did Maurice inform Jeanne of the true situation.

Prior to her marriage Jeanne had owned and operated a rooming house in San Francisco worth from six to eight thousand dollars. Several years later she inherited between two and four thousand dollars. Maurice apparently had no assets at the time of his purported marriage to Jeanne. By 1939, the year in which this action was begun, Maurice and Jeanne owned, as joint tenants, real and personal property worth in excess of $150,000. It is Jeanne's story that at Maurice's suggestion she sold her rooming house and invested the proceeds in a motion picture film laboratory, known as the Blache Film Laboratory, which she operated as her own business. Her testimony as paraphrased in her opening brief is as follows:

"It was understood between them from the beginning that the business and the profits therefrom would be her own separate property. During all of the time that Jeanne Blache managed the business, Maurice was regularly employed on a weekly salary by the Pathe Company.

"About 1930 Jeanne's health became impaired as a result of her overwork in her business and she suffered a breakdown which required a long vacation in an attempt to recover her health. She did not improve and was obliged to give up management of her laboratory business and in 1931 turned the business over to Maurice, who thereupon quit his employment with Pathe and devoted his time to the laboratory business;—for a while, alone, and later in partnership with other persons.

"All the earnings of Maurice were used by him in payment of household expenses, personal expenses and entertainment. While Jeanne managed her laboratory business, and afterward her hotel business, she collected all the moneys and established a bank account in the joint names of herself and Maurice. She did this upon the advice of her banker, after she informed him that she was not in good health, and if anything happened to her, she wanted her husband to have what money or property she possessed, and wished to avoid the expense or delay of probate proceedings or litigation of any kind.

"Later, when Jeanne purchased real estate, she followed the same plan and had the deeds made out in their joint names. This was done under the original understanding with Maurice that Jeanne was to continue to be the owner of the property and that he, whenever requested, would sign any release or transfer to show true ownership in Jeanne. Jeanne testified that in addition to her desire to have Maurice succeed to her property in case of her death, she wanted her husband's name to appear in the business and in the records, as that was the custom among her people and she did not wish to humiliate her husband before their friends." Jeanne's testimony was corroborated by Maurice.

Shortly before Anna began her action, Maurice transferred his interest in the property held in joint tenancy to Jeanne. The trial court ordered these transfers set aside on the ground that they were made to prevent Anna from successfully asserting her rights.

The trial judge did not believe Jeanne's story as to why the property was held in joint tenancy. He found that the property was acquired through the joint efforts of Maurice and Jeanne and was held by them jointly. Jeanne's contention that he was not entitled to disbelieve the testimony of herself and Maurice is without merit. The trial court was entitled to take into consideration all of the testimony, such as the fact that the operation of a film laboratory is technical and Maurice, not Jeanne, was experienced in the business. He taught the employees; he negotiated a complicated lease of the premises which were specially built to guard against fire. Maurice filed a statement that he was doing business under the name of "Blache Film Laboratories." In 1938 an income tax return was filed reflecting income as that of the community and allocating one-half to Maurice and one-half to Jeanne. In connection with their operation of the Mayfair Hotel and the Traymore Apartments, both Maurice and Jeanne filed certificates of doing business. When they were sued in the municipal court as a result of a transaction involving the business of the hotel, Jeanne verified an answer expressly alleging that she and Maurice were doing business under the name of "Mayfair Hotel" but in a later suit on the same cause of action, after Jeanne was apprised of Anna's claims, Jeanne took a contrary position and alleged that she alone operated the hotel. Jeanne's testimony with reference to the $15,978.26 she and Maurice held in a joint bank account may, in the view of the trial court, have cast some doubt on her credibility as a witness. As soon as Jeanne learned that Anna was Maurice's wife she had him sign a withdrawal voucher. She then redeposited the $15,978.26 under the name "Lucille Codo" and sixteen days later withdrew the money. At the trial she testified that she could not recall what she had done with this money.

[1-3] The accumulations of Maurice and Jeanne, based upon the facts previously set forth, belonged to Maurice and Jeanne in equal shares. There can be no community property in the absence of a valid marriage. In dividing gains made by the joint efforts of a man and woman living together under a voidable marriage, where the parties enter into the relationship in good faith the rule is the same as when a valid marriage is dissolved. Schneider v. Schneider, 183 Cal. 335, 191 P. 533, 11 A.L.R. 1386; Vallera v. Vallera, 21 Cal.2d 681, 134 P.2d 761; Coats v. Coats, 160 Cal. 671, 118 P. 441, 36 L.R.A., N.S., 844. However, Maurice's share of the property acquired during his association with Jeanne may be the community property of himself and Anna in the absence of evidence that their marital status has

been legally dissolved (Britton v. Bryson, 216 Cal. 362, 14 P.2d 502) unless Anna waived, abandoned or is estopped to assert her claim to such community interest.

With the factual background in mind, the problem is, what part of the judgment, if any, may be sustained in view of the fact that the trial court awarded a part of the community property to Anna but struck the allowance for separate maintenance from the judgment and deleted the finding of willful neglect.

There is evidence in the record to sustain certain findings if the court believed the testimony of one spouse and disbelieved that of the other. A fair sample is the finding that it is not true that each party agreed to "support or maintain himself or herself." On appeal we cannot evaluate the truth of the testimony from the manner and demeanor of the witnesses. There appear enough contradictory and inconsistent statements in the transcript of the testimony of each of the three principal parties to justify this court in sustaining a finding contrary to the testimony of any one of the parties. Arguments in the briefs that one party should be believed and not the other will not be considered in detail.

[4-6] Whatever conclusion the trial court reached in reference to awarding maintenance and support to Anna payable in installments "so long as plaintiff Anna Blache shall live" was set aside on motion for a new trial. However, the award of $7,989.13 to Anna "representing the community interest" of Maurice and Anna in a certain bank account remained as part of the judgment. In a divorce action the court has power to grant alimony in a lump sum, but if the assets consist of community property then the award must be made in accordance with code provisions. If the action is one for separation and maintenance, a dissolution is not contemplated. The parties remain, as before, husband and wife. The rights of the wife in the community property are not destroyed by the decree for maintenance unless there is an agreed property settlement or the court awards the community property in accordance with the statutes. In a maintenance action, periodical payments, not an absolute allowance, are ordinarily contemplated (Kusel v. Kusel, 147 Cal. 57, 81 P. 295), though the court has the right to order otherwise. Sec. 137, Civil Code.

[7] It is proper to resort to community property to enforce orders for separate maintenance. Civil Code, secs. 137, 140, 141; West v. West, 206 Cal. 706, 276 P. 100; D'Arcy v. D'Arcy, 89 Cal.App. 86, 264 P. 497. "Under that section (Civ.Code, sec. 140), or independently, the payment of permanent alimony may be secured by making the same a lien or charge on the obligor's property." Reed v. Hayward, 23 Cal.2d 336, 341, 144 P.2d 561, 564. If the cause of action is for extreme cruelty the court may authorize an award of all of the community property (Finnegan v. Finnegan, 64 Cal.App.2d 109, 148 P.2d 37), and the husband's business may be sold and the proceeds used to support the wife and children. Smith v. Smith, 49 Cal.App.2d 716, 122 P.2d 346. In the present case no children are involved. Anna took no part in the accumulation of the community property. She seems to have lived without appealing to Maurice for assistance until it was discovered that either he or Jeanne or both owned considerable property. The allowed $7,989.13 represented "the community interest of Maurice * * * and Anna * * * in said bank account." The record discloses that the court found the value of the real and personal property described to be in excess of $150,000. The findings recite: "In fixing so small an amount of allowance in comparison to the value of the property owned by defendant Maurice J. Blache, the court has taken into consideration the fact that plaintiff Anna J. Blache did not participate in the acquisition of said property." The court made it plain that maintenance payable in installments was not to be allowed. The amount of $7,989.13 is the community interest ordered paid and that "On payment or satisfaction of this judgment, plaintiff Anna J. Blache shall have no further claim, right, title or interest in or to or recourse against any of the remaining real or personal property herein or in the complaint referred to or any community property of the plaintiff Anna J. Blache and defendant Maurice J. Blache."

Under the facts of this case community property may not be disposed of in the foregoing manner in an action for maintenance. Anna's first amended complaint prays for separate maintenance upon the ground of desertion, failure to provide and adultery. The desertion charge is referred to only indirectly in the findings. There are findings that a marriage ceremony was performed between Maurice and Jeanne and that they lived together as man and wife. There is no direct finding that the charge of adultery is true. There is an explicit finding that at the time of the marriage ceremony between Maurice and Jeanne, Maurice believed that a divorce had been procured from Anna. Whatever actuated the trial judge, the findings show that the basis of the judgment is attempted to be placed upon the second cause of action, alleging wilful neglect. It appears that upon that cause of action alone the court distributed the community property and decreed that upon payment Anna should have no further claim or recourse against any of the "community property."

Civil Code, section 137 provides that during the pendency of an action for divorce, or when a husband wilfully fails to provide for his wife, she may, without applying for divorce, maintain an action for permanent support and maintenance. The section further provides: "* * * the court may, in its discretion, require the husband or wife, as the case may be, to pay as alimony or as costs of action or as attorney's fees any money necessary for the prosecution of the action and for support and maintenance, and execution may issue therefor in the discretion of the court. The court, in granting the husband or wife permanent support and maintenance of himself or herself * * * shall make the same disposition of the community property * * * as would have been made if the marriage had been dissolved by the decree of a court of competent jurisdiction."

[8] Civil Code, section 146 provides: "In case of the dissolution of the marriage by decree of a court of competent jurisdiction, the community property, and the homestead, shall be assigned as follows: * * * If the decree be rendered on any other ground than that of adultery, incurable insanity or extreme cruelty, the community property shall be equally divided between the parties." Section 137 makes section 146 applicable for separate maintenance. Greenlee v. Greenlee, 7 Cal.2d 579, 61 P.2d 1157. Any division other than as approved by section 146 may not be approved on an appeal. Buller v. Buller, 62 Cal.App.2d 687, 145 P.2d 649; Tipton v. Tipton, 209 Cal. 443, 288 P. 65; Mason v. Mason, 219 Cal. 111, 25 P.2d 461; Stewart v. Stewart, 204 Cal. 546, 269 P. 439; Lorraine v. Lorraine, 8 Cal.App.2d 687, 48 P.2d 48. No doubt the trial judge endeavored to reach a practical and perhaps just solution of the difficult problem but, except in the instance designated in the code, community property in either divorce or maintenance actions must be equally divided. Civil Code, secs. 137, 146. Other sections called to our attention do not change this rule.

No findings were made upon which an order disposing of the community property in accordance with section 137 of the Civil Code could have been based. There are certain findings on the allegations of desertion and adultery, but Anna realizes the insufficiency of these findings. She takes the position that the evidence clearly permits this court to make a finding of wilful neglect, which would require a judgment awarding separate maintenance and dividing the community property. All of the evidence relevant to the charges of adultery or desertion may be disregarded therefore unless such evidence likewise pertains in some manner to the wilful neglect count. With this position in mind, a number of contentions of appellant Jeanne and respondent Maurice may be disregarded. Maurice did not appeal from the whole or any part of the judgment.

[9] There are two sets of facts that may constitute wilful neglect; (a) failure to provide the wife with the common necessaries of life when the husband has the ability to do so, and (b) failure to provide through inability by reason of idleness, profligacy or dissipation. In either of these instances the wife must be destitute of the common necessaries of life. There is evidence that Anna supported herself. If her earnings were sufficient to supply her with the common necessaries of life without assistance from others then she was not destitute and Maurice did not wilfully neglect her.

[10, 11] The court did not strike the finding that Anna was destitute, which is inconsistent with its action in striking out the direct finding of wilful neglect. Locke v. Locke, 153 Cal. 56, 94 P. 244; Rycraft v. Rycraft, 42 Cal. 444; Washburn v. Washburn, 9 Cal. 475; Hammond v. Hammond, 92 Cal.App. 212, 267 P. 893. However, this court cannot resolve the inconsistency by making a finding of "wilful neglect" because the record shows that the trial judge was justified in striking the finding on that point. If the trial court on

motion for new trial determined, upon a reexamination of the record, that the evidence on the part of Anna was not substantial or was not worthy of belief the court had the right to modify the finding. Code Civ.Proc. sec. 662; Spier v. Lang, 4 Cal.2d 711, 53 P.2d 138; California Machinery, etc., Co. v. University City Synd., 3 Cal.App.2d 425, 39 P.2d 853; Quetin v. Caubu, 58 Cal.App.2d 793, 137 P.2d 880; Clarke v. Fiedler, 44 Cal.App.2d 838, 113 P.2d 275; Estate of Perkins, 21 Cal.2d 561, 134 P.2d 231; 39 Am.Jur., New Trial, pp. 42, 43, sec. 17.

The following evidence supports the trial court's action in modifying the judgment: Upon learning that Maurice had not secured a divorce Anna wrote: "While it is true, you should never have attempted taking this serious step without knowing for sure if you were free to do so, but since you have there is only one honorable thing for you to do—when she is well and feels her real good self again, talk this matter over with her sensibly and explain your intention was very good at time, but that the whole thing was such a misunderstanding and you really thought I had obtained the divorce. Then immediately state to her you are willing to go at once and have your present marriage annulled, get your divorce from me and then marry her over again and this it seems to me would be the honorable and the only decent thing to do and the only legal way out. So far as I am concerned, I will never in any way cause you trouble regarding this but would rather help you for your wife's sake as it would be unjust to make an innocent person suffer for this mistake." A few days later Anna wrote Maurice that she would never cause him trouble, saying: "I am not that cruel Maurice."

The first request or demand for money, according to the testimony of Maurice, was on his third visit to Los Angeles to discuss with Anna passport, citizenship and marital difficulties. The record shows the following:

"A. [Maurice Blache] On the first time I saw her, she thought about going East, and she says, 'I would like to see what I can do about having that citizenship paper fixed before I go,' and then two weeks after she asked me to come to see her.

"Q. Did she say why she wanted you to come to see her. A. Yes, just to see what I had done about the naturalization paper. * * * On the first conversation she said she was going to think matters over and see what was best to do in regard to her and to me, and on that second conversation she said that it would be best just to leave the thing alone and let the thing ride, let me not say anything to Jeanne, leave us as we have been doing before, and I promised her that as quick as Jeanne felt better and she can stand the shock, I will tell her and go and straighten up that mess. I asked her if she was going to stay in Los Angeles, and she say she don't know because she has to go to Palm Springs for some business, it is about four years ago, that conversation, and it wasn't at all—she never asked me for any money. * * *

"Q. Give us your best recollection of what Anna said, that you would have to get a divorce sooner or later from her, just what did she say? A. I am trying to get the exact words, was she told me that I will have to get a divorce sooner or later and that as far as she was concerned she wasn't interested only to get her citizenship papers."

On the third conversation the record shows the following:

"A. [Maurice Blache] I asked her if she was going, when she was going back East, and I asked her if she came back from Palm Springs, she is supposed to spend the winter in Palm Springs, and she says, 'No, I went to Palm Springs because I had some business to attend to.' I didn't ask her what business she was doing, so she says, 'I don't think I am going to go back East right now, I have to wait for a little while.' We spoke for about one hour or two, over one hour. Then she says to me, just coming from a clear sky, says, 'Maurice I need some money.'

"Q. She said? A. She said, yes.

"Q. Was that the first time money had been mentioned in any of the three conversations? A. That is the very first time that the word of money, that she wants some money, that she told me she needs some money.

"Q. Just what did she say? A. She says, 'Maurice, I want some money, I need some money.'

"Q. Go ahead. A. This is really the first time she asked me for money since we left, since she left me in Edmonton, Canada, she asked me for some money. * * * I said, 'No, you ask me for money, this is the first time you ask me for some. What do you need, how much do you want? What is it all about? You told me you were not exactly well off, but you were getting along very nicely. This is the first time you told me, you talked about asking some money. How much do you want? What is it all about?' She says, 'Well, I owe $3,000.'

"Q. She owed? A. Yes, she owed $3,000, that she would like to pay, and she says, 'My car is getting kind of shabby now and I would like to buy a new one.' I said, 'Well, how much do you want? What kind of car do you want?' 'Oh,' she said, 'I would like to get a $2,000 car, a Cadillac.' I said, 'Well, Anna, I have a Buick and my Buick I got it for five or six years.'

"Q. What else was said now at that time about money, either by the lady or by you? A. Well, I told her that I didn't have any money and that it was absolutely impossible for me to give her $5,000."

The record discloses, according to Maurice, that he did not inform Jeanne of his previous marriage to Anna until an offer to settle Anna's claim in full upon a payment of $37,500 had been made. The offer was refused and this proceeding instituted one month later.

Maintenance should be granted only when necessary and reasonable. In the middle of the trial Anna returned to her home in Los Angeles. With some difficulty her presence was obtained during the further proceedings. During the interim the court on a motion for continuance expressed itself as follows: 'Of course, I do not overlook the fact that her marriage to Mr. Blache is still in existence—and it evidently is from the testimony heard so far, that she might be entitled to some moderate relief possibly. Under the circumstances it could not be very much. In any event, she has subsisted for almost twenty-five years without receiving any support from Mr. Blache or from anybody else apparently except this lady friend." The evidence shows that upon several visits to San Francisco from her home in Los Angeles she stopped at one of the best hotels. She owned two lots some fifty miles from Palm Springs of unknown value. In a deposition taken prior to the trial the following appears: "Q. Have you [Anna] any property? A. I have only a car and a trailer." The evidence shows that she had been a cashier in a restaurant, a chaffeur, a bookkeeper, a traveling companion to a woman friend and a seller of "art objects."

[12] The action of the court in striking out the finding of "wilful neglect," coupled with the insertion of the provision giving Anna less than one-half of the community property, and the evidence in the case, make it necessary to reverse the judgment. Whether the factual questions on a new trial should be submitted on the same record, or whether new or additional evidence should be presented, is a question to be decided by the trial court and the respective attorneys.

In view of the conclusions reached herein it does not seem necessary to consider further questions raised by appellant Jeanne. Whether the property described in the complaint was the separate property of Jeanne is a question of fact which may be tested again on a retrial. Referring to Jeanne, the trial judge expressed the thought "The real victim is this lady sitting down there. * * * She was innocent, she has found herself in this situation through her marriage to Mr. Blache."

The appeal by Anna is based primarily upon "The failure of said Superior Court to award to plaintiff support and maintenance, and the part of said judgment which fails so to do. * * * The failure of said Superior Court to decide that defendant Maurice J. Blache had for more than one year prior to the commencement of this action wilfully failed to provide for plaintiff, and the part of said judgment which fails so to do." "The failure of said Superior Court to make appropriate provision in said judgment protecting the rights of plaintiff to said community property, and the part of said judgment which fails so to do." These questions have been sufficiently commented upon.

Maurice as a respondent on appeal contends that Anna abandoned him; that the failure to answer the complaint for divorce filed in Los Angeles County some years ago, and the entry of the default, constitute a bar to the present action, and that the element of fraud in the transfer of property from Maurice to Jeanne is a false quantity in the case.

[13, 14] Whether Maurice deserted Anna or vice versa is entirely a question of fact. The same statement may be made in reference to letter subsequently written by Anna to Maurice. There was a default in the original proceeding but no judgment of divorce entered. A default judgment, if a

court has jurisdiction, is a waiver of one's right to subsequently litigate the adjudicated issues (Horton v. Horton, 18 Cal.2d 579, 116 P.2d 605), but the "issues" in the present case were not previously adjudicated. Paduveris v. Paris, 213 Cal. 169, 1 P.2d 986; Brown v. Brown, 170 Cal. 8, 147 P. 1171; Maxwell v. Maxwell, 66 Cal.App.2d 549, 152 P.2d 530; Green v. Green, 66 Cal.App.2d 50, 151 P.2d 679. The question of fraud is not a false quantity in this case though the finding thereon appears inadequate, but this defect may be rectified on a retrial if the court finds that there was fraud in the transfer of property.

[15] The judgment purports to protect the award of attorney fees by providing that the payment of $7,989.13 "representing the community interest" of Maurice and Anna in a bank account shall be applied to the payment "of any and all amounts due to Anna Blache and her attorneys." This appears to be the only reference specifying that community property shall be held as security for attorney fees. The award of the community property may not stand for the reasons heretofore stated. It follows that if the community property award may not be held as security for the payment of the community interest, it may not be held as security for the payment of the attorney's fee in the absence of a direct order to that effect. In other words the judgment, stripped of the provisions of the community award, leaves the following provision protecting the attorney's fees: "There are hereby created and imposed on the interest of Maurice Blache in the properties and assets hereinabove described liens securing the payment of any and all sums required to be paid by the judgments heretofore made herein and described in the findings herein, and also by this judgment, and also any amounts which may be allowed or awarded to plaintiff or her attorneys by orders which may hereafter be made." Considering the substantial nature of Maurice's assets, it appears that the award of attorney fees is sufficiently protected.

The judgment in so far as it refers to attorney fees and all provisions of said judgment protective of those fees are affirmed; the portions of the judgment adjudicating Maurice's ownership of one-half of the real and personal property, and vacating and setting aside certain transfers of his interests in such properties to Jeanne, insofar as such transfers affect his one-half interest, and the provisions of the judgment granting an injunction against Maurice until the rights of the parties can be determined, are also affirmed; in other respects the judgment is reversed, and the cause remanded for a new trial in accordance with the views herein expressed. Costs shall be entered as follows: On the appeal from the whole of the judgment, Jeanne may recover against Anna and Maurice; on the appeal by Anna from part of the judgment, costs may be recovered from Maurice.

PETERS, P. J., and DOOLING, J., pro tem. concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

70 Cal.App.2d 96

GOLDKETTE v. DANIEL et al.

Civ. 14858.

District Court of Appeal, Second District,
Division 2, California.
July 6, 1945.

Hearing Denied Aug. 30, 1945.

1. Arbitration and award 🔑82(5)

An arbitration award confirmed by superior court, finding that partnership between professional entertainers and their business manager had been dissolved, was binding on parties, all of whom signed arbitration agreement, and barred manager's action for accounting for subsequent profits.

2. Arbitration and award 🔑79

An arbitration award, having become a final judgment after being confirmed by superior court, was not subject to collateral attack.

◆

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action for declaratory relief and accounting by Jean Goldkette against Howard Daniel and others. Defendants' motion for judgment on the pleadings was granted, and plaintiff appeals.

Affirmed.

Sam Houston Allen, of Los Angeles, for appellant.

Kornblum & Austrian, of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants predicated upon the granting of their motion for a judgment on the pleadings, in an action for declaratory relief and accounting between the parties, plaintiff appeals.

So far as material the facts alleged in the complaint are:

On March 6, 1935, plaintiff and defendants entered into a written contract providing that defendants should render services as professional entertainers and that plaintiff should act as their business manager. The agreement provided that the proceeds of the enterprise should be divided equally among the six parties.

On July 3, 1942, the original contract was modified by another agreement in writing which was executed by all parties excepting defendant Daniel. However, though defendant Daniel did not execute the second agreement he conducted himself as though he were a formal party to the contract, rendering his services in the same manner as the other professional parties and sharing compensation on an equal basis with them. Just prior to the first of June, 1943, defendants Daniel and Williams refused, in the absence of an increase in their compensation, to participate in the presentation of a performance which plaintiff as their manager had arranged. In order that the performance should take place as scheduled, all parties signed an agreement May 31, 1943, which reads in part as follows:

"The Manager [plaintiff], Wilfred Williams and Howard Daniel, agree that in the event the controversy between them cannot be settled amicably on or before June 15, 1943, the entire matter will be submitted to Arbitration under the rules of the American Arbitration Association under the supervision of the Actors' Equity Association, the American Federation of Radio Artists or any other branch of the Four A's that might be affected."

The dispute between plaintiff and defendants Williams and Daniel was not amicably adjusted and pursuant to the provision quoted in the agreement of May 31, 1943, the controversy was submitted to the American Arbitration Association which made its award reading in part as follows:

"1. That complainant Jean Goldkette, and respondents Wilfred Williams and Howard Daniel were, prior to May 30, 1943, members of a partnership which partnership consisted of said persons together with Ira Williams, Edward Jackson, and James Sherman.

"2. That said partnership was a partnership at will.

"3. That said partnership was dissolved on May 31, 1943, by the withdrawal therefrom of said Wilfred Williams and Howard Daniel."

The superior court on May 12, 1944, made an order confirming this award.

The complaint before us concludes with a prayer for declaratory relief and an accounting of funds in the alleged partnership.

Defendants moved for a judgment on the pleadings predicated upon the ground that the complaint did not state a cause of action in that it showed on its face that the partnership between the parties had been dissolved.

This is the sole question necessary for us to determine:

Did the arbitration award which was entered as a judgment in the superior court constitute a bar to the present action for the reason that it found that the partnership between the parties had been terminated?

[1,2] This question must be answered in the affirmative. The award of the board of arbitration which had been entered as a judgment in the superior court expressly found that the partnership between the parties had been dissolved on May 31, 1943. Such award having become a final judgment was not subject to collateral attack (Hise v. Superior Court, 21 Cal.2d 614, 624, 134 P.2d 748; Mutual Benefit Health & Accident Ass'n v. United Casualty Co., 1 Cir., 142 F.2d 390, 393; 6 C.J.S., Arbitration and Award, § 115, page 265), and was thus an established fact in the present case.

Since all of the parties to the instant action signed the agreement of May 31, 1943, by which it was agreed that the controversy could be submitted to arbitration, such award was binding on each of the parties, and as the complaint showed on its face that the partnership which plaintiff claims existed had been terminated, the complaint failed to state a cause of action in plaintiff's favor for profits accruing subsequent to the date of the dissolution of the partnership.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

RAISCH v. MYERS et al.*

Civ. 12826.

District Court of Appeal, First District, Division 1, California.

July 3, 1945.

Rehearing Denied Aug. 2, 1945.

Hearing Granted Aug. 27, 1945.

1. **Municipal corporations** 🔑923

Where street improvement bond contained all that ordinance required, that bond also incorrectly stated that assessment, diagram and warrant were issued to assignee instead of assignee's predecessor in interest, did not invalidate the bond.

2. **Municipal corporations** 🔑564

A street improvement bond providing that in event of default holder could foreclose assessment lien, which should continue until paid, and that lien was thereby created and acknowledged did not waive statute of limitations. Code Civ.Proc. § 329.

3. **Municipal corporations** 🔑78

The street improvement ordinance of a charter city governing foreclosure of assessment liens has the effect of the charter itself and supersedes state law.

4. **Limitation of actions** 🔑165
Municipal corporations 🔑490, 519(5)

The provisions of ordinance governing foreclosure of assessment liens in case bonds were invalid did not apply to valid street improvement bond, and where valid bond of charter city provided that assessment lien should continue until paid, the lien continued accordingly, and the owner could not quiet title without discharging lien, although statute of limitations would have prevented foreclosure of lien by holder of bond. Code Civ.Proc. § 329.

5. **Municipal corporations** 🔑564

The two-year limitation provided in improvement ordinance of charter city in respect of assessment liens is a statute of limitations rather than a condition precedent to affirmative action.

6. **Equity** 🔑66

An action involving assessment liens is an equitable one and the parties must do equity in order to obtain any active relief.

7. **Municipal corporations** 🔑525
Taxation 🔑614

Tax and assessment liens should be enforced wherever reasonably possible in order to assure the proper operation and function of government.

8. **Municipal corporations** 🔑519(6)

In absence of statutory direction or of provision in ordinance of a charter city, a subsequently imposed street assessment lien is prior in right to a preceding street assessment lien.

Appeal from Superior Court, San Francisco County; I. L. Harris, Judge.

Action by A. G. Raisch against Alma M. Myers and Federal Construction Company to foreclose the lien of a street assessment wherein the Federal Construction Company filed a cross-complaint against the plaintiff and the other defendant in which the court was asked to declare a lien upon the property involved for street work done and for which a bond was issued under a street improvement ordinance. From a judgment holding that the cross-complainant did not have an assessment lien on the property involved and that the street improvement bond was void, the cross-complainant appeals.

Reversed and remanded with directions.

Henry F. Wrigley, of San Francisco, for appellant.

Alma M. Myers, of San Francisco, in pro. per.

BRAY, Justice pro tem.

Defendant Federal Construction Company appeals from a judgment holding that it does not have an assessment lien on certain real property and that a certain street improvement bond is void.

* Subsequent opinion 167 P.2d 198.

Plaintiff filed an action to foreclose the lien of a street assessment issued in 1939 for work performed under the San Francisco Street Improvement Ordinance of 1934. Defendant Myers is the owner of the real property assessed. No question is raised here concerning the validity of the judgment for the foreclosure of that assessment, except as it might be affected by the question of priority as between the plaintiff and the appellant Federal Construction Company. Appellant Federal Construction Company appeared by answer and cross-complaint, in which it asked to have the court declare a lien upon the Myers property for street work done and a bond issued in 1928 under the San Francisco Street Improvement Ordinance of 1918. The effect of the assessment and bond for that work is the question here involved. Plaintiff Raisch has not appeared on this appeal. Respondent Myers contends, and the court found, that the bond in question is void and that, anyhow, any cause of action based on the bond or the assessment is barred by the limitations in the ordinance and statutes.

Appellant's position is that the execution of the bond is a waiver of all limitations of action and that, in any event, whether the bond be valid or invalid, or if the right to foreclose the assessment lien is barred by any ordinance or any statute, still the assessment lien continues and the property owner cannot quiet her title without payment of, or offering to pay, the unpaid portion of the assessment. Appellant distinguishes between the lien itself and the right of foreclosure of that lien, and, while admitting (again subject to the effect of the alleged waiver in the bond) that the right to foreclose is barred, contends that the lien of the assessment itself is never extinguished.

The facts concerning the assessment and bond in question are not disputed. The assessment, diagram and warrant were issued by the Board of Public Works on January 3, 1928, to A. E. Hennessey. On January 6, 1928, Hennessey assigned the same to appellant, Federal Construction Company. On April 2, 1928, pursuant to the San Francisco Street Improvement Ordinance of 1918, defendant Myers, as owner of the property, executed the bond in question. It is for the sum of $579.85 (the amount of the assessment against the Myers property). The claimed invalidity of the bond arises from the fact that the bond refers to an assessment and diagram issued to Federal Construction Company when in actual fact they were issued to A. E. Hennessey. Appellant contends that this is a minor error; that section 34 of the 1918 ordinance provides the form of the bond and that such form does not require any mention of the person to whom the assessment and diagram are issued, but merely reference to the amount of the assessment and a description of the real property, and that the bond sufficiently makes such reference. The bond in this respect refers to the assessment and diagram issued by the Board of Public Works January 3, 1928, and recorded in "Volume numbered 25A at pages...numbered 2204 of the Record of Assessments for Street Improvements, in the office of said Board of Public Works."

[1] The form of the bond required under section 34 only requires reference to two things, (1) a description of the property, and (2) the amount of the assessment. It would seem, in view of the definite reference to the assessment and diagram, its number in the Board of Public Works record, and the fact that the requirement of section 34 as to the description of the property and the amount of the assessment has been fully met, that the error in the name would not be sufficient to invalidate the bond. Especially is this true in view of the provisions of section 47 of the ordinance: "The provisions of this Ordinance shall be liberally construed to promote the objects thereof, and no error, omission, or irregularity in connection with the proceedings thereunder not affecting a substantial right of a party interested shall invalidate any of such proceedings." Certainly no substantial right of the owner is affected by the surplusage in the bond referring to the Federal Construction Company. The owner is given a description of the property, the amount of the assessment, the volume of the recording of the assessment and the assessment number. By an examination of such proceedings the owner would determine that the Federal Construction Company was the assignee of the contractor who did the work and to whom the assessment was originally issued.

The validity of the bond is only important on the question of alleged waiver of limitations. If the bond be valid and its language does not constitute a waiver, then the right to foreclose is barred by the provisions of section 329 of the Code of Civil Procedure. If the bond be invalid, the right to foreclose the assessment is barred by the provisions of section 24 of the ordinance, and by the provisions of subdivision 1 of section 337, subdivision 1 of section 338, and section 343 of the Code of Civil Procedure. Assuming the bond to be valid, does it contain language which creates a waiver of the statute of limitations? The language depended upon for this purpose is the following: "The person in legal ownership of this bond shall, in the event of such default, have the right to foreclose the lien created by the said assessment for any unpaid portion thereof, as in the case where no bond had been made or executed, *and such lien shall continue until such assessment is fully paid.* It is hereby expressly provided that a lien for the full amount * * * is hereby created and acknowledged upon, in and to the real property described herein * * *." (Emphasis added.) (Sec. 34, S.F. Street Imp. Ord. 1918.)

[2] To sustain its position appellant has cited a number of cases upon the general subject of waiver, none of which is in point, as they do not refer to street improvement bonds. There is no express waiver of the statute in the bond, and appellant has cited no case which holds that the general language of the bond constitutes such waiver. The language to the effect that the lien shall continue until fully paid does not mean that any limitations provided for by law in the ordinance or in the codes shall not apply.

[3, 4] The main question raised by appellant is that under the Street Improvement Ordinance of 1918, and under the decisions of the courts in this state, the lien of the assessment never outlaws, even if the right to foreclose does. Section 28 of the ordinance provides: "In all actions brought to enforce the lien of assessments made pursuant to the proceedings of this Ordinance the proceedings therein *shall be governed and regulated by the provisions of this Ordinance,* and when not in conflict therewith, by the Codes of this State." (Emphasis added.) Section 40 thereof provides: "In case it should appear at any time that any bond made as herein provided was not executed by the owner of the property described therein, or *for any reason was invalid,* or that a sale in accordance with its terms would not convey a full and clear title to such property, then the person entitled to collect and receipt for the payment of the original assessment, or his assigns, *shall have the right to foreclose the lien thereof for any unpaid portion as originally imposed and such lien shall continue until such original assessment is fully paid.*" (Emphasis added.) Appellant contends that as section 28 provides that enforcement of the lien is governed and regulated by the ordinance and as admittedly, San Francisco being a charter city, its charter supersedes, in this field, state law; and since the Street Improvement Ordinance adopted pursuant to such charter has the same effect as the charter itself (Mardis v. McCarthy, 162 Cal. 94, 121 P. 389), then, under section 40, the lien continues regardless of any limitations in the ordinance or the codes until the original assessment is fully paid. Section 40 applies to a situation where the bond "for any reason was invalid." If the bond is valid, then under its very wording the assessment lien is to "continue until such original assessment is fully paid."

The cases sustain appellant's contention in this respect. Bradley Company v. Ridgeway, 14 Cal.App.2d 326, 58 P.2d 194, was a case in which a property owner sought to quiet title against the lien of street improvement bonds issued under the Street Improvement Act of 1911, St.1911, p. 730. On page 336 of 14 Cal.App.2d, on page 199 of 58 P.2d, the court says: "With reference to the third cause of action, it should further be observed that the attempt is here made to state a cause of action for quieting title against claims for payment of principal and interest due on bonds validly issued on the ground that such payments are barred by the statute of limitations, without pleading willingness to pay the indebtedness represented by the bonds, which indebtedness is admittedly due. The cause of action thus attempted to be stated is strictly equitable in character and is to be measured by equitable principles. No principle of equity is more firmly established than the familiar rule that he who seeks equity must first do equity. Unwillingness to pay a just indebtedness concededly due does not commend him who seeks the aid of equity to avoid payment of such indebtedness on the ground that the debt, though morally due, is barred by the provisions of a statute limiting the time within which an action to enforce payment of the obligation may be instituted. Hayne v. San Francisco, 174 Cal. 185, 197, 162 P. 625; Dool v. First National Bank, 207 Cal. 347, 352, 278 P.

233; Warden v. Barnes, 111 Cal.App. 287, 292, 295 P. 569. For this additional reason, we conclude that the third cause of action is vulnerable to the claim that it fails to state a cause of action for equitable relief."

The Bradley case was discussed in Ritter v. Franklin, 50 Cal.App.2d 844, 123 P.2d 866, where the court pointed out that the rule established by the Bradley case applied to a situation where the property owner, as here, wanted to quiet title against the lien of the assessment, although the court held that the statute of limitations would apply as against a foreclosure proceeding by the bondholder.

In Lantz v. Fishburn, 17 Cal.App. 583, at page 588, 120 P. 1068, at page 1071, in connection with bonds issued under the Street Improvement Act of 1893, St.1893, p. 36, the court said: "In support of that contention, he [appellant] cites section 2911, Civil Code, which provides as follows: 'A lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation.' By express provision of the bond act (Stats. 1893, p. 36), the amounts of the assessments are made 'a first lien upon the property affected thereby, until the bond issued for the payment thereof, and the accrued interest thereon, shall be fully paid.' The power conferred upon the city treasurer to enforce payment in the same manner as a tax collector is authorized to enforce collection of delinquent tax assessments does not, as before noted, include any right to bring a personal action against the property owner. A tax collector has no such authority, although by the statutes of 1880, page 136, such a right is specially given to a city, county, or city and county. Section 2911, Civil Code, is therefore not applicable here, and it follows that the liens of the assessments against the property of plaintiff's testator have not been extinguished by limitation of time." Respondent here has made the same contention as made in the Lantz case. The language of the 1893 act is almost identical with the language of section 40 of the San Francisco Ordinance. The 1893 Act made the assessments "a first lien * * * until the bond * * * shall be fully paid." The 1918 ordinance here involved says "such lien shall continue until such original assessment is fully paid."

Hayne v. San Francisco, 174 Cal. 185, 162 P. 625, was an action in which the property owner attempted to quiet title against the lien of an assessment for the construction of the Stockton Street Tunnel, under the provisions of a city ordinance. The court held, page 197 of 174 Cal., page 630 of 162 P.: "As we find the assessment to be valid, the property of the plaintiffs is justly liable for its due proportion thereof. In such cases, the plaintiff is not entitled to any relief in a court of equity unless he shall pay, or offer to pay, the amount actually due upon the assessment against his property. As was said in Ellis v. Witmer, 134 Cal. [249], 253, 66 P. [301], 303: 'This being the case, they cannot successfully invoke the assistance of a court of equity against the irregularities in the sale complained of, unless on the condition of paying what is due from them. * * * Here, no such condition has been imposed by the court, nor is there an offer in the complaint to pay what is due. The plaintiffs were therefore not entitled to relief.' This states precisely the fact and the law with respect to the present case."

In Warden v. Barnes, 111 Cal.App. 287, 295 P. 569, where the property owner was attempting to quiet title against the lien of bonds issued under the 1913 Street Improvement Act, St.1913, p. 845, the court said (page 292 of 111 Cal.App., page 571 of 295 P.): "The judgment, however, must be reversed and sent back for the following reasons: The respondents Barnes asked for and obtained affirmative relief as against the plaintiff Grace P. Warden, and judgment was entered in favor of the defendants Barnes quieting their title as against all claims of the plaintiff. To this relief respondents Barnes are not entitled. The statutes of 1893, page 36, so far as the bond involved herein is concerned, reads as follows: 'Said assessment shall be a first lien upon the property affected thereby, until the bond issued for the payment thereof, and the accrued interest thereon, shall be fully paid.' While the foreclosure sale and deed based upon the proceedings therein had availed the plaintiff nothing, the lien of the bond was not extinguished. This being an action in equity, title cannot be quieted in favor of a party, extinguishing a valid lien upon real property, without requiring the person in whose favor the judgment is entered, to do equity. The foreclosure proceedings in this case only being held invalid, the property is still subject to the lien of the bond and the trial court should have entered judgment in favor of the respondents Barnes, quieting their title thereto, upon payment of the amount due the plaintiff Grace P. Warden, as the owner of the bond, including such costs as she was entitled to collect. This question is settled, we think, by the following cases: Sawyer v. Berkeley Securities Co., 99 Cal.App. 545, 279 P. 217, and the authorities there cited; Green v. Palmer, 68 Cal.App. 393, 229 P. 876."

Section 24 provides that the assessment shall be a lien for two years. However, if the property owner elects to pay the assessment in installments, he executes the bond provided for in section 34, which bond continues the lien on the real property, and under the terms of the bond, "such lien shall continue until such assessment is fully paid." It is conceded that the only obligation of the bond is the obligation to pay the assessment therein described. Hence there is but one lien,—that of the assessment. There is no provision in the ordinance for any limitation other than that set forth in section 28, the two-year limitation where a bond is not executed. It is not necessary to determine whether the provision in section 28, i.e., "In all actions brought to enforce the lien of assessments made pursuant to the provisions of this Ordinance the proceedings therein shall be governed and regulated by the provisions of this Ordinance, and when not in conflict therewith, by the Codes of this State," and the provision in section 34 to the effect that the assessment lien shall continue until paid, supersede or do away with the code limitations, such as sections 329, 337, 338 and 343 of the Code of Civil Procedure, for the reason that appellant has not asked for, nor is it urging, a foreclosure. However, Griffith Company v. Kelly, 52 Cal.App.2d 739, 126 P.2d 909, upholding the bar of the statute of limitations would appear to solve that problem, as its reasoning concerning the provisions of the Improvement Act of 1911 would apply, by analogy, to the provisions of the San Francisco ordinance. Appellant merely asks the court to find that it has a lien which must be paid off before the Raisch lien is foreclosed or the Myers title quieted.

[5] It is conceded that the only lien involved here is the lien of the assessment. The two-year period for this lien provided in section 28 is a statute of limitations rather than a condition precedent to affirmative action. Ritter v. Franklin, 50 Cal.App.2d 844, 123 P.2d 866. The execution of the bond does not create a new lien, it merely extends the time of the enforceability of the assessment lien. Both sides concede that the bond creates no additional or new lien.

In Woods v. Hyde, 64 Cal.App. 433, 222 P. 168, 170, relied upon by respondent, the court held that in spite of the language in a street improvement bond issued under the 1893 act, "The assessment shall be a first lien upon the property affected thereby, until the bond * * * shall be fully paid," the statute of limitations applied to an action in mandamus to compel the city treasurer to sell the property, but the court approved the holding in Lantz v. Fishburn, 17 Cal.App. 583, 120 P. 1068, to the effect that before the property owner could quiet his title against the lien of an outlawed street bond he must do equity by paying off such lien. It then goes on to say that the rule established in this state makes a distinction between the existence of a right and the existence of a remedy. Although the remedy may be barred the right still exists. So here, although the remedy of foreclosure is barred, the lien still continues and cannot be eliminated except by payment.

[6] Respondent lays great stress upon the fact that the assessment referred to in the bond is an assessment issued to Federal Construction Company, and, of course, there is no such assessment. Therefore, respondent contends, execution of the bond referring to a Federal Construction Company assessment, does not continue the lien of the Hennessey assessment in force because under section 24 of the ordinance that terminates in two years unless extended by the execution of a valid bond. However, as pointed out before, the bond properly describes the assessment and the property, and the error as to the name of the contractor is unimportant. There is no error in the assessment, and as this is an equitable proceeding the parties must do equity in order to obtain any active relief. Respondent cites City Street Improvement Co. v. Pearson, 181 Cal. 640, 185 P. 962, 20 A.L.R. 1317, on the point that there was no consideration for the bond. In that case the assessment itself was void and the court held that a promissory note given for the payment of the void assessment was without consideration. There is no claim here that the Hennessey assessment was void, but that merely because the bond gives the name of the assignee of the con-

tractor, instead of the name of the contractor, the Hennessey assessment was not carried into the bond. Even were this true, the Hennessey assessment was before the court and would have to be paid before affirmative relief against the Federal Construction Company in a court of equity could be given. Under the authorities hereinbefore cited on this point, it would not make any difference whether any bond had ever been issued. In such event, even though the two years had expired in which foreclosure of the assessment could be brought, still the property owner could not quiet her title against that lien until she did equity by offering to pay the amount of the assessment. All but one of the cases cited by respondent as attempting to show that the lien of the assessment, as distinguished from the right to foreclose, does not continue in spite of the statute of limitations, are not in point. They are all actions in which the holder of the lien was attempting to enforce that lien after the statute of limitations had run. Except the Clark case, hereafter discussed, not a single one was a case in which the property owner was trying, as here, to quiet his title against such outlawed liens. City of San Diego v. Higgins, 115 Cal. 170, 46 P. 923, held that the statute of limitations barred an action to foreclose a lien for city taxes. Woods v. Hyde, 64 Cal.App. 433, 222 P. 168, held that because of the statute of limitations mandamus would not lie to compel the city treasurer to sell property covered by a street bond. Griffith Company v. Kelly, 52 Cal.App.2d 739, 126 P.2d 909, was the consolidation of several actions to foreclose street assessment liens under the Improvement Act of 1911. The question involved was whether the statement in the act that the "amounts assessed shall be a lien * * * and such lien shall so continue until it be discharged of record," St. 1927, p. 1407, did away with the statute of limitations. The court held that it did not. Again, there the lien holder was attempting affirmatively to foreclose an outlawed lien. Ritter v. Franklin, 50 Cal.App.2d 844, 123 P.2d 866, cited on oral argument, is likewise a case of attempted foreclosure of a street bond which the court found was barred by the statute.

[7] Clark v. City of San Diego, 144 Cal. 361, 77 P. 973, seems to support respondent's position. In that case the court held that because the right of action for the collection of city taxes had been barred by the statute of limitations the lien of the taxes was likewise lost, and the property owner's title was quieted against that lien. However, the later cases of Bradley Company v. Ridgeway, 14 Cal.App.2d 326, 58 P.2d 194; Ritter v. Franklin, 50 Cal.App.2d 844, 123 P.2d 866; Hayne v. San Francisco, 174 Cal. 185, 162 P. 625; and Warden v. Barnes, 111 Cal.App. 287, 295 P. 569, are directly contrary to the Clark case. The Clark case was decided at a time when the courts were extremely technical in their attitude towards the enforcement of taxes and assessments. Courts now feel that, to assure the proper operation and function of government, tax and assessment liens should be enforced wherever reasonably possible. The ruling in the Clark case has not been followed in any other case in California. It is cited in the case of Griffith Company v. Kelly, 52 Cal.App.2d 739, 743, 126 P.2d 909, and a couple of other cases, as authority for the proposition that the statute of limitations does not apply to tax liens, but not upon its holding that because the right to enforce the lien is lost because of the statute of limitations a property owner may quiet title against such lien without doing equity.

Respondent argues that the only court action contemplated by the ordinance for enforcement of the lien is an action for foreclosure of the assessment, or, if executed, the bond; and that, therefore, no court has any jurisdiction to declare the assessment a lien where foreclosure is not asked and where it is barred, and refers to the case of Boskowitz v. Thompson, 144 Cal. 724, 730, 78 P. 290. That was an action brought by property owners to enjoin the collector of an irrigation district from selling their lands to pay delinquent irrigation district assessment bonds which they claimed to have been illegally issued. Certain bondholders intervened with the defendant collector to resist the claims of the defendant, and then cross-complained asking the court to declare the bonds liens on the property and to direct the collector to sell the lands to pay the amounts due. The court held that the bondholders were permitted to intervene, not because the controversy between the original parties could not be determined without their presence, but because of their interest in the success of the collector in defeating the claims of the defendants, and that their right to affirmative relief was no greater than was his; that for the purpose of defending the validity of the assessment in his effort to collect it, the collector sufficiently represents the district, but he is not authorized to represent it in any proceeding to have the bonds adjudged a lien upon the land within the district. In any litigation of this kind the district is a necessary party and in its absence the court has no authority to render a judgment. The court then goes on to hold that a court cannot enforce a lien, where the statute provides a method of enforcement, in any other mode than that prescribed. It is apparent that the court in that case was not passing on the question of the claim of a property owner in a proper proceeding to quiet his title against a statutory lien without first doing equity.

There is one question left to determine and that is,—as between the lien of the assessment levied in favor of plaintiff in 1939 and the lien of the assessment levied in 1928 in favor of appellant, which has priority? This matter is not discussed in the briefs. Apparently appellant concedes that the later assessment is prior in right, for, in its opening brief, appellant states: "Neither is there any contest between plaintiff, Raisch, and defendant Federal Construction Co." However, there is some other language in the appellant's brief which would indicate that the appellant is not quite sure on this subject.

[8] A study of the San Francisco Ordinance of 1918, in the volume of Ordinances of the City and County of San Francisco, published in 1924, which is the volume submitted to the court as covering all amendments applicable to this case, fails to disclose any provision on the question of priorities between liens imposed under the ordinance at different dates. There being no provision in the ordinance, this question has been determined by the decision in Woodill & Hulse Electric Co. v. Young, 180 Cal. 667, 182 P. 422, 5 A.L.R. 1296, where the court held that in the absence of statutory direction a subsequently imposed street assessment lien is prior in right to a prior imposed street assessment lien. While that case referred to street assessment liens imposed under state law, there is logically no difference between such liens and those imposed by an ordinance which has the effect of state law. "It is well established in this state by the decisions of this court that in the absence of any statutory enactment establishing a rule of priority for special assessment and bond liens, that such liens are ranked in the inverse order of their creation, that is to say, that the last in point of time is superior in rank, or is first in priority." Cullinan v. Grey, 18 Cal.2d 247, 249, 115 P.2d 460, 461.

The judgment appealed from is reversed and the trial court instructed to modify its findings and judgment to provide:

1. That Raisch has a lien on the premises in the amount as fixed by the judgment appealed from;

2. That Federal Construction Company has a lien on the premises in the amount shown by the evidence;

3. That the Raisch lien is prior in right to the Federal Construction Company lien;

4. That the remedy to enforce the Federal Construction Company lien has been lost, but the lien still exists;

5. That Alma M. Myers is entitled to no affirmative relief, except the declaration that the remedy to enforce the Federal Construction Company lien is lost, without first paying the Federal Construction Company lien, plus costs and expenses;

6. That a sale of the premises to satisfy the Raisch lien is ordered; that any of the parties to this action may bid at that sale; that the money realized from such sale be first applied to the satisfaction of all sums due Raisch, then to the satisfaction of all sums due Federal Construction Company, the excess, if any, to go to Alma M. Myers.

PETERS, P. J., and WARD, J., concur.

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WILCOX v. SWAY.

Civ. 14760.

District Court of Appeal, Second District,
Division 1, California.
June 13, 1945.

1. Trial 🔑387(1)

Findings of fact by court without a jury constitute the "decision" which must be filed in writing. Code Civ.Proc. § 632.

See Words and Phrases, Permanent Edition, for all other definitions of "Decision".

2. Trial 🔑391

In trial by court without a jury, findings are required on all material issues raised by the pleadings and the evidence. Code Civ.Proc. § 632.

3. Appeal and error 🔑931(9)

In trial before court without a jury where findings were filed, a waiver of any insufficiency of findings could not be presumed. Code Civ.Proc. § 632.

4. Appeal and error 🔑237(6), 265(1), 293

In trial before court without a jury, defendant was not required to move trial court to amend its findings or to make a motion for a new trial nor to except to the findings in order to question their sufficiency on appeal. Code Civ.Proc. § 632.

5. Appeal and error 🔑864

The sufficiency of findings to support judgment and sufficiency of the evidence to support findings are proper questions for review on appeal from judgment entered. Code Civ.Proc. § 632.

6. Trial 🔑397(1)

In action for injuries sustained in automobile collision, where plaintiff pleaded special damages which were put in issue by defendant's denial and evidence was offered to prove them, each item was a material issue on which the losing party was entitled to a special finding by court sitting without a jury. Code Civ.Proc. § 632.

7. Trial 🔑404(5)

Oral statements made by trial court can have no effect on the findings of fact which were signed and filed, which control. Code Civ.Proc. § 632.

8. Appeal and error 🔑717

In order to determine whether the findings support the judgment, appellate court can look only to the findings. Code Civ.Proc. § 632.

9. Trial 🔑397(6)

In action for injuries sustained in automobile collision, where plaintiff asking for special damages particularized the items claimed, and the express findings of trial court as to special damages amounted to only $359.53, failure of the trial court to expressly mention a $630 item in findings must be construed as a finding that plaintiff's allegation concerning it was not true, and the findings would not support a judgment for $989.53 special damages. Code Civ.Proc. § 632.

10. Appeal and error 🔑233(2)

Where defendant had had certain evidence stricken out on objection and motion thereto but the court later reversed its ruling, the defendant was not again required to object in order to save the point for review on appeal.

11. Trial 🔑79

An objection and motion to strike out evidence having been made in the first instance, no objection was required to the same class of evidence subsequently received.

12. Damages 🔑144

Any value of time lost as result of injuries sustained in automobile collision was included in plaintiff's allegation of general damages, and no special pleading was required.

13. Damages 🔑38, 99

The value of time lost as result of injuries sustained in automobile collision was the equivalent of plaintiff's power to earn money, and damages to which she was entitled were not measured by amount of income or wages lost but estimate thereof should be based upon earning power rather than actual earnings, and the fact that plaintiff was not in the receipt of any salary or wages but was attending to her own business did not deprive her of right to compensation for loss of earning capacity.

14. Damages 🔑173(1), 222

In action for injuries sustained as result of automobile collision, testimony that plaintiff was able to do certain house work prior to the accident, that she was unable to perform such work afterwards and that such work had been performed by a housekeeper employed for that purpose was properly received, and finding that plaintiff had sustained general damages in the sum of $5,000 included any loss of earning power.

15. Appeal and error ⚷1068(4)

Where $5,000 allowed plaintiff as general damages for injuries sustained in automobile collision was not claimed to be excessive, trial court's failure to itemize amount awarded for loss of earning power was not prejudicial. Code Civ.Proc. § 632.

16. Appeal and error ⚷994(3)

Testimony believed by trial court sitting without a jury must be accepted on appeal unless it is inherently unbelievable.

17. Appeal and error ⚷994(3)

The credibility of plaintiff's testimony in action for injuries sustained in automobile collision was for trial court.

18. Damages ⚷142

Special damages cannot be recovered unless they are pleaded.

19. Pleading ⚷252(1)

In action for injuries sustained in automobile collision, plaintiff's allegation that by reason of such injuries plaintiff had been forced to incur bills for medical attention, hospitalization, etc., the true amounts of such expenditures being unknown, was sufficient to include item for replacement of eye glasses broken in collision where the allegation was made definite by amendment at the close of the trial.

◆

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by Ann Mae Wilcox against Joseph Sway for injuries received in automobile collision. From a judgment for plaintiff for $5,000 general damages and $989.53 special damages, the defendant appeals.

Judgment modified by awarding only $359.53 special damages and as modified affirmed.

William K. Young, of Los Angeles, for appellant.

Arthur A. Jones, of Los Angeles, for respondent.

WHITE, Justice.

Joseph Sway prosecutes this appeal from a judgment in favor of Ann Mae Wilcox, plaintiff and respondent, for damages suffered by reason of a collision of automobiles in the intersection of Arlington Avenue and West Adams Boulevard, in the City of Los Angeles, at 12:15 a.m., December 16, 1943. Plaintiff drove her Ford automobile toward the north on Arlington, stopped at the southern boundary of West Adams, and then proceeded in low and second gears into the intersection. There the right side of her Ford was struck by the front end of defendant's Oldsmobile, which had been traveling in a westerly direction on West Adams. The parties to the action are the only witnesses to the events leading up to and at the time of the collision, about which their testimony is in direct conflict. The case was tried by the court sitting without a jury and resulted in a judgment against defendant for "$5,000.00 general damages, and in addition thereto, $989.53 special damages".

Appellant's first specification of error is that the findings do not support the judgment awarding special damages.

[1-5] Respondent contends that, since appellant did not "request the trial court to file findings or move the court below to amend" them, he cannot now complain of their insufficiency. In support of this contention, respondent cites the cases of Calderwood v. Brooks, 28 Cal. 151, and Troy v. Clarke, 30 Cal. 419. These cases are no longer authority for the rule stated by respondent, and are of no assistance in the determination of any question now before us, as they were decided in 1865 and 1866, respectively, under the Act of 1861 and prior to the time when the codes came into operation in 1873. 2 Cal.Jur. 283; Lamb v. Harbaugh, 105 Cal. 680, 693, 39 P. 56. Section 632 of the Code of Civil Procedure provides that "upon the trial of a question of fact by the court, its decision must be given in writing and filed with the clerk * * *. Judgment upon the decision must be entered accordingly". It is well settled that findings of fact constitute the "decision" which "must be given in writing" and "ever since the adoption of the Codes, it has been the rule that findings are required on all material issues raised by the pleadings and evidence". James v. Haley, 212 Cal. 142, 147, 297 P. 920, 922; Fairchild v. Raines, 24 Cal.2d

818, 151 P.2d 260. Respondent does not claim that appellant waived findings in any manner provided by the code (C.C.P. § 632). Had no findings of fact been made by the trial court and had none appeared in the judgment roll, a waiver thereof would be presumed in support of the judgment, Mulcahy v. Glazier, 51 Cal. 626, 627; Carpenter v. Pacific Mut. Life Ins. Co., 10 Cal.2d 307, 326, 74 P.2d 761; but, in the instant action, findings of the trial court are on file, and, therefore, such a waiver cannot be presumed. People v. Forbes, 51 Cal. 628, 629. Appellant was not required to move the court below to amend its findings, or to make a motion for a new trial; nor was he required to except to the findings, as they are deemed excepted to. The sufficiency both of the findings to support the judgment and of the evidentiary basis for the findings are proper questions for review on this appeal from the judgment. 2 Cal.Jur. 298; C.C.P. 646, 647; Hackleman v. Lyman, 50 Cal.App. 323, 328, 195 P. 263.

[6] Plaintiff pleaded special damages, particularizing the items thereof; defendant by denial put them in issue; and evidence was offered to prove them. Each item thereof is a material issue in the instant action, on which the losing party is entitled to a special finding in order that he may know in what manner the court determined the amount of the judgment against him. James v. Haley, supra, 212 Cal. at page 146, 297 P. 920; Klein v. Milne, 198 Cal. 71, 76, 243 P. 420. The trial court followed this rule, and in that regard found as follows: "That it is true that Ann Mae Wilcox sustained special damages, arising out of said accident, as follows, to-wit: $30.24 to replace glasses broken in the accident; $60.00 paid for medical attention; $59.29 for hospitalization; $10.00 for ambulance; and that plaintiff's automobile was totally wrecked and damaged, as a result of said accident, and that she sustained a loss of $200.00, which sum was the reasonable market value of said automobile on the day of said accident * * *."

The aggregate amount of the special damages so found to have been suffered is $359.53 and not $989.53 as appears in the judgment. The trial court, "as conclusions of law, from the foregoing facts", appended to its said findings a statement that said respondent is entitled to judgment "in the sum of Five Thousand Dollars ($5,000.00) general damages, and Nine Hundred, Eighty-nine and 53/100 Dollars ($989.53), by way of special damages". Judgment was thereupon rendered for $5,000 general damages and $989.53 special damages.

[7, 8] Respondent next asserts that a consideration of the general language of the findings "that all of the allegations of Plaintiff's Complaint * * * are true", together with the statement made orally by the trial judge at the close of the trial that "It would seem, from the fact, that the plaintiff was obliged to hire someone to perform certain duties, which she was able to perform prior to the accident, that she would be entitled to recover for the amounts necessarily expended by her for that purpose", makes it apparent that the trial court intended to, and did, incorporate in the findings of fact the allegation of her complaint, as amended, that she also suffered special damage in "the sum of $630.00 for a housekeeper", and consequently the findings do support the judgment for $989.53 special damages. However, the correct rule regarding oral statements of the trial judge is expressed in respondent's brief when urging that other oral statements made at the same time "can have no effect on the findings of fact which were signed and filed", Dell v Hjorth, 51 Cal.App.2d 576, 579, 125 P.2d 505, 506; Fisk v. Casey, 119 Cal. 643, 645, 51 P. 1077; Phillips v. Hooper, 43 Cal.App.2d 467, 470, 111 P.2d 22; and it is settled that inconsistencies between the antecedent expressions of the trial judge and the findings of fact cannot be considered by an appellate court. Lord v. Katz, 54 Cal.App.2d 363, 367, 128 P.2d 907. The findings of fact must be taken as embodying the conclusions of the trial court on all questions of fact submitted to it for decision "and no antecedent expressions of the judge can in any way restrict his absolute power to declare his final conclusion, in the only manner authorized by law, to-wit, by filing his 'decision' (findings of fact and conclusions of law), provided in sections 632 and 633 of the Code of Civil Procedure." Phillips v. Hooper, supra, 43 Cal.App.2d 470, 111 P.2d 22, 23; Boas v. Bank of America, 51 Cal.App.2d 592, 599, 125 P.2d 620; Scholle v. Finnell, 173 Cal. 372, 376, 159 P. 1179. To determine whether the findings support the

judgment, we can look only to the findings. Risinger v. Anderson, 10 Cal.App. 2d 455, 456, 51 P.2d 1119.

[9] In support of respondent's contention that the item of "$630.00 for a housekeeper" is included in the findings by the general language therein "that all of the allegations of plaintiff's complaint * * * are true", numerous cases are cited, Tower v. Wilson, 45 Cal.App. 123, 188 P. 87; Stoner v. Security Trust Co., 47 Cal.App. 216, 190 P. 500; Howe v. Schmidt, 151 Cal. 436, 90 P. 1056; Carey v. Brown, 58 Cal. 180; Kendrick v. Gould, 51 Cal.App. 712, 197 P. 681; Carr v. International Indemnity Co., 58 Cal.App. 614, 209 P. 83; Kenfield v. Weir, 16 Cal.App.2d 501, 60 P. 2d 885, none of which is helpful in the situation presented herein, for the reason that the facts in the instant action differ materially from those considered in the cited cases. The trial court, in the case at bar, limited its general finding "that all of the allegations of plaintiff's complaint * * * are true" by the addition of the phrase "save and except as hereinafter specifically otherwise mentioned", and thereafter found that the respondent "sustained special damages * * * as follows", listing the items hereinbefore set forth, amounting to $359.53. Respondent's contention that the trial court, by not specifically mentioning it, included in its findings respecting special damages the additional item of "$630.00 for a housekeeper" is untenable, since the allegation concerning the $630 item is merely a part of the same allegation in which respondent set forth the items of special damages which were expressly found to have been suffered. In the case of Alameda v. Crocker, 125 Cal. 101, 57 P. 766, also cited by respondent in this connection, the finding under consideration is quite similar to the one in the case at bar, and, under the reasoning of that decision, the findings before us "exclude the idea" that any special damages, other than those specifically enumerated therein, were suffered by respondent. In other words, the omission of this item of $630 must be construed as a finding that plaintiff's allegation concerning it is not true, and the findings in the instant case must be held to be that respondent suffered only the special damages itemized therein and hereinbefore set forth, aggregating $359.53.

It is immaterial whether the trial judge unintentionally omitted the $630 item from his findings of fact, or inadvertently included it in the amount of the judgment. In either event the findings do not support the judgment for $989.53 special damages. 24 Cal.Jur. 999; Spindler v. Wittemann Co., 54 Cal.App. 207, 209, 201 P. 604.

Respondent insists that the judgment should not be reversed or reduced, in the event it be held on this appeal that it is not supported by the findings with respect to special damages, for the reason that the judgment as rendered is fully supported by the evidence and therefore this court may make an additional or different finding based upon such evidence (C.C.P. § 956a), thus disposing of the cause without the necessity for further proceedings in the trial court. However, appellant contends that the court erred in admitting evidence respecting wages paid by respondent to a housekeeper employed in her business enterprise. We, therefore, epitomize the evidence adduced at the trial which tends to support respondent's allegation in her complaint, as amended, that "by reason of the said injuries" she was "forced to incur bills * * * and the sum of $630.00 for a housekeeper, all of which sums were reasonable and necessary and arising out of said accident".

Respondent testified in her own behalf that she was a registered nurse "managing a guest home"; that "as a result of the accident", she incurred "bills for medical attention, hospital, nursing, housekeeper, medicines and ambulance"; that on the day of December 15th, the day preceding the accident, she "had been in attendance for" her "duties at the rest home"; that she "rose" about 7 o'clock that morning, had been "on duty all that day", and had "left" "about seven in the evening"; that she was in the hospital from December 19, 1943 until January 2, 1944; that from January 2d to February 11th, she was in bed in her own rest home, able only to go to the bath room, take care of her "personal self and get" her "meals"; that her meals were prepared by her cook who prepared meals for the guests in the rest home. Then the following proceedings were had:

"The Court: You resumed your work on February 11th? A. No, sir, I have not yet resumed it.

"The Court: What have you done in that regard? A. I hire a maid now to do the work which I was doing. I can't do any of the turning of the mattresses, or things like that, and I can't carry trays any more. I do the shopping and the managing.

"Q. What do you have to pay those you now have? A. Fifty dollars a month, room and board.

"Q. What do you estimate her room and board is valued at? A. About forty dollars a month."

In reply to further questions by the court, respondent testified that she had leased the place, bought the furniture on a loan and was running it "as a proprietor of a rest home"; that she is "paying for the furniture"; hires "a cook or any other employees", has "a housekeeper, and another lady comes in one day a week for cleaning"; that she employs them and pays them to work for her. She further testified that the payments made by the guests or patients "are put down in a book" and she gets "what is over after the expenses are paid"; that she is "operating this as a partnership"; that she pays a "certain percentage of the net proceeds" on the mortgage on the furniture and retains the balance for herself. After this, the record discloses the following:

"The Court: So that this employment of the maid is to do the work that prior to the accident you did yourself? A. Yes, sir.

"The Court: Proceed.

"Q. (By Mr. Jones) When did you hire this maid or cause her to go to work there to do this work? A. Since I have been in the accident.

"Q. Well, when did she come there, December or January? Was she there when you came home from the hospital? A. Yes, sir; I couldn't tell the exact date that they got her, but they got her while I was in the hospital.

"Q. Well, say January 1st. Was it necessary to hire any other help besides this maid to do the work that you were accustomed to do prior to the accident? A. Yes, sir; because at that time we got this lady to come in one day a week for cleaning.

"Q. How much did she charge? A. Five and a half.

"Mr. Young: Object to that on the ground it is immaterial. Also move to strike out the other testimony on the subject of employment of servants, and so forth, in the business this lady testifies that she was engaged in, and was unable to do by reason of her injuries, upon the ground it is not within the issues of the pleadings.

"The Court: The objection is well taken, and it is stricken out. The witness may state what she can do. That portion will be allowed to remain in the record as to what she can and cannot do, what she was able to do prior to the injury. As to the amount of the employment of other persons that will be stricken out and will be disregarded by the Court.

"Mr. Jones: Well, there is that housekeeper, your Honor.

"The Court: If there is anything there in the pleadings. The objection is well taken."

This was followed by testimony of this witness that prior to the accident she was accustomed to "doing what a maid would do, cleaning the rooms", turning the mattresses and changing the linens on approximately 15 beds, checking outgoing and incoming linens, carrying clean linens upstairs to the linen room once a week, scrubbing and cleaning two bathrooms and dusting and vacuuming 16 rooms two or three times a week, waiting on tables for ten persons in the dining room at meal times, carrying four trays upstairs, going to market and buying food for these people every day, taking care of the garbage and garbage cans, watering lawn and cleaning front and back porches. She further testified that she personally did all of these things herself before the accident; that she then had only one employee who cooked the meals and kept the kitchen clean, and respondent did the rest of the general housework for 12 to 16 people.

At the conclusion of the trial, the court made the following statement: "I have been giving some further consideration to the matters which relate to the employment by the plaintiff of assistants, and I am not sure as to the rulings of the Court on those matters. It would seem, from the fact that the plaintiff was obliged to hire someone to perform certain duties, which she was able to perform prior to the accident, that she would be entitled to recover for the amounts necessarily expended by her for that purpose. While the situation is somewhat different in the case of a person who is merely employed by the day or month, the income of Mrs. Wilcox from her Rest Home depends upon certain work being done; and, therefore, since she received a less net income by reason of the fact that payments made by her having been deducted from the payments made to her, that she would be entitled to recover for that to the extent shown by the testimony in the record; and if the Court has excluded testimony concerning the amounts expended by her in any ruling, the Court will now reverse its ruling and consider in evidence those amounts thus testified to."

[10, 11] It is contended by respondent that because of appellant's failure to object when the Court reversed its previous ruling and reinstated the evidence "that respondent sustained special damage by reason of being compelled to hire a housekeeper" at $90 per month from January to July (the time of the trial), or a total cost of $630, appellant cannot raise the point on appeal. This argument is without merit. An objection and motion to strike having been made by appellant in the first instance, he was not required to repeat his objection to the same class of evidence subsequently received, Moore v. Norwood, 41 Cal.App.2d 359, 368, 369, 106 P.2d 939, nor is there any reason for repeating his objection to the Court's subsequent ruling admitting the same evidence. Both respondent and the trial judge were aware of appellant's objections and his failure to repeat them at that time did not deprive respondent of full opportunity to meet them during the trial in the court below. Appellant did not thereby waive his objection to this evidence; and he is entitled to a review of the trial court's ruling on appeal.

Appellant's objection was to evidence "on the subject of employment of servants, and so forth, in the business this lady testifies that she was engaged in, and was unable to do by reason of her injuries", and was based "upon the ground it is not within the issues of the pleadings". In her complaint, as it was at the time of the objection, respondent alleged general damage in the sum of $15,000, that by reason of her said injuries she had been forced to incur bills for all the items included in the court's finding respecting special damage, excepting the item of glasses, also alleged that she had been forced to incur bills for a housekeeper, and further alleged "the true amounts of said expenditures being unknown to plaintiff at this time, but she will ask leave of court to amend at the time of trial to conform to the true amounts when the same are ascertained".

It is not necessary to determine the question raised by appellant as to whether respondent's allegation respecting the payments made by her to a housekeeper should be construed as an allegation of personal expense or business expense incurred by her. Respondent is not here seeking to recover for her business expense, loss of profits, damage to said business, or even the value of her services to such business, as was the situation in the cases of Senegram v. Groobman, 30 Cal.App.2d 514, 86 P.2d 859; Hoffman v. Lane, 11 Cal.App.2d 655, 659, 54 P.2d 477; Lombardi v. California St. Ry. Co., 124 Cal. 311, 320, 57 P. 66; Pretzer v. California Transit Co., 211 Cal. 202, 208, 294 P. 382.

[12-14] In the case at bar, the import of the allegation that respondent received certain physical injuries, that she has suffered and for some time in the future will continue to suffer great pain and mental anguish to her damage in the sum of $15,000, necessarily includes some impairment of her personal capacity to earn money. In the case of Castino v. Ritzman, 156 Cal. 587, 588, 105 P. 739, the court said: "A bodily injury may cause financial loss by reason of the party being thereby made unable to work, or to attend to business, as well as by the pain and distress he suffers therefrom. The injury to the person causes all the damage. * * * The plaintiff may recover all the damages proximately caused by the injury (Civ.Code, § 3333). It is not necessary in such a case to state separately the amount of the loss that is caused by each element of damage. A general statement of the whole amount of damage will suffice when all the damage claimed is the natural and ordinary effect of the injuries alleged. * * * There was no claim made for special damage to the plaintiff's property, by reason of his inability to attend to his business."

The value, if any, of respondent's time, during the period she has been and will be disabled as the direct and proximate result of said injuries, is an item included in her general damages alleged to have been $15,000 and no special pleading is required. Armstrong v. Ford, 30 Cal.App.2d 347, 353-355, 86 P.2d 385; Treadwell v. Whittier, 80 Cal. 574, 578-580, 22 P. 266, 5 L.R.A. 498, 13 Am.St.Rep. 175; Worden v. Central Fireproof Bldg. Co., 172 Cal. 94, 97, 155 P. 839; Storrs v. Los Angeles Traction Co., 134 Cal. 91, 93, 66 P. 72. The value of respondent's time is the equivalent of her power to earn money. The damages to which she is entitled by reason of this loss is not measured by the amount of income or wages lost, but the estimate thereof should be based upon earning power, rather than actual earnings, and the fact that she "was not in the receipt of any salary or wages but was attending to" her "own business, does not deprive" her "of right to compensation for the loss of" her "earning capacity". Storrs v. Los Angeles Traction Co., supra; Hicks v. Ocean Shore R. R. Inc., 18 Cal. 2d 773, 785, 117 P.2d 850. Respondent testified that prior to the accident, she was able to do, and did, certain housework, which she was unable to do thereafter; and that the same kind and amount of work was thereafter performed by a housekeeper employed for that purpose. It has been held that evidence of what persons in a similar vocation commonly earn is admissible, Zibbell v. Southern Pac. Co., 160 Cal. 237, 248, 116 P. 513; Storrs v. Los Angeles Traction Co., supra; that one injured may prove what wages or emolument he was earning or capable of earning prior to the accident, Perry v. McLaughlin, 212 Cal. 1, 12, 297 P. 554; and in the case of Hoffman v. Southern Pacific Co., 101 Cal.App. 218, 233, 281 P. 681, 688, it was held that "the nature of plaintiff's employment as a well digger, and the cost of hiring a man to take his place while he was incapacitated from his injuries, tended to establish the measure of his damages". It was not error for the trial court in the instant case to admit any of the testimony hereinbefore set forth. It should have been considered in determining respondent's loss of power to earn money as a part of her general damages; and the trial court was not required to segregate that item of damage from the other items of general damage found by him to have been suffered by respondent. The finding that respondent "sustained general damage in the sum of $5,000.00" necessarily includes her loss of earning power, if any.

The decisions in the cases of Bertrand v. Pacific Electric R. Co., 46 Cal.App.2d 7, 115 P.2d 228, and Edgar v. Bank of America, 50 Cal.App.2d 827, 833, 123 P.2d 885, 889, are not controlling or even persuasive in the instant action, as both those cases were based upon facts materially different from those here before us. In the Bertrand case, the uncontroverted evidence in proof of definite allegations in the complaint were to the effect that plaintiff had been damaged by lost time alone in an amount far greater than the entire amount of the judgment for damages. In the case of Edgar v. Bank of America, supra, the court said, "From the pleadings, the evidence, and the instructions to the jury, we are unable to determine whether the proper measure of recovery was applied."

[15] In the case at bar, even if it should be held that a finding should have been made as to the amount of respondent's damage because of her loss of earning power, the court's failure to make such segregation of amounts could not have prejudiced appellant for the reason that the aggregate amount of general damage would have remained $5,000 which is not claimed to be excessive.

[16, 17] Appellant further seeks a reversal of the entire judgment on the ground that the only evidence of any negligence on his part is the testimony of respondent, which he claims is "valueless because of lack of credibility". In this regard, appellant cites several discrepancies between statements of this witness in her deposition taken soon after her discharge from the hospital and her testimony at the trial. The trial judge has determined the witness' credibility and testimony believed by him must be regarded as true by an appellate tribunal, unless it is inherently unbelievable. From the record on appeal, respondent's testimony cannot be so strictured.

[18, 19] Appellant contends that the item of $30.24 to replace eyeglasses broken in the accident" cannot be recovered because not specially pleaded in the original complaint, citing as authority for this contention the case of Ramsey v. Penry, 53 Cal.App.2d 773, 777, 128 P.2d 399. True, special damages cannot be recovered unless they are pleaded, but in the instant action the allegation in the original complaint that "by reason of said injuries, plaintiff has been forced to incur bills for medical attention, hospitalization, nursing, housekeeper, medicines, ambulance, and so forth, the true amounts of said expenditures being unknown * * *" said allegation having been made definite by amendment at the close of the trial, is sufficient.

It is unnecessary to discuss any of the numerous errors claimed by appellant to have been made in the admission and rejection of evidence, as, from a reading of the entire record on appeal, we are convinced that if all are conceded to be erroneous, still appellant was not prejudiced thereby; and, if the rulings in every instance had been in appellant's favor, the ultimate decision of the action would not have been affected thereby.

For the reasons herein stated the judgment is modified by striking therefrom the phrase "and in addition thereto, Nine Hundred Eighty-nine and 53/100 Dollars ($989.53) special damages" and inserting in lieu thereof the phrase "and in addition thereto, Three Hundred Fifty-nine and 53/100 Dollars ($359.53) special damages". As so modified the judgment is affirmed. Neither party to recover costs on appeal.

YORK, P. J., and DORAN, J., concur.

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70 Cal.App.2d 6

JACKSON et al. v. HARDY et al.

Civ. 14631.

District Court of Appeal, Second District, Division 3, California.

June 29, 1945.

1. Pleading ⇨63

A statute relied on as creating a duty need not be pleaded or referred to in pleading where action is predicated on negligence and not to enforce statutory liability or penalty.

2. Pleading ⇨35

In action for damage sustained in collision of automobile with defendants' cattle, plaintiffs' general allegation of negligence that defendants negligently permitted their cattle to stray on highway was sufficient, and subsequent allegations that cattle were permitted to remain thereon without herders, in violation of statute, were merely averments of evidentiary matter provable under such general allegation and could be disregarded as surplusage. St.1933, p. 129, § 423.

3. Negligence ⇨119(4)

Where general allegations of negligence in complaint are followed by enumeration of specific acts, plaintiff will not be limited to proof of specific acts unless complaint clearly indicates intention of pleader to limit negligence to such acts.

4. Automobiles ⇨178

A cattle owner who negligently fails to keep his cattle from straying upon a highway may be held liable in a civil action for damages arising from collision of a vehicle with his cattle even at a point where highway is unfenced in open range country. St.1933, p. 129, § 423.

5. Automobiles ⇨178

The term "fence", in Agricultural Code provision that no person owning or controlling livestock shall willfully or negligently permit such livestock to stray upon a public highway both sides of which are adjoined by property separated from such highway by a fence, is liberally construed in a civil action in determining whether such a fence exists and requisites thereof. St.1933, p. 129, § 423.

6. Automobiles ⇨244(2)

Where there was sufficient evidence before trial court to indicate that requirements of Agricultural Code as to fencing had been met, trial court's finding that defendants had negligently permitted their cattle to stray on highway in violation of such provision was warranted in action for damage sustained in collision between automobile and cattle on highway. St.1933, p. 129, § 423.

7. Automobiles ⇨242(2)

The Agricultural Code provision that no owner or possessor of livestock shall willfully or negligently permit livestock to stray or remain unaccompanied by persons on public highway both sides of which are adjoined by fenced property abolishes applicability of res ipsa loquitur doctrine to collision of automobile with such animals on highway. St.1933, p. 129, § 423.

8. Automobiles ⇨244(36)

Evidence that cattle had been driven to a point three or four miles from highway and left there unattended for two days, though owners had been warned they might stray away, was sufficient to sustain finding of direct causal connection between alleged negligence of owners in permitting cattle to stray on highway and collision of automobile with such cattle, without reliance on res ipsa loquitur doctrine. St. 1933, p. 129, § 423.

9. Negligence ⟹134(2)

In connecting defendant's negligence with injuries sustained by plaintiff, it is not necessary that an eyewitness be produced to testify directly to any fact, but circumstantial evidence is sufficient.

◆

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Action by Charles M. Jackson and another against Frank T. Hardy, John Law, and others, for personal injuries and property damage allegedly sustained in collision with automobile and named defendants' cattle on a public highway. Judgment for plaintiffs, and named defendants appeal.

Affirmed.

Dudley Robinson, of Los Angeles, for appellants.

Bauder, Veatch & W. I. Gilbert and Donn B. Downen, Jr., all of Los Angeles, for respondents.

DESMOND, Presiding Justice.

Defendants, Hardy and Law, owners of livestock in the neighborhood of Mojave, appeal from a judgment by which the court assessed damages against them under the first cause of the complaint in the sum of $723.67 for injuries resulting from a collision upon a public highway at 10:30 p.m. of August 21, 1942, between the Jackson automobile and a cow belonging to defendant Hardy, and, under the second cause, damages in the sum of $1,303.47 resulting from a collision between a bull belonging to defendant Hardy and a passenger bus belonging to M. C. Yahne, Incorporated, doing business as Inland Stages. This second collision occurred on the same night and on the same highway as the first and about an hour and a half later. Prior to the filing of the complaint the bus owner assigned its claim to the plaintiffs.

The first collision occurred on a much-traveled state highway at a point approximately one and one-half miles south of the city of Mojave while Mr. Jackson was driving his family north from Los Angeles toward Lake Tahoe. The weather was clear and the road where the accident occurred was straight, but it curved about a fifth of a mile north of the point of collision as it entered Mojave. Jackson testified that just before the accident a car was coming toward him about a quarter of a mile away and another car was about 200 feet behind him; that he first saw the cow when she was about 60 or 70 feet in front of him, in the middle of his lane of the road; that he was traveling about 40 miles per hour at the time; "my daughter hollered and at the same instant I saw this—I saw eyes staring me in the face and that is the first thing I noticed. The next second why a cow loomed up and I slapped on my brakes. * * * Q. And at the time you saw the cow, how close would you say this car was to you that was coming from the opposite direction? A. Oh, that was practically about the same time because I done no more than—I was watching the fellow's headlights and I had mine on the beam, the low beam, because, as I say, there as a lot of traffic that night and I had passed several cars and when this car headed up to me I just left it on the low beam because he was about a quarter of a mile from me and I saw these eyes and hit the cow"; that after hitting the cow his car came to rest on the paved portion of the road not more than ten feet from the point of impact; that the cow was "very black" in color. When asked why he had not swerved his car to avoid hitting the cow, Jackson answered that he probably could have if it had not happened in "such a split second."

As a result of the collision, Mrs. Jackson, asleep in the rear of the car, was thrown out, sustaining the personal injuries complained of and the Jackson car was damaged.

The second collision, involving the passenger bus, occurred about half a mile south of the scene of the Jackson collision. The bus, containing 12 passengers and driven by P. G. Higgins, was heading north toward Mojave. It was traveling, according to the testimony of the driver, at about a speed of "Under 33 miles an hour," and in third gear, the next to the highest gear. He stated: "There was a pair of lights that came around the curve of a highway which for an instance [sic] blinded me. Then, just as the glare of those lights got past, here stands a bull in the middle of the road, and by that time the car got down to me where I couldn't swing over to the left side of the road to avoid hitting him and a ditch being on the right, I couldn't swing there, consequently I hit the bull"; that when he first observed the bull it "wasn't over 20 feet" away from him; that the bull was a Hereford, dark red and white in color; that the highway where the accident occurred was a two lane highway "with just a couple or three feet on each side to spare"; that the lights of the car headed toward him were very bright; that he blinked his lights several times for the driver of the other car to dim his but the latter did so only after it was too late, for he had already observed the bull in the road; that he immediately applied his brakes but after he saw that he was going to hit the animal he accelerated his speed to prevent it from getting underneath his wheels and turning the bus over; that "I hit my brakes and my brakes took hold and I seen [sic] that I was going to hit; I couldn't swing to the left; if I had I would have come head on with this other car coming toward me so I just gripped my wheel and let go of my brake and stepped on it," knocking the bull off the road to the east side; that the bus was equipped with air brakes; that they were more dependable than any other type.

Leon Smith, a witness for plaintiffs, stated that he had been hired by Hardy to help defendant Law [Hardy's father-in-law] drive his cattle, which were commingled in a common herd with those of defendant Law's, from the place where the cattle were then grazing, some 11 miles east of Mojave, to Duntley Spring, about 12 miles west of Mojave; that he had been instructed by Hardy to take orders from Law; that there were about 210 or 215 head of cattle in the herd, of which 110 or 115 belonged to Hardy and the rest to Law; that on August 19th, 1942, Law brought his horse in a horse truck from Little Rock where he lived, a distance of about 40 miles from Mojave, to Smith's place, where the cattle were grazing and he and Law saddled their horses and started to round up the cattle and herd them toward Duntley Spring; that they drove them to a point about three or four miles west of Mojave; that it took them from about 10 o'clock in the morning until about 6:30 that evening; that the cattle then started to bed down and Law said, "Well, we will just leave the cattle here and I will come back in the morning"; that Law asked him if he could come back and he answered, "No, I have got to work"; that he had taken off only one day from the Mojave Mud Corporation, where he was employed, in order to help drive the cattle. When asked whether he had any conversation with Law concerning whether the cattle would stay there, he answered:

"Well, I told him that I didn't think the cattle would stay up there; when daylight come somebody would have to be there and drive them back, and he said, 'Well, I will come up in the morning and get them on out' and that was all that was said; we loaded the horses and went home.

"Q. Did you indicate to him where the cattle might go if they did stray? A. Well, I said something about coming back, they might come back the other way, and we would have to drive them over again.

"Q. What did you base that opinion upon? What was the reason for you thinking that they would return? A. I thought maybe they would drift back; they generally always do. A cow will drift back from one water hole to another.

"Q. In other words they will drift back to where they had been watered previously. A. Yes."

Smith further testified that he and Law went back to his place where the horses, including the one brought by Law, were placed in a corral; that Law did not come for his horse the next day nor the day following, which was August 21st, the date of the accidents; that he, Smith, was informed of the accidents about 1 o'clock a.m. of August 22nd when the road patrolman and the bus driver drove in the yard and asked "if I were taking care of the cattle * * * I said 'No, they are out of my jurisdiction, I haven't anything to do with the cattle at all.' * * * Well, Clark [the road patrolman] asked me to go down and drive those cattle back off the road and I said: 'All right.' There was a friend of mine with me and I didn't want to saddle up a horse and ride all night, working, and he told me to get his car and we would go down in the car and we went and drove back those that was across the railroad track and drove them back across into the other pasture where they were at * * * west of the highway"; that when he arrived there were about 75 head of cattle along the railroad right of way. This witness, when asked the question "* * * Do you, yourself, know of any person who was actually in charge of the cattle from the time you left them on the

night of August 19th, to the time of the accident?" answered, "No, I don't."

In considering the grounds urged for reversal, it is necessary to quote at this point the following portion of section 423 of the Agricultural Code of California, St.1933, p. 129: "No person owning, or controlling the possession of, any live stock, shall wilfully or negligently permit any such live stock to stray upon or remain unaccompanied by a person in charge or control thereof upon a public highway, both sides of which are adjoined by property which is separated from such highway by a fence, wall, hedge, sidewalk, curb, lawn or building. * * *"

What may be called the charging allegations of the complaint as to each cause of action are identical and read as follows: *"that at said time and place the defendants, and each of them, did negligently and carelessly permit certain cattle then and there owned by said defendants to stray upon the said highway,* and to remain thereon unaccompanied by any person, and without providing a sufficient or any number of herders for such cattle, in violation of Section 423 of the Agricultural Code of the State of California, then and there in full force and effect; that by reason of such negligence on the part of the defendants, and each of them," etc. (Italics added.)

The trial court in awarding damages for each collision found as follows: "that at said time and place the defendants, and each of them, did negligently and carelessly permit certain cattle then and there owned by said defendants to stray upon the said highway, and to remain thereon unaccompanied by any person, and without providing a sufficient or any number of herders for such cattle *and* in violation of Section 423 of the Agriculture [sic] Code of the State of California, then and there in full force and effect; that by reason of such negligence on the part of the defendants, and each **of** them," etc.

The judge, in making his findings, merely added to his quotation from the complaint the conjunction "and," as we have indicated by italics, and the addition of that single word directs us to the main point of this appeal. It is contended by appellants that the court was without power under the pleadings to find that the defendants negligently permitted their cattle to stray upon the highway, *and* also that such straying, so negligently permitted, constituted a violation of section 423. They assert that the first finding is on an issue of general negligence not alleged in the complaint, and argue that the case was tried on an issue of specific negligence only, namely, the violation of the provisions of section 423. They say that, following the allegations of the complaint, they defended only against that particular type of negligence. As to the finding on the issue so raised they argue that the evidence failed to show that they had permitted their cattle to stray or remain upon a public highway, fenced, or otherwise bounded, on both sides as described in section 423, and that they should be acquitted of all blame since that was the only kind of negligence charged against them in the complaint.

We note that defendants, answering both causes of action, had denied that they "did negligently and carelessly, or negligently or carelessly, permit certain cattle then and there owned by said defendants, or either of them, or any cattle at all, *to stray upon the said highway,* or upon any highway, and/or to remain thereon unaccompanied by any person and/or without providing a sufficient or any number of herders for such cattle, in violation of Section 423 of the Agricultural Code of the State of California, or in violation of any section of any code, or of any law, of the State of California, *or at all;* and deny, and each of them denies, that by reason of such *or any negligence* on the part of these defendants, or either of them, the vehicle then and there owned by the plaintiff * * * collided with certain cattle [etc.]." (Italics added.) Also, as one affirmative defense, appellants alleged as to each cause of action that all damages resulted from an unavoidable accident so far as they were concerned "and occurred without any negligence on the part of these defendants, or either of them."

[1, 2] Answering appellants' contention that general negligence was not charged in the complaint, we point out that under our system of pleading, it is unnecessary to plead or refer to a statute relied upon as creating a duty, where the action is one predicated upon the negligence of the defendant and not one to enforce a liability or penalty imposed by statute. 4 Bancroft's Code Pleading p. 3538; Martin v. Shea, 1920, 182 Cal. 130, 136, 137, 187 P. 23. Therefore, the phrase in the allegation reading "in violation of Section 423

of the Agricultural Code of the State of California, then and there in full force and effect;" is unnecessary, being surplusage and redundant. See Szopieray v. West Berkeley, etc., Co., 1924, 194 Cal. 106, 113, 227 P. 720; Opitz v. Schenck, 1918, 178 Cal. 636, 174 P. 40, 41. In the Opitz case defendant appealed from a judgment in favor of plaintiff in an action to recover damages for personal injuries. The complaint alleged negligence generally, and further alleged that defendant, in driving his automobile "cut the corner" at the intersection of the streets "in violation of an ordinance of the city of Los Angeles prohibiting it." On appeal, it was claimed that the ordinance was improperly pleaded. This argument the Supreme Court disposed of in language singularly appropriate to the case which we are considering (178 Cal. at page 638, 174 P. at page 41): "The complaint, however, was good without any allegations as to the ordinance at all. It alleged negligence in general terms which, as we have just shown, was all that was necessary. If under such an allegation the plaintiff wished to prove the violation of the ordinance, he could do so whether it was pleaded or not. This was not an action for damages for the violation of a city ordinance or to enforce a liability or penalty imposed by one where, of course, it would be necessary to plead the ordinance relied on as the foundation of the action, but was an ordinary suit for damages for negligence pleaded in general terms. Under these circumstances the defective pleading of an ordinance relied on as additional evidence in proof of negligence, or a failure to allege its existence at the time of the accident, or at all is immaterial; its existence and its violation are given in evidence in aid of the general negligence alleged; it is simply evidentiary matter, and as such under our system of pleading it would be improper to plead it. Cragg v. Los Angeles Trust Co., 154 Cal. 663, 98 P. 1063, 16 Ann.Cas. 1061.

[3] That portion of the plaintiffs' allegation, which we have italicized, supra, alleges negligence in general terms on the part of the defendants. The fact that there follows an enumeration of specific acts in the same allegation, to-wit, (a) "and to remain thereon, unaccompanied by any person," and (b) "and without providing a sufficient or any number of herders for such cattle," does not alter the character of the allegation in this case, for both of these specific acts, as well as the applicability of section 423, may properly be classed as evidentiary facts, provable under an allegation of general negligence. Since evidentiary averments are superfluous, they may be disregarded. We note at this point the statement in Olcese v. Hardy, 1919, 40 Cal.App. 323, 331, 180 P. 666, 669, "Where general allegations of negligence are followed by an enumeration of specific acts, the plaintiff will not be limited to proof of specific acts unless the complaint clearly indicates the intention of the pleader to limit the negligence to such acts. [Citing cases.]" Defendants were fully advised by the allegations of the complaint in the case at bar that their negligence in permitting their cattle to stray upon the highway was involved in this case. That they so understood the issue presented by the complaint is indicated by the denials in their answer and the allegations in their affirmative defenses.

[4] That the judgment can rest solely upon the proof offered in support of the general allegation of negligence appears from the decision in Galeppi Bros. v. Bartlett, 9 Cir., 1941, 120 F.2d 208. That was a case involving a collision between an automobile and a cow on a California highway. The cattle owners argued that since the accident occurred on an unfenced highway they were under no duty to keep their cattle off the highway because the common law made no such requirement, that such law had not been changed in California and until changed by the legislature no duty could be found. To that argument the court replied (120 F.2d at page 210): "The common-law rule was adopted when there was no elaborate system of highways and no motor vehicles. There was then no such reason for imposing on cattle owners a duty of using ordinary care in the care and control of cattle. Now, however, the changed conditions compel adoption of a different rule. There is no reason for exempting cattle owners from the same duty applicable to other people to use 'ordinary care or skill in the management of (their) property.' Civil Code, § 1714. * * *" It clearly appears from this decision that a cattle owner who negligently fails to keep his cattle from straying upon a highway may be held liable in a civil action for damages arising from a collision with his livestock, even at a point where the highway is unfenced, in open range country.

[5, 6] Appellants contend that there was no conflict in the evidence from which a construction might have been taken that the adjoining property was separated from the highway on both sides by a fence, or other means within the terms of section 423, but we take a contrary view. We do so upon reading the record and having in mind that this is a civil case, although violation of section 423 may be prosecuted as a misdemeanor. We rely upon the liberal construction allowable in a civil action when determining what is a fence; that is, whether it must be wholly complete or intact, or whether it may still be a fence when its course is occasionally interrupted by gaps or openings large or small; or whether a railroad track may be considered a curb; or whether a fence, not immediately adjacent to the highway but separated from it by a railroad right of way, is such "a fence" within the meaning of the statute. Notwithstanding the evidentiary conflict, the record shows that there was sufficient evidence before the trial court to indicate that the requirements of section 423 of the Agricultural Code as to fencing had been met, thus supporting the trial court's finding that defendants had negligently permitted their cattle to stray upon the highway "in violation of section 423 of the Agricultural Code."

[7-9] As a final contention appellants urge that the evidence does not show a direct causal connection between the alleged negligence and the injuries sustained. It is true that section 423 of the Agricultural Code abolishes the applicability of the doctrine of res ipsa loquitur to a case such as is presented on this appeal (Anderson v. I. M. Jameson Corp, 1936, 7 Cal.2d 60, 59 P.2d 962; Galeppi Bros., Inc., v. Bartlett, supra), but it cannot be said, as defendants claim, that plaintiffs here relied upon that doctrine to establish their case, for the evidence goes far beyond the mere showing that the cattle were present on the highway. There was evidence before the trial court showing the circumstances under which they had been driven three or four miles west of the highway on which the accidents occurred; that Smith had warned Law that the cattle would not stay where they had bedded down; that Law did not return the next morning although he had indicated to Smith that he would do so, nor did he return to Smith's place for his horse, which he had gone to the trouble of bringing 40 miles at the time of the roundup; that no one was actually in charge of the cattle from August 19th to the date of the accident. From this and other direct evidence, it could reasonably have been inferred, particularly in view of the testimony showing the propensity of cattle to return to their last water-hole, that the two animals involved in this case had strayed from the herd and were headed toward their old grazing ground; likewise, that since the two animals, admittedly the property of defendant Hardy, had strayed on to the highway, the 75 cattle found at and near the scene of the accidents were part of the same common herd from which the two straying cattle had come; also, since Law did not return to his horse, that he or no one else was in charge of the herd from the evening of August 19, 1942, to the time of the accidents, two days later. In connecting defendants' negligence to the injury, it is not necessary that an eyewitness be produced to testify directly to any fact, circumstantial evidence being sufficient. Johnson v. Griffith, 1941, 19 Cal.2d 176, 179, 180, 120 P.2d 6, quoting with approval language used in Gorman v. County of Sacramento, 1928, 92 Cal.App. 656, 661, 268 P. 1083. The question of defendants' negligence was a question of fact for the trial court and, in our opinion, the evidence presented, together with the inferences reasonably deducible therefrom, supports the trial court's findings and judgment.

Judgment affirmed.

SHINN and PARKER WOOD, JJ., concur.

70 Cal.App.2d 1

McKENZIE v. DEPARTMENT OF MOTOR VEHICLES et al.

Civ. 14638.

District Court of Appeal, Second District, Division 1, California.

June 29, 1945.

Automobiles ⟹50

Where the Department of Motor Vehicles collected registration fees on exempt vehicles, whether due to the mistake of the party paying the fees or to mistake of the department, the fees were collected through "error" within meaning of statute providing that, whenever the department through error collected any fee not required to be paid, the same shall be refunded. Vehicle Code § 374, St.1941, p. 2443; § 383(b), St.1937, p. 374.

See Words and Phrases, Permanent Edition, for all other definitions of "Error".

◆

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Freeman A. McKenzie against the Department of Motor Vehicles and others for a writ of mandate to compel respondents to refund to petitioner registration fees collected by respondents on certain vehicles. From a judgment denying the petition, petitioner appeals.

Reversed.

Joseph A. Ball and Kenneth Sperry, both of Long Beach, for appellant.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondents.

DORAN, Justice.

This is an appeal from a judgment of the superior court denying appellant's petition for a writ of mandate.

Respondents' brief under the heading, "Statement of the Case," recites the facts as follows: "The court below denied the verified petition for a writ of mandate to compel respondents to refund to petitioner the sum of $351.58 collected as registration fees by respondents for the registration of certain vehicles for the year 1942. Petitioner appealed from this judgment in favor of respondents. The appeal is submitted upon a settled statement in lieu of either a clerk's or reporter's transcript. From such record on appeal it appears that the California Shipbuilding Corporation issued a purchase order for some trucks to be registered in the name of the United State Maritime Commission as the legal registered owner thereof, the license and registration to be at cost; that petitioner is engaged in the automobile business in Long Beach; that on or about the 16th day of February, 1942, an employee of petitioner presented to the Department of Motor Vehicles, Long Beach Branch, several obsolete application forms for exempt registration of certain vehicles to be registered in the name of the United States Maritime Commission; that the Department of Motor Vehicles refused to accept the obsolete forms and supplied petitioner's employee with proper forms and advised him that in addition to these forms being properly filled out, it would be necessary to present a regular report of sale for each of the vehicles; that on or about the 17th day of February, 1942, a clerk in the employ of petitioner prepared said reports of sale, applications for non-exempt registration and calculated the fees due on each vehicle and prepared a check for said fees in the amount of $351.58, which she presented to petitioner for his signature and which he signed, and also prepared applications for exempt registration; that she delivered all of said papers and documents to another employee of petitioner for presentation to the Long Beach Branch office of Department of Motor Vehicles; that the employee of petitioner who prepared said applications did not know the difference between exempt and non-exempt registration, for the making out of registration applications was not one of her regular duties, but she did so on this occasion because other clerks of petitioner were busy and she understood the sale in question was a rush order; that the employee who presented the applications to the Department of Motor Vehicles was an errand or messenger boy and had worked for petitioner for only a short time and was inexperienced in the matter of applying for the registration of motor vehicles; that on or about the 17th day of February, 1942, said petitioner's errand or messenger boy again appeared at the office of the Department of Motor Vehicles, Long Beach Branch, and presented fourteen reports of sale of

Ford trucks to the United States Maritime Commission, and to each of the reports of sale there was attached an application for non-exempt registration of the vehicle, properly filled out and executed, in the name of the United States Maritime Commission; that at said time there was also presented a check in the sum of $351.58 signed by petitioner and which was the correct amount for non-exempt registration of the said fourteen trucks; that at said time there was also presented fourteen applications for exempt registration of said trucks properly filled out and executed in the name of the United States Maritime Commission; that at said time said employee of petitioner was advised by a clerk in the office of said Department of Motor Vehicles that she understood these fourteen vehicles were to be registered as exempt vehicles, in which case no fee was necessary; that said employee of petitioner then and there stated that the applicant did not desire exempt registration for said vehicles but desired the regular non-exempt registration thereof; that said employee of petitioner insisted upon paying the $351.58 as fees for such non-exempt registration and demanded the immediate issuance and delivery to him of the regular license plates for such trucks; that pursuant to such demand, said clerk of said Department of Motor Vehicles accepted said reports of sale and applications for non-exempt registration and calculated the regular fees due thereon, which amounted to the sum of $351.58; that said clerk of said Department of Motor Vehicles then transmitted said documents to the cashier in said office of said Department of Motor Vehicles who accepted said check in the sum of $351.58 and delivered to petitioner's employee Emergency Permits, of the pasteboard type, for such vehicles; that metal plates were mailed from Sacramento in due course for such trucks; that petitioner billed the California Shipbuilding Corporation for said sum of $351.58 and received payment therefor; that about ten days after the issuance of the pasteboard type of plates for said vehicles the sales manager for petitioner telephoned to the said Department of Motor Vehicles at Long Beach and stated that a mistake had been made in securing regular instead of exempt registration of said trucks; that the California Shipbuilding Corporation filed a claim with the Department of Motor Vehicles for a refund of said $351.58 and said claim was rejected; that the said metal plates were returned to the Department of Motor Vehicles and applications were filed for exempt registration of said vehicles; that pursuant to said applications the vehicles were registered and exempt plates were thereafter issued to the United States Maritime Commission, that petitioner reimbursed the California Shipbuilding Corporation in the sum of $351.58 for such fees; that the California Shipbuilding Corporation thereupon assigned its interest therein to petitioner; that on or about the 9th day of July, 1942, petitioner filed a claim for refund of said fees with the Department of Motor Vehicles and said claim was rejected."

The arguments of appellant and respondents respectively are presented briefly by respondents as follows, again quoting from respondents' brief:

"In his brief on appeal petitioner states that the trial court took the view that, under section 383 of the Vehicle Code [St. 1937, p. 374], refunds were permissible only where the collection or payment was due solely to an error or mistake upon the part of the Department of Motor Vehicles and that such payment and collection in the case at bar were due to an error on the part of petitioner rather than the respondents. He argues that section 383 of the Vehicle Code should be construed as requiring the Department to refund registration fees collected by it regardless of whether the error was committed by the person paying the fees or by the Department in cases where fees are not required to be paid under the provisions of said code.

"The portion of section 383 of the Vehicle Code applicable here is subdivision (b), which at the time of the payment of the fees herein read as follows:

"'Whenever the department through error collects any fee not required to be paid hereunder the same shall be refunded to the person paying the same upon application therefor made within six months after the date of such payment.'

"Section 374 of the Vehicle Code [St. 1941, p. 2443] provides that registration fees specified in the code, except fees for duplicate license plates, certificates or cards, need not be paid for any vehicle of a type subject to registration owned by the United States, etc.

"The United States Maritime Commission is an agency of the United States, the members thereof being appointed by the

President by and with the advice and consent of the Senate. (46 U.S.C.A. § 1111.) Therefore, if the fourteen trucks hereinbefore mentioned were owned by the United States Maritime Commission at the time applications were presented to the Department of Motor Vehicles for their registration, then no fee for such registration was required. This much is clear because when proper applications were finally presented to the Department of Motor Vehicles for exempt registrations of these vehicles, exempt plates were issued to the United States Maritime Commission."

Appellant, however, insists that "the collection of any registration fee for the registration of vehicles which are owned by and registered in the name of a governmental agency, and therefore entitled to registration without the payment of any fee, constitutes an error on the part of the Department." And that "The circumstance which gives rise to right to a refund is an erroneous collection by the Department of fees not required to be paid."

It is respondents' position that license fees fixed by the vehicle code are "taxes" and that taxes voluntarily paid may not be recovered by the taxpayer in the absence of a statute permitting a refund thereof.

From the foregoing it will be seen that respondents stand on the proposition that the mistake was appellant's and not respondents' hence, no authority exists for the repayment of the sum involved.

That appellant's payment of the license fee was an error, there can be no question. But, it does not follow logically that respondents' act in receiving and accepting the fee was any the less an error. In the circumstances, what appellant did is of no help in determining the validity of respondents' act. The receipt and collection of the fee by the motor vehicle department was either an error or it was not an error and, so far as that question is concerned, the conduct of appellant is immaterial. Respondents concede that it was not entitled to the fee. If receiving and collecting a fee to which the department is not entitled under the law, is not an error within the meaning of section 383 of the Vehicle Code then, it would be difficult indeed to determine just what such provision contemplates. The Vehicle Code specifically provides for certain fees that may be collected, but there is no provision authorizing the collection of fees by mistake. Appellant was not required to pay the fee in question and it was an "error" of the Vehicle Department to collect it hence, under the provisions of Section 383 of the Vehicle Code, "the same shall be refunded."

Appellant was entitled to the writ applied for; the judgment is therefore reversed; and, there being no controversy as to the facts, the trial court is directed to issue such writ.

YORK, P. J., and DRAPEAU, Justice pro tem., concur.

69 Cal.App.2d 697

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. CRAWFORD.

Civ. 14827.

District Court of Appeal, Second District, Division 3, California.
June 25, 1945.

1. Deeds 🔑196(3)

Evidence as to defendant's associations and transactions with a feeble and penurious property owner 90 years of age justified a finding of the existence of a confidential relationship, creating a presumption that a conveyance of property to defendant without consideration was obtained by undue influence. Civ.Code, §§ 2219, 2235.

2. Deeds 🔑196(3)

Evidence was sufficient to support finding that defendant failed to sustain burden of overcoming presumption that defendant, occupying a position of personal confidence, exerted undue influence in obtaining a conveyance without consideration from a feeble and penurious property owner 90 years of age. Civ.Code, §§ 2219, 2235.

3. Deeds 🔑196(3)

Defendant who obtained a conveyance of property from deceased without consideration could not sustain the transaction except by clear and convincing evidence that there had been no abuse of the confidence reposed in him by deceased, and to overcome the presumption of undue influence the testimony had to be clear, positive, uncontradicted, and of such nature that it could not rationally be disbelieved. Civ. Code, §§ 2219, 2235.

4. **Appeal and error** ⟹1012(1)

The trial court determines what weight should be given to the testimony of a witness, and appellate court may not control the conclusion of the trial court denying credence to testimony unless it appears that there is nothing which at all impairs its accuracy.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by the Bank of America National Trust & Savings Association, executor of the estate of Charles L. Martin, deceased, against George B. Crawford, to set aside a deed executed by deceased to the defendant, on ground of mental incompetency of grantor and undue influence of defendant. Judgment for plaintiff, and defendant appeals.

Affirmed.

George Gardner, of Los Angeles, for appellant.

John H. Miller, of Los Angeles, and Austin & Austin, of Compton, for respondent.

SHINN, Justice.

On August 31, 1943, Charles L. Martin conveyed to defendant Crawford two residential properties located in Los Angeles, of the value of $3,000 each. Within two months thereafter Mr. Martin died and his executor brought this action for recovery of the property, alleging that the grantor was mentally incompetent to make the deed and that it had been procured by the undue influence of Crawford. Upon the trial the court found all the allegations of the complaint to be true and rendered judgment setting aside the deed and awarding plaintiff the amount of the rents collected by defendant after the death of Mr. Martin. Defendant appeals.

There were additional findings to the effect that the grantor did not intend to convey any title, except one to take effect upon his death, that there had been no delivery of the deed, and a finding which would indicate that the court did not intend to find that Mr. Martin was incompetent, but it is not necessary to consider the correctness of these findings. The case does not turn upon these points.

It was alleged in the complaint, and found to be true, that a confidential relationship existed between decedent and defendant, that decedent was aged and infirm, unable to withstand the importunities of defendant, and that the latter made use of the confidential relationship to persuade decedent to execute the deed. The decisive question is whether there was evidence to sustain this finding. There was no direct evidence of undue influence exercised by defendant, or anyone in his behalf. There was, however, a presumption of undue influence if defendant stood in the relationship of a trustee. One who voluntarily assumes a relation of personal confidence is a trustee (Civil Code, sec. 2219), and every transaction with his beneficiary during the existence of the trust, by which he obtains any advantage over the beneficiary, is presumed to have been entered into without sufficient consideration and under undue influence (Civil Code, sec. 2235). It is conceded by defendant that he gave no consideration for the deed. Mr. Martin was 90 years of age; he was taken ill on August 25, 1943, six days before the execution of the deed. The physician who attended him on the evening of the 25th described his condition as follows: "While I found that he had—he was just worn out, his heart was just worn out, he had a myocardial condition there and he was just an old man * * * he said he was awful weak." He grew weaker steadily until he died. There was also testimony that his memory and other mental powers had failed perceptibly prior to his last illness. He was saving to the extent of being penurious, lived on poor and inexpensive food, wore old clothes which he mended and patched himself, and habitually remained standing while eating, for the reason, as he stated, that that was the way the animals ate. One of his neighbors urged him to eat more nourishing food and he said, "I haven't been in the habit of eating much—I chew my food as long as I can chew it, because when I swallow my food it is gone and that is all the good it does you." Neighbors frequently took food to him during the last several years of his life and were very attentive to him, and one of them, Mrs. Parker, was especially attentive during the last nine months or a year, going to his house several times a day even though he was not actually sick. She cared for him in his last illness and Mr. Martin paid her $200 for her services, but he did not make any gifts to his friends, other than defendant. He owned eight houses, three upon one lot, other than the one in which he lived, and they were worth in the neighborhood of $40,000. His houses were rented and he attended to the collection of his rentals. He had four adult children residing in Texas and grandchildren by a deceased child. His wife had been dead since 1941 and he lived alone. Defendant Crawford was in the real estate and insurance business and had been acquainted with decedent for some eight years; he handled the insurance on the several properties. He saw Mr. Martin with great frequency, often drove him to and from Martin's properties, and he testified that he was occasionally consulted by Martin in business matters. He also testified that during the last two years, by pre-arrangement, Martin had called him by telephone almost every day. No explanation was given as to the occasion for these frequent conversations, and the court could have inferred, with good reason, that they were of a business nature. Ownership of eight rented houses undoubtedly demanded much attention to detail and a considerable amount of negotiation with tenants. It is not likely that it was arranged that Martin should call defendant daily for the purpose of passing the time of day or engaging in purely social conversation, and it is reasonable to believe that matters pertaining to Martin's business were discussed upon the frequent occasions when defendant drove him to and from his several houses. He did not discuss his business affairs with his neighbors and other friends. When Mr. Martin's wife died, defendant took charge of the funeral and thereafter received from Martin the sum of $25, and a letter promising him that he would be remembered further. Mr. Martin made a will in February, 1942, by which he left defendant $300 and the remainder of his property to his children. He was on good terms with his children and corresponded with his son Claude once or twice a week up until the time of his last illness. The will was olographic and defendant stated to Claude Martin, according to the latter's testimony, that it had been written in his, defendant's office; defendant denied this upon the stand, but testified that decedent had given him the will and asked him to make several copies of it and that he did so. When Martin became ill a physician was engaged through defendant's office, defendant being out of the city, and upon defendant's return he took entire charge of Martin during his illness, engaged a neighbor to attend and nurse him, and left instructions that he was to be called, even if he was out of the city on vacation, in the event he should be needed. He told the son Claude that he knew more about the father than either Claude or Mr. Brown, Martin's banker friend. Claude, who was 66 years of age, arrived from Texas less than a month after his father was taken ill and cared for him until his death a month later. During that time defendant called at the house from 17 to 19 times. On the 11th of September, defendant said to Mr. Martin, in the presence of a neighbor, that "he would be there the next day and take care of or fix up all of his business for him."

[1] There was little in the characteristics of this feeble and penurious old gentleman which would have rendered his companionship enjoyable to a man engaged in active business, as defendant was. And if the trial court had believed that Martin's ownership of a considerable amount of property was at the bottom of defendant's interest in him, we could not say that this would have been an unreasonable deduction. The evidence and the reasonable inferences therefrom amply support the finding that there was a confidential relationship.

[2-4] Defendant's next contention is that the evidence conclusively proved that no undue influence was exerted to obtain the deed. His account of the transaction, if believed, would show that Mr. Martin conceived the idea of making a gift of the property and that he was not subjected to outside influence. It is the contention of defendant that his testimony was not contradicted, that it was not inherently improbable, and that the court was bound to accept it. Although there was no directly contradictory evidence, defendant's testimony did meet opposition, inasmuch as the evidence was such as to give rise to the presumption of undue influence. Having obtained $6,000 worth of property without consideration, defendant could not sustain the transaction except by clear and convincing evidence that there had been no abuse of the confidence reposed in him by the decedent, and when he placed his dependence on the testimony of witnesses to overcome the presumption of the use of undue influence, such testimony had to be clear, positive, uncontradicted, and of such a nature that it could not rationally be dis-

believed. Hicks v. Reis, 1943, 21 Cal.2d 654, 661, 134 P.2d 788; Blank v. Coffin, 1942, 20 Cal.2d 457, 461, 126 P.2d 868. "It is within the province of the trial court to determine what weight and credit shall be given to the testimony of any witness and this court may not control the conclusion or finding of the superior court denying credence to the testimony unless it appears that there is nothing which at all impairs its accuracy. Blanc v. Connor, 167 Cal. 719–722, 141 P. 217; Davis v. Judson, 159 Cal. 121–128, 113 P. 147." Cox v. Schnerr, 1916, 172 Cal. 371, at page 379, 156 P. 509, 513.

Defendant's testimony was that Mr. Martin had sent for him on the day the deed was executed, told him that he wanted to give him, Crawford, the house he was living in, and gave him the choice of either of two other properties; that Martin had previously asked defendant how he could make a deed and retain the use of his property during his lifetime and that he, defendant, had advised him he could deed the property, reserving a life estate; that on the day the deed was made, when Martin mentioned it, he, defendant, asked him if he wished to reserve a life estate, and that Martin said that he did not; that he knew Crawford would not put him out of the home if he lived to be 100. He testified that he returned to his office, prepared the deed, returned to Martin's home with a Mrs. Schulte, who was the notary and his office assistant; that the deed was signed and acknowledged to Mrs. Schulte but that it was not recorded until several days after Martin's death. He admitted that he had not mentioned the deed to Martin's son or daughter until after Mr. Martin's death, and had not answered their questions concerning the will, although he saw them frequently. Mrs. Schulte was not called as a witness and no explanation was given as to defendant's failure to call her. She was the only living person, other than defendant, who knew of the circumstances under which the deed was executed, the only one who could have corroborated defendant's testimony as to the conversation that was had, if it had occurred as defendant testified. Defendant testified that Martin had a life estate in the home property, which had stood in the name of his wife, and that he acquired the remainder from the wife's estate for the joint benefit of himself and defendant, saying that he intended defendant to have the property after he was gone. There was no evidence that Mr. Martin ever expressed this intention to anyone else nor of facts which would have furnished a reason for such a gift. So far as the evidence disclosed, defendant may have represented to Martin that his services had been of great value to the latter and that he deserved to be compensated therefor in a substantial manner, or he may have made other representations equally as persuasive. There was no testimony of any distinterested witness as to the subject of their innumerable conversations. To be sure, there is no evidence that Martin was thus influenced, but the burden of proof upon that issue did not rest upon plaintiff; it rested upon the defendant. It was necessary for him to prove affirmatively that Martin's act was entirely voluntary, uninfluenced by his relationship with defendant or by adverse pressure of any sort. In weighing defendant's evidence the court no doubt was impressed by the fact that defendant failed to call as a witness the only distinterested person who could have testified as to the conversations with reference to the deed, and that he concealed the fact that the deed had been made from Mr. Martin's two children who attended him during his last illness, and declined to answer their questions with reference to Mr. Martin's will, other than to say that they had been remembered. This concealment, during the entire time when the children could have learned of Mr. Martin's wishes and his motives, tends to indicate that defendant felt so insecure in his position as a voluntary grantee that he did not dare to risk any inquiry, while the old man lived, as to the conditions surrounding the giving of the deed. Mr. Martin had an an attorney, Mr. Miller, and also frequently advised with Mr. Brown at the bank, but he consulted with neither of them about making the deed and defendant, although he knew Mr. Martin's relations with them, made no mention to them of the deed until after Martin's death. It was not shown that Mr. Martin ever mentioned the deed to any of the members of his family or his friends or that he had any independent advice concerning it. The evidence as a whole furnished no satisfactory reason why Mr. Martin should have placed defendant upon a basis of substantial equality with his children, all of whom enjoyed his natural affection. Undoubtedly there was a feeling of obligation, dictated by a relationship which went considerably beyond mere friendship. For some reason Mr. Martin increased his bounty to defendant from $300 at the time the will was made, to $6,000, a year and a half later. The evidence left his motive in so doing a matter of speculation.

The findings upon the issue of undue influence are supported by the evidence, they are sufficient to support the judgment, and it is unnecessary to discuss other points which are relied upon by respondent.

The judgment is affirmed.

DESMOND, P. J., and FOX, Justice pro tem., concur.

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69 Cal.App.2d 767

CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION v. HANSEN.

Civ. 14579.

District Court of Appeal, Second District, Division 3, California.

June 27, 1945.

1. Executors and administrators 🔑93(1), 96

The general powers of an executor or administrator do not ordinarily authorize him to bind the estate, nor to continue the business of the decedent except where the carrying on of a business would be cast upon the executor or administrator as a necessary means for the preservation of the estate. Probate Code, § 572.

2. Executors and administrators 🔑93(1)

An executor or administrator who carries on the business of decedent upon his own responsibility does so at his own risk. Probate Code, § 572.

3. Executors and administrators 🔑93(2)

Where executor, pursuant to express authority therefor in decedent's will, continues the operation of a business, his obligations properly incurred therein are charges against the estate.

4. Executors and administrators 🔑93(1)

The purpose of statute giving probate court power to authorize an executor or administrator to continue the operation of decedent's business was to permit the business to be continued under the direction of the court for the benefit of the estate, and effect of statute was to make claims arising under such circumstances chargeable against the estate rather than against the administrator or executor personally. Probate Code, § 572.

5. Executors and administrators 🔑93(1)
Taxation 🔑59

Where decedent's widow and sole heir continued to operate decedent's business as administratrix under authority of court until discharged, the estate, and not the widow individually, was the "employer" liable for unemployment contributions during such period. Gen.Laws 1937, Act 8780d, § 8.5; Probate Code, § 572.

See Words and Phrases, Permanent Edition, for all other definitions of "Employer".

6. Statutes 🔑236

The principle of liberal construction of a remedial statute cannot be used as a pretext to create a liability against a person where none exists or appears to have been intended.

7. Executors and administrators 🔑93(1)
Taxation 🔑59

Where Employment Stabilization Commission had knowledge that deceased's widow and sole heir continued to operate deceased's business as administratrix under authority of court until her discharge, but filed no claim against the estate for unemployment contributions and did not pursue remedy as a creditor of the estate, fact that administratrix was discharged without an accounting did not make her personally liable for such contributions. Gen.Laws 1937, Act 8780d, § 8.5; Probate Code, § 572; Code Civ.Proc. § 473.

◆

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by California Employment Stabilization Commission, successor to the California Employment Commission, formerly the Unemployment Reserves Commission, against Thelma C. Hansen, also known as Thelma Simonsen, individually and doing business as Hansen Truck Line, to recover contributions, interest, and penalties alleged to be due under the California Unemployment Insurance Act. Judgment for defendant, and plaintiff appeals.

Affirmed.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn and Doris H. Maier, Deputy Attys. Gen., for appellant.

Nixon A. Lange, of Huntington Park, for respondent.

FOX, Justice pro tem.

Plaintiff brought this action against Thelma C. Hansen, also known as Thelma Simonsen, for the collection of contributions, interest and penalties alleged to have accrued from December 12, 1937, to July 24, 1939, under the provisions of the California Unemployment Insurance Act, Stats.1935, p. 1226, Chap. 352, as amended, Deering's Gen.Laws, Act 8780d. The complaint alleged that defendant had been an employer during said period and subject to the provisions of said act and that she had failed to make the required contributions. From a judgment in favor of defendant plaintiff appeals.

During his lifetime, Olaf M. Hansen owned and operated a trucking business in Bell, California, known as "Hansen Truck Line." He died on December 11, 1937, and the respondent, his widow, was appointed administratrix of his estate. As such administratrix she was duly authorized by the probate court under section 572 of the Probate Code to continue the operation of said business. Respondent did, in accordance with the authority granted by said order, conduct and operate said trucking business until July 25, 1939. At that time the probate of the estate was completed and respondent was discharged as administratrix without an accounting. The assets of the estate, including the trucking business, were thereupon distributed to respondent as the sole heir. No taxes were paid by respondent individually, or by the estate during the period said business was operated by it. Contribution reports, however, were filed on behalf of the estate for the quarters ending September 30, June 30 and March 31, all in 1939. Appellant filed no creditor's claim in said estate, though notice to creditors was duly published.

The trial court found that during the period here in question the "Hansen Truck Line" was operated by the Estate of Olaf M. Hansen, deceased, and that said estate was an "employer" within the meaning of that term as used in section 9 of the California Unemployment Insurance Act. It also found that respondent was not engaged in business, as alleged by appellant, during said period and therefore that respondent was not personally indebted to appellant for the alleged contributions.

Appellant contends that notwithstanding the order of the probate court authorizing respondent to continue the operation of the decedent's business, she is nevertheless personally liable for contributions under the said Act during the period she operated said business as administratrix of the said estate. Respondent, however, contends that since she was authorized to continue to operate said business by the probate court, under section 572 of the Probate Code, she is thereby relieved from any personal liability for such contributions during said period. In our opinion respondent's position must be sustained.

[1, 2] The general powers of an executor or administrator do not ordinarily authorize him to bind the estate (First Nat. T. & S. Bank v. Indus. Acc. Comm., 1931, 213 Cal. 322, 325, 2 P.2d 347, 78 A.L.R. 1324), nor to continue the business of the decedent except where the carrying on of a business would be cast upon the executor or administrator as a necessary means for the preservation of the estate. Riedy v. Bidwell, 1925, 70 Cal.App. 552, 555, 233 P. 995; In re Estate of King, 1942, 19 Cal.2d 354, 359, 121 P.2d 716; In re Estate of Scherer, 1943, 58 Cal.App. 2d 133, 144, 136 P.2d 103. If he carries on the business of the decedent upon his own responsibility he does so at his own risk. In re Estate of Burke, 1926, 198 Cal. 163, 166, 244 P. 340, 44 A.L.R. 1341.

[3, 4] If an executor, pursuant to express authority therefor in decedent's will, continues the operation of a business, his obligations, properly incurred therein, are charges against the estate. In re Estate of Ward, 1932, 127 Cal.App. 347, 357, 15 P. 2d 901. See, also, Riedy v. Bidwell, supra, 70 Cal.App. page 555, 233 P. 995, and In re Estate of Burke, supra. As pointed out in the Burke case, where there is authority for carrying on the business and the estate is liable for the obligations incurred, the reasons for charging the executor or administrator with a personal liability do not exist. The amendment to section 1581 of the Code of Civil Procedure in 1929, St. 1929, p. 157, now section 572 of the Probate Code, gave the probate court power to authorize an executor or administrator to

continue the operation of a decedent's business. In re Estate of Ward, supra; In re Estate of Smith, 1936, 16 Cal.App.2d 239, 60 P.2d 574; In re Estate of Allen, 1941, 42 Cal.App.2d 346, 108 P.2d 973. The purpose of the legislature in adopting section 572, Probate Code, was to permit the business of a decedent to be continued upon the order of and under the direction of the court for the benefit of the estate. In re Estate of Allen, supra, 42 Cal.App.2d page 352, 108 P.2d 973. The effect of that section is to make claims arising under such circumstances a charge against the estate rather than one against the administrator or executor personally. In re Estate of Allen, supra, 42 Cal.App.2d page 351, 108 P.2d 973. It cannot be questioned that the estate of Mr. Hansen would have been liable for the payment of any contributions which may have accrued by reason of the operation of the business by the administratrix. An examination of the cases in this state relied on by appellant to support the proposition that an administrator or executor, and not the estate, is liable for obligations incurred by him in continuing the operation of a decedent's business, discloses that the personal representative either did not have express authority in the decedent's will therefor, or an order of court which authorized the continued operation of the business.

[5] Since respondent was authorized by the probate court under section 572 of the Probate Code "to continue the operation of the decedent's business" she was acting as the agent of said estate in operating the business, and the estate and not the respondent, as the trial court found, was operating the business. Hence, the respondent was not liable as an employer for the contributions herein sought to be collected.

[6] Appellant, however, contends that section 8.5 of the California Unemployment Insurance Act establishes the liability of respondent as an individual for the alleged contributions. The material portion of that section reads as follows: "Sec. 8.5. 'Employing unit,' as used in this act, means any individual or type of organization, including any partnership, association, trust, estate, joint stock company, insurance company or corporation, whether domestic or foreign, *or* the receiver, trustee in bankruptcy, trustee or successor thereof, *or* the legal representative of a deceased person, which has, or subsequent to January 1, 1936, had, in its employ one or more individuals performing services for it within this State." (Italics added.) The effect of appellant's argument is that both the estate and the respondent personally are liable. But it is clear that we do not here have two employers or two employing units. The estate, according to the findings of the trial court, was the employer. The respondent "was not engaged in business as alleged by plaintiff" during the period here in question. To hold, however, that she was nevertheless liable for the said contributions, would be doing violence to the language of the quoted section of the Act. It would mean construing the disjunctive "or" to mean "and." There is no foundation for such construction. We are not unmindful of the established rule that the Act here under consideration is remedial in character and subject to a liberal construction to effectuate its purpose. California Emp. Comm. v. Butte County, etc., Ass'n, Cal.Sup.1944, 154 P.2d 892. However, the principle of liberal construction cannot be used as a pretext to create a liability against a person where none exists or appears to have been intended. In construing a remedial statute "reason must have its just proportion." County of Los Angeles v. Frisbie, 1942, 19 Cal.2d 634, 639, 122 P.2d 526, 529. The first reason against the construction here contended for by appellant is that it would be placing an undue responsibility upon an administrator or executor who was authorized and directed by the probate court to continue the operation of the decedent's business. It might well make financially responsible persons and concerns unwilling to act in such capacity. The second reason is that if the legislature had intended that an administrator or executor who continues to operate a decedent's business pursuant to authority granted by the probate court should be personally liable for the contributions, it would have been simple to so provide in clear language. The absence, therefore, of any such language, is indeed significant. That the legislature did not intend that an administrator should be personally liable under such circumstances is made manifest by the amendment of the Act in 1939, Stats.1939, p. 2051, Chap. 630, Gen.Laws Supp.1939, Act 8780d, which became effective a few months after the Hansen estate was closed, which provides in section 46.1 that every administrator or executor of the estate of a deceased employing unit shall

within 90 days after assuming office send due notice thereof in writing to the plaintiff and furnish plaintiff certain information. Failure to observe this requirement shall cause "the administrator or executor of the estate of the deceased employing unit to be personally responsible for all loss in contributions, penalties and interest attributable to such failure to notify the commission." It is thus made clear that the liability of an administrator or executor is not upon the basis that he was an "employer" or an "employing unit" under the Act but upon the principle that he should be responsible for any loss that might be sustained by reason of his failure to perform a duty imposed upon him by law. If it had been considered that he was already liable under section 8.5 of the act, such an amendment would have been wholly unnecessary. It is significant also that the amendment imposes the same duty and the same penalty upon the assignee, receiver, trustee in bankruptcy or other representative of an insolvent employing unit, although the primary liability is that of the insolvent "estate." Furthermore, it is difficult to see how a person can be held liable for contributions on the theory that he is an "employer" or an "employing unit" in the face of a finding, amply supported by the evidence, that during the period in question the person was not engaged in business.

[7] Appellant also suggests that respondent should be held personally liable for the contributions because the estate was closed and distributed to her without an accounting. It is not contended that the appropriate provisions of the Probate Code were not followed nor that the necessary notices were not given. Appellant did not file in said estate any creditors claim or other claim or demand for the contribution. It is clear from the correspondence of appellant that it was advised of the death of Mr. Hansen and that his estate was continuing to operate the "Hansen Truck Line" at least "a few months" prior to December 5, 1939. Even if appellant got this information after the estate was closed on July 25, 1939, it still had time and opportunity to pursue its remedy as a creditor of the estate under section 473, Code of Civil Procedure, if any grounds therefor existed. Appellant, however, took no steps to this end and did not file this action until September 28, 1942.

In view of our conclusions herein it is unnecessary to consider other grounds for an affirmance urged by the respondent.

The judgment is affirmed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

WILLIAMS v. DAVIS.

Civ. 14617.

District Court of Appeal, Second District, Division 2, California.

July 6, 1945.

Hearing Granted Aug. 30, 1945.

1. Appeal and error ⟹607(1)

An order terminating proceedings for preparation of transcript on appeal is largely within discretion of trial judge.

2. Appeal and error ⟹985

Trial court's order terminating proceedings for preparation of transcript on appeal will not be disturbed in absence of clear showing of abuse of discretion.

3. Appeal and error ⟹607(1)

Where reporter's transcript was filed with trial court in September, 1940, and in June, 1941, plaintiff submitted about 177 pages of proposed corrections, and about two years later defendant offered to stipulate to certain corrections but not to others, and judge suggested conferences, and plaintiff did nothing further for five months, trial court was justified in terminating proceedings for preparation of transcript.

◆

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Edna I. Williams against Everly M. Davis, Sr. From an order granting defendant's motion to terminate proceedings for preparation of a transcript on appeal, plaintiff appeals.

Affirmed.

Edna I. Williams, in pro. per.

Edward R. Young, Frank R. Johnston and E. L. Searle, all of Los Angeles, for respondent.

McCOMB, Justice.

From an order of the trial court granting defendant's motion to terminate proceedings for the preparation of a transcript on appeal, plaintiff appeals.*

The essential facts are:

A reporter's transcript was filed with the trial court September 27, 1940. The trial judge thereupon fixed October 7, 1940 as the date for the hearing on the settlement of the transcript. The matter was continued from time to time until June 23, 1941 for the purpose of affording plaintiff time to read the transcript and prepare suggested corrections. On June 23, 1941, plaintiff handed to defendant in court approximately 177 typewritten pages of proposed corrections. Thereafter the matter was continued from time to time to afford defendant's counsel time within which to check the proposed corrections. On May 18, 1943, the matter came on for settlement of the transcript and defendant's counsel stated to the court that he would stipulate to certain corrections but not to others; the trial judge then suggested that plaintiff and defendant hold conferences to see if they could not agree upon the remaining corrections. Nothing further was done by plaintiff in the matter until October 18, 1943 when she filed a notice of motion for a new trial; whereupon defendant filed a motion to terminate the proceedings for the preparation of a transcript on appeal which resulted in the order which is the basis of the present appeal.

This is the sole question necessary for us to determine:

Did the trial court err in granting defendant's motion to terminate the proceedings for the preparation of a transcript on appeal?

[1, 2] This question must be answered in the negative and is governed by the established rule in California that an order of a trial court terminating proceedings for the preparation of a transcript on appeal is one largely within the discretion of the trial judge which will not be disturbed on appeal in the absence of a clear showing of an abuse of discretion. (Walker v. Etcheverry, 38 Cal.App.2d 611, 613, 101 P.2d 709, and cases cited therein.)

[3] Applying the foregoing rule to the facts in the present case, it appears that more than three years elapsed from the time plaintiff commenced proceedings to obtain a transcript on appeal until the present order was made; also that for more than five months subsequent to May 18, 1943, plaintiff took no action whatsoever to have the transcript settled. Such delay, we believe, supports the trial court's implied finding that plaintiff had not exercised due diligence in proceeding to have the transcript settled. Therefore the order was correct.

It should ever be borne in mind that the best interests of litigants and the public is served in having appeals promptly heard and determined, and it has ever been the spirit of an enlightened jurisprudence to have litigated matters promptly and speedily settled without undue delay.

For the foregoing reasons the order is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

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69 Cal.App.2d 723

GEBHARDT v. GEBHARDT.

Civ. 14676.

District Court of Appeal, Second District, Division 3, California.

June 26, 1945.

As Amended July 9, 1945.

1. Divorce ⚷243

In divorce action, order denying wife's motion for alimony was not objectionable because not expressly reciting that, as records showed, the court, on two former hearings on the motion, had awarded alimony for four months and six months respectively.

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* For previous phases pertaining to this action, see Williams v. Davis, 68 Cal.App.2d 640, 157 P.2d 655, and Williams v. Davis, 69 Cal.App.2d 141, 158 P.2d 748.

2. Divorce ⚷183

A recital that both plaintiff and defendant had testified, contained in order disposing of alimony motion in divorce action, would be accepted as correct in absence of a complete record, especially where defendant, an attorney, had conducted his own case and made arguments to trial court.

3. Divorce ⚷245(1)

The court's statutory power to "modify" alimony allowances includes right finally to terminate alimony payments previously ordered. Civ.Code, § 139.

See Words and Phrases, Permanent Edition, for all other definitions of "Modify".

4. Divorce ⚷247

Where court on alimony petition by employed wife terminated payments until further order, refusal finally to terminate husband's obligation was not abuse of discretion, since the legal practice of the husband, an attorney, might improve, while wife with advancing age might be in need.

5. Divorce ⚷223

Where court in divorce action, on wife's petition for alimony and attorney's fees, terminated alimony payments until further order and reserved jurisdiction, it was not abuse of discretion to award additional attorney's fees.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Divorce action by Mathilde O. Gebhardt against Hans Alfred Gebhardt wherein plaintiff, several years after the granting of a final decree of divorce, moved for the allowance of certain alimony and attorney's fees, and defendant filed a motion for final termination of alimony payments. From part of an order denying alimony but awarding attorney's fees and reserving jurisdiction, and from a subsequent order denying defendant's motion to correct and modify the former order, defendant appeals.

Orders affirmed.

H. A. Gebhardt, of Los Angeles, in pro. per.

Leo Shapiro, of Los Angeles, for respondent.

DESMOND, Presiding Justice.

This is an appeal by the defendant in a divorce action from orders concerning alimony payments and attorney fees made several years after the final decree of divorce was granted. The interlocutory decree in this case was signed on December 16, 1938, after a hearing upon respondent's complaint for divorce, as to which the appellant defaulted. He is an attorney and was present in court at the time of the proceedings but gave no testimony. He was asked, and so was the respondent, whether a property settlement agreement, which had been executed was satisfactory. Both parties answered in the affirmative and the court, by its interlocutory decree, approved and incorporated therein the terms of that agreement. The defendant was thereby "ordered to pay to plaintiff as and for the support and maintenance of plaintiff and Elinor Gertrude Gebhardt, minor child of the parties, the sum of $87.50 per month in installments of $43.75 on the 1st and the 15th days of each and every month commencing on Friday, the 16th day of December, 1938, and continuing thereafter until said minor child shall marry or reach her majority or become self-supporting. Upon the happening of any of said events, if the parties are unable to agree upon the amount of future support and maintenance to plaintiff, an application shall be made in the above entitled action or in any other appropriate action or proceeding, to determine the amount of support and maintenance to be paid by defendant to plaintiff thereafter. The said allowance shall be based upon the needs of plaintiff as of the date of said application, and upon the ability of defendant to pay as of said date. * * *"

The minor daughter of the parties became of age on December 2, 1942, and shortly thereafter her mother represented to the court that she and her former husband had been unable to agree upon the amount of future support and maintenance to be paid by him and asked the court to make its order requiring payment to her of "The sum of $200.00 per month, or such other sum as may be reasonable and proper for her support and maintenance," and, also, "The sum of $150.00 for attorneys' fees. * * *" At the hearing upon this petition, March 25, 1943, it was stipulated that the defendant pay to plaintiff the reduced amount of $40 per month for the ensuing four months; also that "The Court retains jurisdiction to make such and further orders as may be meet in the premises; further hearing on the motion is continued to August 2, 1943, at 9:00 A. M." On August 2, 1943, the court ordered the monthly payments of $40 to be made for an additional period of six months, continuing hearing on the motion to February 2, 1944. On that date defendant served and filed a motion to terminate finally alimony payments, alleging in his supporting affidavit that plaintiff had failed to show any need for alimony in the future and that he was unable to meet any alimony payments. This motion was before the court for its consideration in connection with the motion of the plaintiff which, on the two prior occasions, had been continued for further hearing. According to a minute order of February 2, 1944, entered on February 7, 1944, "Plaintiff's motion for support comes on for further hearing, Leo Shapiro appears for the plaintiff and the Defendant appears in propria persona. The plaintiff testifies. Thereupon the motion is submitted; 5—5 and 3 days allowed for counsel to submit authorities."

Following the submission, and on March 6, 1944, the court signed an order, according to appellant's opening brief, reading as follows:

"The motion of plaintiff to fix and determine the amount of future support and maintenance to be paid to plaintiff and the motion of plaintiff for an allowance of attorney fees in connection with said motion having been partially heard on March 25, 1943, and August 2, 1943, in Department 4 of this Court, and having been continued for further proceedings to the 2nd day of February, 1944, plaintiff and defendant being both personally present at each of said hearings, plaintiff appearing by Sam Wolf and Leo Shapiro, by Leo Shapiro, her attorneys, and defendant appearing in propria persona, plaintiff and defendant having both testified and both of said motions having been submitted to the Court for decision, the Court, being fully advised in the premises, now finds that, for the present, plaintiff is not in need of alimony.

"Now therefore, it is hereby ordered, adjudged, and decreed as follows:

"The interlocutory decree heretofore made and entered in the within action, insofar as the same provides for the payment of alimony to plaintiff, is hereby modified, payments thereunder to cease as of the first day of March, 1944, *until further order of this Court.*

"The Court expressly reserves jurisdiction to make such other or further orders, from time to time, as may be necessary by reason of changed circumstances of the parties.

"It is further ordered that defendant pay to Leo Shapiro, attorney for plaintiff, the sum of One hundred dollars, as additional attorney fees, payable in installments of Ten dollars a month, commencing March 15, 1944."

The appeal is from that portion of the order which we have italicized and also from an additional order which the court made on April 6, 1944, denying defendant's motion to correct the order of March 6, 1944 by (1) inserting the words "Orders were made by the court on March 25, 1943 and August 2, 1943," and by (2) striking the words "plaintiff and defendant having both testified," and further to modify that order by (3) striking the italicized language, and by (4) terminating finally alimony payments. The minute entry of the court of April 6, 1944 indicates that on that date defendant appeared in propria persona, plaintiff also appearing by counsel, and that argument was made upon the motion before the court rendered its decision.

[1, 2] Treating first the appeal from the order of April 6, 1944 denying the motion to correct and modify, it is apparent that the court saw no reason to modify its decision on item (4) above, rendered on March 6th, just one month previously, refusing to terminate finally the payment of alimony; therefore, as to that item if we find the decision reached on March 6th should be sustained, the appeal from that portion of the order of April 6th must fail. The same is true as to item (3) by which the court retained jurisdiction to pass in future upon the question of alimony and also allowed the additional attorney fee. No proper grounds appear for sustaining the appeal from items (1) and (2). As to item (1), the records of the court presented upon this appeal show that the court did make orders on March 25, 1943, and August 2, 1943, for monthly payments of alimony in the sum of $40, and there was no compelling necessity, therefore, for the court to recite that fact in the order of March 6th. As to

item (2), the request that the court strike from the order of March 6th the phrase "plaintiff and defendant having both testified," no proper showing is made as to why such action should be taken. We have not been furnished with a bill of exceptions or a reporter's transcript of the proceedings in this case and the clerk's transcript is not altogether complete, but it does show that testimony was taken and arguments made to the court. Since appellant, long and active member of the Bar, acted as his own attorney at the various hearings where testimony was taken on the matter of alimony and submitted lengthy affidavits sworn to by himself which he considered pertinent, there is no doubt in our minds that in his argument to the court he was in an ideal position to state any facts which, in his opinion, were germane to the issues. If he did not testify and the statement in the order of April 6th that both parties testified may be attributed to inadvertence, there is nothing in the record to show that he offered to take the stand or requested to do so and was refused the opportunity. Since the court's order says that both he and the plaintiff testified, and since the complete record which might conceivably show a contrary situation has not been brought before us, we accept the court's statement as correct. This disposes of item (2).

We now consider whether the trial judge erred on March 6, 1944 when, having ordered alimony to cease as of March 1, 1944, he expressly reserved jurisdiction to make such other or further orders in the future as changed circumstances might render necessary and also ordered payment of additional fees in the sum of $100.

[3, 4] Considerable space in the briefs is devoted to a discussion as to whether a trial court may, upon petition, finally terminate alimony payments previously ordered. We find the answer in Greer v. Greer, 1939, 31 Cal.App.2d 39 page 41, 87 P.2d 388, 390, where the court said: "As to the power of the trial court under section 139 of the Civil Code to permanently relieve a husband from future payments of alimony, we think the case of McClure v. McClure, 4 Cal.2d 356, 49 P.2d 584, 100 A.L.R. 1257, is decisive of the question. * * * it is sufficient to say that the rule there laid down is that the power granted to the court to 'modify' alimony allowances includes a right in proper cases to terminate finally the obligation to pay alimony." The inquiry then in the present instance must be whether the circumstances presented to the court make out a proper case for final termination. Appellant argues that they do because his former wife is now profitably employed and he, on the other hand, finds it difficult to make any further payments. He wanted the trial court to disregard the future and the probability that his former spouse, with approaching age and diminishing payroll, may be in real need while he, at the same time, with a return to normal conditions may be enjoying a lucrative practice. The affidavits which he filed set out in great detail the conditions upon which he rests his argument and we have no doubt that all the items to which he refers were brought to the attention of the court in oral argument. The trial judge, however, was called upon to consider the facts presented in the wife's affidavit and the possible future hardship which she might suffer by reason of a final termination of the obligation of her former husband to contribute to her support. The appellant contends that the failure of the judge to rule as he desired constituted an abuse of discretion under the existing circumstances, but we find nothing in the record to substantiate that claim.

[5] The last remaining point raised on this appeal is whether, as urged by appellant, the court abused its discretion in allowing additional attorney fees in the sum of $100. In McClure v. McClure, supra, 4 Cal.2d at page 362, 49 P.2d at page 588, 100 A.L.R. 1257, we find the following: "Where the divorced husband has not been released permanently from the obligation to pay alimony, the court may allow the wife costs and attorney's fees to prosecute or defend an appeal from an order of modification * * * on the theory that where the power to modify continues, the action is still pending under section 137, Civil Code, which authorizes the court to require the husband to pay money to enable the wife to prosecute or defend the action." We believe the principle there stated is broad enough to cover the situation presented in the instant case, and in Wilder v. Wilder, 1932, 214 Cal. 783, page 785, 7 P.2d 1032, 1033, where the court refused an allowance, we find the court stating, "* * * the whole matter rested in the sound discretion of the trial court. [Case

cited.] * * * A clear abuse of discretion only will justify its [the reviewing court's] interference with the judgment of the trial court."

The order of March 6, 1944 is affirmed; so, also, is the order of April 6, 1944.

SHINN and PARKER WOOD, JJ., concur.

HEATON v. KERLAND, M. D. et al.

Civ. 14555.

District Court of Appeal, Second District, Division 1, California.

June 20, 1945.

Hearing Granted Aug. 16, 1945.

1. Workmen's compensation 🔑957

The aggravation of an industrial injury or the infliction of a new injury resulting from its treatment or examination which is compensable, is an aggravation or injury as is likely to occur or may possibly occur in such circumstances, even though the generally accepted procedure and technique are diligently followed. St.1937, p. 273, §§ 3852, 3853; Const.art. 20, § 21.

2. Workmen's compensation 🔑6

The Workmen's Compensation Act is not concerned with negligence except as the Act provides. St.1937, p. 273, §§ 3852, 3853; Const. art. 20, § 21.

3. Workmen's compensation 🔑616

The only injury over which the Industrial Accident Commission has any jurisdiction and in connection with which the Legislature can legislate, is an injury incurred or sustained by workmen in the course of their employment. St.1937, p. 273, §§ 3852, 3853; Const. art. 20, § 21.

4. Workmen's compensation 🔑2158

Under provision of the Workmen's Compensation Act that an employee's claim for compensation does not affect his claim against a person other than the employer for damages resulting from "such injury", quoted words refer to the injury incurred in the course of employment. St.1937, p. 273, §§ 3852, 3853.

See Words and Phrases, Permanent Edition, for all other definitions of "Such Injury".

5. Workmen's compensation 🔑1793

Where language of an award of workmen's compensation, although general, did not recite that damages for alleged malpractice were included, that the Industrial Accident Commission exceeded its jurisdiction and included such damages in award would not be assumed. St.1937, p. 273, §§ 3852, 3853.

6. Workmen's compensation 🔑2252

An injury resulting from alleged malpractice of doctors who treated employee's injury occurring in the course of her employment, did not occur in course of employment, and the employer's compensation insurance carrier could not file a lien for any part of the compensation payments paid to the employee, against any judgment that might be recovered by the employee against the doctors. St.1937, p. 273, §§ 3852, 3853; Const. art. 20, § 21.

◆

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Esther Heaton against Milton Kerland, M.D., and others, for alleged malpractice, wherein the Associated Indemnity Corporation, the insurance carrier of plaintiff's employer, filed an application for a lien for workmen's compensation payments against any judgment that might be recovered. From a judgment dismissing the application after the court sustained a demurrer thereto, the insurance carrier appeals.

Judgment affirmed.

Syril S. Tipton, of Los Angeles, for appellant.

F. Murray Keslar, of Los Angeles, for respondent Esther Heaton.

DORAN, Justice.

This is an appeal from the judgment following the order sustaining a demurrer to an application for a lien against any judgment that might be recovered in an action for damages.

Plaintiff had received an injury in the course of employment and pursuant to a hearing before the Industrial Commission, was awarded compensation for said injury. The pertinent language of the findings of fact and the award is as follows, "Findings of Fact

"1. Esther May Heaton, born February 26, 1913, while employed on January 30, 1941, as a masseuse, at Los Angeles, California, by Terry Hunt, doing business as Terry Hunt Health Club, sustained *injury arising out of and occurring in the course of her employment,* resulting in permanent disability as hereinafter described. (Italics added.)

"At said time the employer's compensation insurance carrier covering said injury was Associated Indemnity Corporation, a corporation, and both employer and employee were subject to the provisions of the Workmen's Compensation, Insurance and Safety Laws of the State of California.

"2. Said injury caused permanent disability consisting of loss of head and neck of radius of minor forearm; some instability of humeral-ulnar articulation on pushing motions; pain in elbow on motions against resistence; some atrophy of forearm muscles; aching pain on outer side of elbow and inner side of arm; tenderness over lower end of humerus and felxor-pronator and extensor-supinator muscles."

Following the action of the Industrial Commission, respondent herein who was the beneficiary of the award, filed an action for damages against the doctors who had treated the injury, alleging malpractice. Before the trial thereof, appellant filed an application for a lien in said action, against any judgment that might be recovered, on the theory that part of the money paid to plaintiff by said lien claimant as insurance carrier, should be charged to the malpractice alleged in plaintiff's action. The court sustained a demurrer to said application without leave to amend and from the judgment of dismissal thereof that followed, petitioner appeals.

It is appellant's contention that, "the points involved in this appeal are as follows:

"1. Does the award for permanent disability as fixed by the Industrial Accident Commission include within it the factors of disability caused by the original injury and also the factors caused by the malpractice.

"2. Having paid to the plaintiff the amount set by the Industrial Accident Commission schedule for all disability suffered by the plaintiff, including that disability caused by the malpractice of the defendant, can the employer's insurance carrier assert a lien against the judgment in favor of plaintiff and against the doctor guilty of the malpractice for that portion of the dissability caused or resulting from the malpractice, or is plaintiff going to be allowed to recover twice for this same disability; once from her employer's compensation insurance carrier and once from the doctor."

And in connection with the foregoing, it is argued that, "a compensation insurance carrier having paid for disability caused by the malpractice of the physician is entitled to recover from the offending physician for such loss." It is also argued that, "the factors of permanent disability included in the industrial accident award are specifically set out in the award and include the disability alleged and proven by respondent, including pain". The language of the award referred to is hereinbefore quoted.

It is respondent's contention, on the other hand that, plaintiff's cause of action for malpractice was separate and distinct from, "her claim before the Industrial Commission", and, that said alleged malpractice did not arise out of the course of employment hence, no lien attaches.

Appellant relies on Fitzpatrick v. Fidelity & Casualty Co., 7 Cal.2d 230, 60 P.2d 276, 277. There the court declares "As we shall hereinafter more fully point out, the aggravation of an industrial injury or the infliction of a new injury resulting from its treatment or examination is compensable under the provisions of the Workmen's Compensation Act and, therefore, within the exclusive cognizance of the Industrial Accident Commission. * * * In other words, where the recovery for an injury sustained by or the death of an employee comes within the provisions of the Workmen's Compensation Act, the Industrial Accident Commission has exclusive jurisdiction, and the superior court may not entertain an action for damages against the employer or his insurance carrier; the latter being subrogated to all the rights and duties of the employer." The foregoing has reference to actions against the employer or insurance carrier but, in the same opinion although dictum, the court declares that, "it is well settled, of course, that a doctor is liable for his own acts and an award to an employee or his dependents against the employer or his insurance carrier does not raise a bar to an action against the doctor for negligence or malpractice."

[1] The Fitzpatrick case was not an action against a third party based on malpractice but, was an action against the insurance carrier based on the alleged negligence of its servants and employees. Whether such servants were physicians or, at all qualified to examine the injury, as a result of which examination the patient died, does not appear. The language of the opinion quoted above that "the aggravation of an industrial injury or the infliction of a new injury resulting from its treatment or examination", must be held to mean such an aggravation or injury as is likely to occur or, may possibly occur in such circumstances, even though the generally accepted procedure and technique are diligently followed. And it must be assumed, if the reasoning of the opinion is to be upheld, that the injury complained of was in such category.

Appellant also relies on Nelson v. Associated Indemnity Co., 19 Cal. App.2d 564, 66 P.2d 184. The Nelson case, which was an action against the insurance carrier, relied in part on the Fitzpatrick case, supra. In the Nelson case the plaintiff alleged malpractice on the part of the insurance carrier's physicians. Quoting from the opinion defendant (insurance carrier) "made the compensation payments to plaintiff for a period of approximately fourteen months, then discontinued them. Defendant stated that it would commence making the payments again if plaintiff would submit to an operation for the purpose of improving his condition. Plaintiff agreed to submit to the operation, which was performed by defendant's physicians. The operation was unsuccessful and, as a result of the unskillful and negligent manner in which the operation was performed, plaintiff's elbow was rendered worse, his disability was aggravated, and his disability is now permanent. Thereupon, plaintiff commenced this action for the purpose of recovering damages from the insurance carrier for the negligence of the physicians, alleged to be its agents, in performing the operation. The insurance carrier is the only defendant." It does not appear that the injury for which plaintiff sought damages occurred in the course of employment, nevertheless, the court held that "It is clear, therefore, that the new or aggravated disability caused by the negligent performance of the operation, alleged in the amended complaint, is a part of the disability for which the plaintiff is entitled to indemnity under an award from the Industrial Accident Commission and that the commission has exclusive jurisdiction over such claim against the employer and his insurance carrier." From the last-quoted language it would seem that the opinion in which it appears is in conflict with the constitution, the Workmen's Compensation Act, St.1937, p. 265, and with the decision of the Supreme Court in Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 153 P. 24. See also Smith v. Golden State Hospital, 111 Cal.App. 667, 296 P. 127.

[2] It should be emphasized that the action here considered is not one against either the employer or the insurance carrier. It is not an action seeking damages for the original injury. It is an action based on negligence, a subject with which the Workmen's Compensation Act is not concerned except as said act provides.

[3, 4] Sections 3852 and 3853 of the Workmen's Compensation Act St.1937, p. 273, refer to injuries sustained in the course of employment. Indeed the only injury over which the Industrial Accident Commission has any jurisdiction and the only injury in connection with which the legislature has any power to legislate by virtue of the provisions of Section 21 of Article XX of the Constitution, is an injury "incurred or sustained by the said workmen in the course of their employment." Pacific Coast Casualty Co. v. Pillsbury, supra. The first sentence of Section 3852 is as follows, "The claim of an employee for compensation does not affect his claim or right of action for all damages proximately resulting from *such injury* or death against any person other than the employer." (Italics added.) And the words "such injury" manifestly refer to the injury incurred in the course of employment. It is in connection with these claims and rights of action for damages *proximately* resulting from "such injury" that a lien is allowed as provided by the succeeding sections of the Act.

Plaintiff's cause of action was based on the negligence of defendants and, as heretofore noted, not on the original injury that had occurred in the course of employment. Although it was necessarily related thereto, the damage for which plaintiff sought recovery did not proximately result from the original injury but from the negligent acts of defendants. The defendants in the within action, in the circumstances, could not escape responsibility by attempting to shift the proximate cause back to the original injury if the evidence supports a finding to the contrary and attributes the injury and resulting damages to said defendants' negligent conduct. Nor could appellants, by the same process, successfully assert the lien contended for.

[5] Appellant's contention that the award in question included "the factors of disability alleged to be caused by the malpractice", is not without merit as a partisan argument but, in the circumstances, it cannot be assumed that the Industrial Accident Commission exceeded its jurisdiction. The language of the award, although general, does not recite that damages for malpractice are included.

[6] The injury for which plaintiff sought damages did not occur in the course of employment and the damages did not proximately result from such an injury, hence, the right to file the lien was not available to petitioner.

For the foregoing reasons the judgment appealed from is affirmed.

YORK, P. J., and WHITE, J., concur.

PEOPLE v. KOENIG et al.*

Cr. 3870.

District Court of Appeal, Second District, Division 3, California.

June 29, 1945.

Rehearing Granted July 13, 1945.

1. Robbery ⇨23(3)

That defendant had money in his possession was a material circumstance to be considered in determining whether three defendants had divided among themselves the money obtained in a robbery, in view of evidence as to giving one defendant who owned revolver money and evidence as to each defendant having approximately the same amount of money at time of arrest.

2. Robbery ⇨24(1)

Evidence sustained conviction of robbery while armed with a revolver.

3. Criminal law ⇨698(1)

Where defendant had moved to strike out a conversation had between officer and a codefendant, failure to object to written statement signed by codefendant could not be considered a waiver of objection in view of court's prior ruling that conversation between officer and codefendant would be limited to such codefendant.

4. Criminal law ⇨1168(2)

When written statement of codefendant was received in evidence, trial judge should have told the jury at the time that the statement was received only against such codefendant; but, where court in charging jury directed that any statement found to have been made by any defendant after the commission of the crime might be considered only against the defendant making such statement, there was no prejudicial error.

5. Criminal law ⇨784(4)

In prosecution for robbery where the evidence was not wholly circumstantial, an instruction that, if the evidence as to any particular count was susceptible of two constructions each of which appeared to be reasonable and one of which pointed to the guilt of defendant and the other to his innocence, it was jury's duty to adopt the latter, was sufficient.

SHINN, J., dissenting.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Donald Edgar Koenig and William Richter were convicted of robbery while armed with a revolver, and William Richter appeals.

Affirmed.

Leola Buck Kellogg, and Montgomery G. Rice, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

It was charged in an information that appellant Richter, Donald Koenig and Ralph Hagenios committed robbery, a felony, in two counts, and that they were armed with a revolver at the time of the commission thereof. It was also charged that Koenig had been convicted of two felonies previously. Hagenios pleaded guilty. Appellant and Koenig pleaded not guilty. Koenig admitted the charge of previous convictions. Trial was by jury, and they were found guilty as charged. They have appealed from the judgment of conviction and the order denying their motions for a new trial. Koenig failed to perfect his appeal, and the same was dismissed.

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* Subsequent opinion 164 P.2d 923.

Appellant Richter contends that the evidence was insufficient to support the judgment of conviction; that the "use of Koenig's statement against Richter was error"; that it was error to admit evidence relative to funds in appellant's possession at the time of his arrest in the absence of evidence that he was impecunious prior to the crime; and that the jury was not properly instructed.

Appellant had been employed by the Veterans Administration, apparently as a cook, for a period of more than 8 years, and at the time he left such employment at Sawtelle, on May 4, 1944, he was chief cook. Hagenios also had been employed by the Veterans Administration at Sawtelle prior to the robbery, and had worked there under appellant's supervision. Hagenios introduced appellant to Koenig. Koenig had stolen a .38 caliber revolver from a company where he had been employed, and he had left the gun in the possession of Hagenios. Appellant was married and his wife was away on a vacation at the time of the commission of the offenses herein. About May 5, 1944, appellant and Hagenios went to San Francisco together and remained there about 2 weeks, returning to Los Angeles on May 19th or 20th. Upon their return they rented a room in a hotel at Ocean Park, and one of them registered for both, using fictitious names. About 12:07 a. m., Sunday, May 21, 1944, Hagenios entered a cafe which was on the north side of Pico Boulevard, near Santa Monica, and was known as "Hamburger Frank's." He asked the cashier to cash a check, and the cashier directed him to an office in the rear of the cafe where the owner kept money to cash checks. Hagenios, armed with said stolen revolver, went to the rear office, where the owner was then cashing a check for a defense worker. After the owner had placed $64.13, the amount of the check, on the counter in front of the defense worker, Hagenios, with the gun in his hand, said, "I will take the rest of it." The owner handed his money to Hagenios, and Hagenios also took the $64.13 which had been placed on the counter for the defense worker. Hagenios then started toward the front of the cafe, and the owner shouted, "Grab that man, it is a hold-up," whereupon Hagenios turned and fired a shot which went over the owner's head and lodged in the rear wall of the cafe. Hagenios then ran out of the cafe and entered an automobile, which was standing at the north curb of Pico Boulevard about 25 feet from the cafe, and which immediately moved away. In the afternoon of that day (Sunday) Koenig went to the hotel room which had been rented by appellant and Hagenios, and when he left there on that same day took with him the gun which Hagenios had used in the robbery. About 10 o'clock that night Koenig was arrested by police officers while he was attempting to hide the gun in a box in an alley at Santa Monica. The gun had been listed with the police department as stolen and was unloaded at the time of Koenig's arrest. About 9 a. m., the next day, five police officers went to the hotel in Ocean Park, and found appellant and Hagenios in the room which they had rented, and also found there forty-nine .38 caliber cartridges and a cartridge box which originally held fifty such cartridges. At that time Hagenios had $233, consisting of currency in one, five and ten-dollar denominations, and appellant had $276. Appellant had sold his automobile on May 2, 1944, to a dealer for $235, and had borrowed $100 from a finance company on May 3, 1944. The owner of the cafe had been cashing checks for 10 years, and appellant had lived next door to him for 6 months about 2 years prior to the robbery.

The cashier, who was in the front part of the cafe, testified that after the robbery she saw Hagenios get into the automobile "from the sidewalk [right-hand] side"; that he was on the right-hand side when it went away; that she did not see anyone else in the automobile, but Hagenios "didn't hardly have time to get his feet in before it started"; that Hagenios opened the door to the automobile "and put one foot into the car and the car drove off"; that "it was dark," but it "was quite light around the restaurant"; that "they have several lights on" and "the whole front of the cafe is windows"; that there were no street lights immediately in front of the place where the automobile was parked; that she did not go outside; and that she got the license number of the automobile.

The owner of the cafe testified that Hagenios took $1915, which amount included the $64.13 he had placed on the counter for the defense worker; that $1500 of said amount consisted of ten-dollar bills, and the balance consisted of one and five-dollar bills; that he was acquainted with appellant only well enough to say "hello"; that he had not seen him during the 2 years preceding the date of the offense herein; that he thought he had been him in his cafe "about a year ago"; and that he had not seen him in his cafe during the past year.

Police officer Subers testified that he was one of the arresting officers; that when they found the cartridges in the room Hagenios told them they were his; that appellant denied any knowledge of the crime; that the money which they took from appellant also consisted of one, five, and ten-dollar bills; that appellant told him that the money was his—that he had sold his automobile for $235, borrowed $100, and won $90 "on the horses" while he was in San Francisco; that Koenig told him he had known appellant about 2 months; that appellant told him he had known Koenig "a short while, probably a month or two"; that on the evening of May 23rd, appellant and Hagenios were taken to a police "show up," after which they were returned to the West Los Angeles jail where he (the witness) had a conversation with Hagenios and appellant; that police officer Ward was present during part of the conversation, and police officer King was present during part of the conversation including all the last part; that he (the witness) told Hagenios and appellant he had a good case against them and asked them if they wanted to plead guilty; that he told them he expected them "to cooperate" with him, and "get back the rest of the money" that was missing, and that they "both spoke up" and said, "that was all the money they got with the exception of a few dollars they might have spent"; that Hagenios denied getting "any more money from there, and the defendant Richter stated that was all they had gotten"; that the amount they named was $750 to $780; that appellant said it was "$780 to be exact"; that appellant said he had given "Koenig $120 as his share of the Hamburger Frank's job," and Hagenios said he had given Koenig $100 as "his share"; that appellant said "they [he and Hagenios] picked" the automobile up on the night of the robbery "at a drive-in place at Wilshire and Santa Monica Boulevard"; that appellant said he drove the automobile and abandoned it, after the robbery, one block east of the St. John's Hospital in Santa Monica; that the witness asked appellant if the automobile was a LaSalle coupe and appellant stated he did not know what kind of automobile it was; and that they (the officers) did not ask appellant to make a written statement. He testified further that Hagenios and appellant had occupied separate cells prior to May 23rd, but on the night of May 23rd they were placed in a cell together, and then he (the witness) and officer King brought Koenig from his cell to the cell occupied by appellant and Hagenios where a further conversation was had; that appellant, Hagenios, Koenig, King and the witness were present during said conversation; that the witness said, "Koenig, are you sure you got $220, you said it was just a loan," and that appellant "spoke up and said, 'I gave you [referring to Koenig] $120.00 and it wasn't a loan'"; that Hagenios said, "'and I gave you [referring to Koenig] $100, and don't try to lie out of it'"; and that Koenig then said he had furnished the gun and received $220 as his share.

Police officer King testified that he participated in the conversation on May 23rd, at which time appellant, Hagenios and Koenig were present; that the witness did not make notes, but officer Subers did make notes; that he (King) left before the "conference was over," but he was there most of the time—5 or 10 minutes; that he did not remember that officer Ward was present; that he and Subers took Koenig from his cell to the one occupied by appellant and Hagenios; that they took Koenig inside the cell, and told the three defendants they "wanted to find out more of the details"; that he questioned Richter, and Subers asked Koenig a few questions; that the witness did not remember anything in particular that Koenig said; that he (the witness) asked Koenig to tell about the robbery, and Hagenios "spoke up" and said appellant drove the car, and all three of them were involved; that appellant denied knowing anything about the robbery; that Hagenios called appellant a "fink" and said, "'You are into this as well as we are, and we are not going to take the rap for this alone,'" and that appellant said he drove the car; that appellant then told him "they" stole the automobile at a drive-in stand on Santa Monica Boulevard in Santa Monica; that he said it was a green convertible coupe, and that it was abondoned in Santa Monica about a block east of St. John's Hospital; that appellant said he knew when he drove the automobile it was "for the purpose of robbery, that the three of them had planned it, that he knew that the money which he had received was the proceeds from the robbery"; that he did not recall any conversation about appellant having given Koenig money; that he and Subers were the only ones who asked any questions; that he did not question Hagenios "particularly," and he did not recall that Subers questioned him; that during this conversation the door to the cell was left open, the three defendants were standing, and the witness stepped into the cell; that before Koenig was taken away the witness left to telephone the Santa Monica police and "have them go over and find the car."

Police officer Barham testified that on May 23rd, he received instructions to look for an automobile one block east of St. John's Hospital; that he and his partner went there and found a 1937 LaSalle green convertible coupe which was on their list of stolen cars.

Another witness, called by the People, testified that she had been employed by the Veterans Administration; that she had known appellant for a period of 4 or 5 months when she worked there as a waitress; that she "just knew him as a co-worker," and the "only time" she ever saw him "was at the Home"; that she had known Hagenios almost 4 years, and had lived with him prior to his trip to San Francisco, but left him and "went home" the "first part of May"; that she met Koenig in March, 1944, and after that saw him on numerous occasions, and she saw him and Hagenios together "many times"; that Koenig brought a revolver to the place where she and Hagenios were living and "wanted to leave it"; that it appeared to be the same gun which was exhibited to her at the trial; that she asked him not to leave it because it might involve Hagenios "if anything happened," and he did not leave it; that subsequently Koenig brought the gun to the room several times; and that the last time she saw it was the day before she left Hagenios, and at that time it was on the table.

Koenig testified that he had stolen the gun; that "around the first of April" he went with Hagenios to the latter's room and left the gun there; that he had known Hagenios about 9 years; that on May 21st he went to the hotel room occupied by appellant and Hagenios; that after he "had been there five or ten minutes" appellant went out of the room, and then Hagenios told Koenig about the robbery; that he (Koenig) took the gun because he was afraid it "would be traced" to him "since it had some connection with the robbery," and he did not want to be involved; that Hagenios paid him $200 which he had owed to him about two months; that he paid it to him before he told him of the robbery, and he (Koenig) did not know the money he received was stolen money; that appellant did not give him any money and he did not tell the police that appellant had given him money; that on the night of May 23rd, officer King did not come to his cell, but Subers came and took him from his cell to the one occupied by appellant and Hagenios; that he (Koenig) did not enter the cell; that he was certain King was not present at the meeting before the cell; that during the conversation before the cell appellant did not say he gave Koenig $120; that he did not remember much of what was said, but "the officer was claiming" that he (Koenig) had received money from the robbery; that he did not remember anything that appellant or Hagenios said and he did not know that they said anything in his presence; that he "would not say" he was fully awake at the time; that he had known appellant about a month before the robbery; that he had seen appellant one time prior to the robbery which was when he met him about the first of May; that the written statement, signed by him, and received in evidence, was not a correct statement of the questions asked him and the answers given by him at the time the statement was made; that he signed the statement, but he did not read it; that the portions of it implicating appellant in the robbery were not answered by him that way; and that the questions may have been asked, but he did not think he gave answers like that because they would implicate appellant.

The proprietor of the hotel where appellant and Hagenios rented the room testified that she was not sure which one of them registered for the room, but she thought it was Hagenios; and that she did not think appellant put the two names on the register.

Appellant testified that he left the Veterans Administration on May 4, 1944, but he was on the pay-roll until May 15th; that he had known Hagenios about 4 months before they went to San Francisco together; that he (appellant) had approximately $500, consisting of the $235 received from the sale of his automobile, the $100 loan, a pay check for $89.54, $75 savings, and the amount he received when he cashed a $50 bond; that he did not register at the hotel; that he did not see Hagenios register; that he first met Koenig the day before he went to San Francisco, and the next time he saw him was when Koenig came to the hotel room on Sunday, May 21st; that on Saturday night (May 20th) appellant left the hotel room about 8:30 p. m. to look for an apartment in Santa Monica; that he asked Hagenios if he wanted to go with him and Hagenios said, "No," and that he was going to see his girl friend; that he (appellant) returned to the room "a little after 12:00" and Hagenios was there; that when Koenig came to the room on Sunday, he (appellant) said, "Hello, Don," and then said he was "going out to dinner" and asked if Koenig and Hagenios wanted "to go along," but they said, "No," and then appellant left alone; that he was in the room about 5 minutes after Koenig came; that he did not see Hagenios give Koenig any money; that he (appellant) did not give Koenig any money; that he saw the cartridges in the room after the officers found them; that the first he knew of the robbery was after he had been arrested and was at the police station; that the police took about $275 from him, consisting "mostly" of ten-dollar bills; that he told the officers he "made a couple of bets on the horses" in San Francisco and won approximately $70; that he was never in Hamburger Frank's, and had no knowledge of the owner cashing checks; that when he and Hagenios were returned from the police "show up," he was taken in the booking office where Subers told him if he did not want to plead guilty, he (Subers) would convict him "on some one else's testimony"; that when they brought Koenig to the cell occupied by appellant and Hagenios, Koenig stood "right outside of the cell," with the officers; that Subers was the only officer present when Koenig was brought to the cell; that the first time he saw King was when King testified; that he thought the name of one of the arresting officers was "King," but he was not the same man who testified at the trial; that he (appellant) was lying on the top bunk reading a magazine, and all the conversation he heard was something Subers said to Hagenios "in regard to a gun"; that he did not say at any time that he had had any part in the robbery; that he did not say that he drove or abandoned the automobile; and that Subers asked him if he drove the LaSalle, and he said "No."

The commissary officer of the Veterans Administration testified that he had known appellant approximately 10 years, and that his reputation for truth and honesty was good.

A steward for the Veterans Administration testified that appellant's reputation for truth and honesty was good.

The automobile dealer who purchased appellant's automobile testified that he had known appellant about 15 months, and that he had investigated appellant's reputation (the record does not show in what respect) and found it to be good.

[1, 2] Under appellant's contention that the evidence was insufficient to support the judgment, he argues that the evidence as to him was circumstantial, that no one testified he saw appellant at or near the scene of the crime, that his acquaintance with Hagenios and Koenig was not sufficient to raise an inference of guilt, and that evidence of possession of funds was no evidence of guilt. The evidence herein shows more than mere acquaintance with Hagenios and more than mere possession of funds. Appellant had lived next door to the owner of the cafe, a victim of the robbery. Hagenios actually committed the robbery by displaying and firing a revolver. Appellant and Hagenios had spent 2 weeks together in San Francisco just prior to the commission of the robbery and were rooming together, under fictitious names, at the time the robbery was committed. When the officers entered their room appellant was there with the actual robber, Hagenios. When Hagenios left the cafe, after committing the robbery, and entered the waiting automobile, it was driven away immediately. According to the police officers' testimony, appellant said that he and Hagenios had stolen the automobile that was used, that appellant had driven it from the cafe at the time of the robbery, that after the robbery he had abandoned it at a certain place, and that he had given Koenig $120 as his share of the money from the robbery. Koenig had stolen the gun that was used in the robbery, and had been in the room of appellant and

Hagenios with them just prior to the time Koenig was arrested while trying to hide the gun in an alley. The automobile was found by the police officers in the place where appellant said he had abandoned it. The total amount of money taken by the officers from appellant, Hagenios and Koenig was $729—being $276 from appellant, $233 from Hagenios, and $220 from Koenig ($200 of the Koenig money had been left by him with a bartender just before he tried to hide the gun). When an officer told Hagenios that he expected him to cooperate in recovering the balance of $1915 which had been stolen, appellant said, according to the testimony of the police officer, the amount the officers had was all that "they had gotten," and that it was "$780 to be exact." It appears that each of the defendants had approximately the same amount of money, and that the amount each one had was approximately one-third of $729. The mere fact that appellant had money in his possession would not be a significant circumstance, but when the possession of money is considered in connection with the other evidence as to giving Koenig money and as to each defendant having approximately the same amount of money, it is a material circumstance to be considered in determining whether the three defendants divided among themselves the money obtained in the robbery. It was the theory of the prosecution that the robbery was the result of a conspiracy. The jury was instructed on the law of conspiracy. In People v. Ross, 46 Cal.App.2d 385, at page 396, 116 P.2d 81, at page 87, the court said: "[A]cts performed subsequent to a theft, which is the object of a conspiracy, in compliance with a promise to pay an accessory a specified sum for his participation in the crime, are also competent as tending to prove the conspiracy." It was not error, under the circumstances here, to receive the evidence as to the possession of funds by the appellant. Appellant asserts that the testimony of officer Subers was highly improbable and concocted, and that the testimony of the officers was conflicting. In the argument in support of such assertion appellant refers to several parts of the testimony which relate to such matters as which officers were present at certain conversations, and where the officers and defendants stood at certain times. In People v. Headlee, 18 Cal.2d 266, at page 267, 115 P.2d 427, the court said: "To be improbable on its face the evidence must assert that something has occurred that it does not seem possible could have occurred under the circumstances disclosed. The improbability must be apparent; evidence which is unusual or inconsistent is not necessarily improbable." The evidence was sufficient legally to support the judgment of conviction.

[3, 4] Koenig, as above indicated, had signed a written statement which implicated appellant. Appellant contends that Koenig's written statement was received in evidence without limiting its consideration to Koenig, and that the failure to so limit the use of the statement was error. Before reference was made to the written statement, and when officer Subers was about to relate a conversation he had had with Koenig, the court upon the suggestion of counsel for appellant, instructed the jury that it could consider the conversation as affecting the defendant Koenig only and not as affecting appellant. When that officer was asked if Koenig had signed a certain written statement and the officer had replied that he had signed it, the document was marked "People's Exhibit No. 4" for identification. Then the written document was offered in evidence, and counsel for Koenig objected to the offer upon the ground that it was not shown that the purported confession was voluntary. After further testimony by the officer concerning the circumstances under which the document was signed, the court overruled the objection but did not state expressly that the document would be received in evidence. The document was then read to the jury. At the time the statement was read, counsel for appellant did not request that the jury be instructed that the statement should be considered as applying to Koenig only; however, said counsel's failure to request such an instruction at that time should not be considered as a waiver by her of an objection to the document insofar as appellant was concerned, for the reason she had previously moved to strike out a conversation had between the officer and Koenig, and the trial judge had said: "The court has limited this conversation as to the other defendant [referring to appellant], and you are protected fully, Mrs. Kellogg." At the close of the People's case, the written statement of Koenig was offered in evidence as People's Exhibit No. 4 as against Koenig only, and it was received. When the court gave its instructions to the jury it included the following:

"Any statement you may find to have been made by any defendant after the commission of a crime, if you find a crime to have been committed, may be considered by you as evidence affecting, if it does affect, only the defendant who may have made such statement and not as affecting any other defendant." In order to have more clearly advised the jury that the written statement of Koenig would not apply to appellant, the trial judge should have told the jury at the time the written statement of Koenig was read to the jury that it should be considered as applying to Koenig only; however, his failure to so advise the jury at that time was not prejudicial error under the circumstances hereinabove referred to.

[5] Appellant asserts further that the court did not properly instruct the jury as to the nature and evidentiary effect of circumstantial evidence. The court instructed the jury that: "If the evidence in this case, as to any particular count, is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of a defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of such defendant's innocence, and reject that which points to his guilt." Appellant argues that under the authority of People v. Rayol, 65 Cal.App.2d 462, 150 P.2d 812, the giving of said instruction was insufficient. In that case the evidence was wholly circumstantial. In the present case the evidence was not wholly circumstantial. As above stated, there was evidence of admissions by appellant that he drove the automobile in taking Hagenios away from the scene of the robbery, that he had abandoned the automobile which had been so used, and that he had given Koenig part of the money obtained in the robbery. The instructions as to circumstantial evidence were sufficient.

By reason of the above conclusions it is not necessary to discuss appellant's other contentions relative to instructions.

The judgment and order denying the motion for a new trial are affirmed.

DESMOND, P. J., concurs.

SHINN, Justice (dissenting).

I dissent. The evidence against the appellant consisted of (1) his association with his codefendants; (2) testimony as to alleged admissions made by him to police officers, and (3) his possession of $276 in currency at the time of his arrest.

The jury, in my opinion, was not adequately instructed. The court refused a requested instruction to the effect that a conviction could not be had upon circumstantial evidence unless it was of such a nature as to be inconsistent with any reasonable theory of innocence. No instruction was given which stated this principle of law. The ones that were given were the same as those considered in People v. Hatchett, 1944, 63 Cal.App.2d 144, 146 P.2d 469, and People v. Rayol, 1945, 65 Cal.App.2d 462, 150 P.2d 812, and which were held insufficient as a statement of the rule of circumstantial evidence. The holding of the main opinion is to the effect that it is not necessary to instruct on circumstantial evidence if in addition to such evidence there is also evidence of admissions by the defendant tending to connect him with the commission of the crime. With this I do not agree. The evidence in the Hatchett and Rayol cases was direct as well as circumstantial. In the Hatchett case a witness, Essie Dempsey, had testified that she held a telephone conversation with the defendant, in which the defendant threatened the killing, that she heard the shooting and immediately thereafter heard the victim groan. In the Rayol case there was direct evidence of police officers who witnessed the act charged, but the evidence as to whether the defendant was sufficiently sober to have knowingly participated therein was circumstantial. In both cases we held that it was prejudicial error to refuse to state the rule of circumstantial evidence which the appellant here sought to have given. It is true that the jury could have believed the testimony of the police officers and could have rested the verdict upon appellant's admissions as well as upon the circumstantial evidence. But the jury might well have disbelieved the testimony of the officers as to appellant's oral admissions. Nothing would then have remained except appellant's suspicious association with his codefendants and his possession of money. His account as to how he happened to have the money was wholly reasonable and well corroborated. His association with his codefendants, so far as disclosed by the evidence, and standing alone, was no more indicative of guilt than it was of innocence. The circumstantial evidence in his favor was that he was a man who had led an upright life and bore a good reputation, and it was not shown that he was in need of money. The appellant had the right to have the jury instructed in the law of circumstantial evidence, on the theory that the testimony as to his oral admissions might be disbelieved, leaving the case entirely one of circumstantial evidence. We stated in the Hatchett case, 63 Cal.App.2d at page 153, 146 P.2d at page 473: "The point to which our discussion of this proposed instruction will be directed is that the defendant had a right to an instruction on circumstantial evidence based upon her own theory of the case, which would include the hypothesis that the jury would disbelieve the testimony of Essie Dempsey, leaving the People's case purely one of circumstantial evidence." The testimony of the officers as to appellant's admissions was contradictory in many particulars. The jury should not have been instructed solely upon the theory that that testimony would be believed, for it might well have been disbelieved. The trial court could not know to what extent guilt, if adjudged, would be rested upon the circumstantial evidence. We, of course, do not know whether the testimony of the officers was believed, but if it was not believed there was nothing in the circumstantial evidence which approached convincing evidence of guilt.

The instruction on circumstantial evidence which is in question here need not be given in every case where the evidence of guilt is partly circumstantial. The direct evidence may be so strong as to render the circumstantial evidence a negligible factor. But the refusal to give the instruction cannot be justified upon the sole ground that there is some direct evidence of guilt. Whether the failure to give it deprives the defendant of a fair trial depends upon the evidence in the particular case. There can be no more definite rule on the subject than this: in fairness to the defendant should the instruction be given? Certainly it should have been given in appellant's case, and it should be given in every case where, in addition to inconclusive circumstantial evidence of guilt, there is nothing but testimony of police officers, denied by the defendant, as to oral admissions of the defendant alleged to have been made to the officers while the defendant was under arrest and in jail.

I notice that no instruction was given that the oral admissions of the defendant should be viewed with caution, as required by section 2061 of the Code of Civil Procedure, subdivision 4. The code declares that such an instruction should be given on all proper occasions. The legislature has, in effect, declared that there are proper occasions and, in my opinion, it is perfectly clear that this is one of them. The earlier decisions holding subdivision 4 of section 2061 to be unconstitutional were overruled in People v. Dail, 1943, 22 Cal.2d 642, 140 P.2d 828. Some of the earlier cases held that it was not prejudicial error to instruct or to refuse to instruct in the language of subdivision 4 because the principles therein stated are commonplaces known to all jurors. The legislature did not think they were known to all jurors and the legislators have a better right than judges have to speak in such matters. In the course of a somewhat extended experience with court proceedings I have encountered no overwhelming evidence that all judges and jurors view with caution the testimony of police officers with respect to the admissions of persons accused of crime. Whether the weight of the evidence may be to the contrary is beside the point. But I am satisfied that the courts should not set themselves above the legislature with respect to the giving of instructions as to the oral admissions of a party.

The principles of law most vital to appellant's case were those pertaining to the weighing of the circumstantial evidence and the testimony as to his alleged oral admissions. The jury was not adequately instructed as to the first, and was not instructed at all as to the second. The case of the People was not so strong as to render it improbable that appellant would not have been convicted if the jury had been properly instructed upon the legal principles which were most vital to the defense.

The judgment and order denying motion for new trial should be reversed.

On Petition for Rehearing.

PER CURIAM.

The petition of appellant, William Richter, for rehearing is hereby granted.

DESMOND, P. J., and SHINN, J., concur.

PARKER WOOD, Justice (dissenting). I dissent from the order granting defendant's petition for a rehearing. The petition for a rehearing should not be granted upon the ground, asserted in effect in the petition for a rehearing, that an admission of guilt by defendant of actually participating in robbery with firearms is circumstantial evidence. Counsel for defendant has cited 8 California cases in support of her said assertion. Five of those cases involve charges of perjury, and are not in point—in 4 of those cases the matter of admissions was not mentioned—and in one of them the court said, "as to whether or not a confession of the defendant would be sufficient evidence to stand in lieu of the testimony of the one witness, we are not called upon to decide." One of those cases was an action to recover on a fire insurance policy, the question being as to what was the cause of the fire—that case is of no value here. One of those cases was an action to recover damages for the loss of a hand while working with oil well tools—that case is of no value here. One of those cases, decided in 1882, involved a charge of larceny, and the trial court gave an instruction defining the kinds of evidence, and stated that circumstantial evidence "may consist of admissions by defendant," and the instruction was held to be correct—no admission was involved in the case, and of course the instruction did not indicate whether such evidence which "may consist of admissions," as referred to therein, was an admission of a collateral or incidental fact or was an admission of the actual commission of a crime, as is the case here.

In 22 Corpus Juris Secundum, Criminal Law, pages 1243, 1245, § 730, it is said that statements by the accused from which an inference of guilt may be drawn "are original or direct evidence." In 20 American Jurisprudence, page 460, section 544, it is said that the admissions of a party "are received as original evidence."

In Mitchell v. People, 1924, 76 Colo. 346, 232 P. 685, 687, 40 A.L.R. 566, defendant was convicted of first degree murder, and the question on appeal was whether a confession was circumstantial evidence within the provisions of a statute forbidding the infliction of the death penalty on circumstantial evidence. The court therein said, "confessions, oral as well as written, are direct evidence."

In Ossendorf v. United States, 7 Cir., 1921, 272 F. 257, it was held that damaging admissions by the accused did away with the necessity of giving instructions on circumstantial evidence, for the reason that the government's case did not then rest wholly on circumstantial evidence.

In an annotation in 40 A.L.R. at page 571, it is said: "The question whether a confession is circumstantial evidence appears to have arisen mainly in cases dealing with the necessity of instructing the jury as to circumstantial evidence. It is held that, for the purpose of an instruction on circumstantial evidence, testimony of a confession is direct evidence and not circumstantial, and that it is, therefore, not error to refuse to charge the jury on circumstantial evidence in such a case." That statement is supported by numerous decisions of numerous jurisdictions, including Alabama, Georgia, Illinois, Kansas, Missouri, Oklahoma, Tennessee, and Texas. Some other jurisdictions which follow that rule are Pennsylvania and Indiana. In the annotation, above referred to, it is said that in a few cases a distinction is made between confessions and incriminating admissions, and it cites Hart v. State, 1914, 14 Ga.App. 714, 82 S.E. 164, 165, wherein the court said: "Confessions may be direct or circumstantial evidence. If they be of facts directly admitting the commission of the crime, they are direct evidence; but if the fact or facts confessed be only matter from which inference of participation arises, they are circumstantial evidence."

In Evans v. State, 1927, 199 Ind. 55, 155 N.E. 203, at page 206, it is said, "The confession of appellant was direct evidence." It was also said in that case on the same page that: "In Underhill, Criminal Evidence (3d Ed.) § 4, it is said: 'Direct evidence of the crime is the evidence of an eye-witness that it was committed. This includes in criminal law the confession and admissions of the accused.'"

In Long v. State, Okl.Cr.App.1943, 140 P.2d 600, at pages 604, 605, it is said: "It is equally well settled that where the prosecution do not rely wholly upon circumstantial evidence for a conviction, the accused is not, as a matter of right, entitled to have the jury instructed upon the law of circumstantial evidence. * * * In this case the facts are all circumstantial unless the admissions of the defendant are such as would constitute direct evidence. The testimony of the officers is to the effect that the defendant told them the car belonged to him, that he had been driving it at the time the wreck occurred, that he was going about fifty miles an hour and had fallen asleep. These statements of defendant are direct admissions of guilt."

The reference to "wholly circumstantial evidence" in the opinion on file herein was made for the purpose of distinguishing the case of People v. Rayol, 65 Cal.App.2d 462, 150 P.2d 812, upon which appellant relied, from the present case. The distinction could have been pointed out more simply by stating that there was no admission in the Rayol case and there were admissions herein of actual participation in the robbery. Irrespective of the academic question as to how the evidence of admissions herein should be classified, the distinction between the two cases—that there was no admission in the Rayol case and there were admissions in this case—is sufficient to show that the rule in the Rayol case was not applicable herein. The question herein was whether the jury was adequately instructed as to circumstantial evidence. As stated in the opinion on file herein, the instructions on that subject were sufficient.

The petition for a rehearing should be denied.

69 Cal.App.2d 704

In re BRAST'S ESTATE.

MUNNELLY v. HANLON.

Civ. 12813.

District Court of Appeal, First District, Division 2, California.

June 26, 1945.

Hearing Denied Aug. 20, 1945.

1. Deeds 🔑68(4)

To warrant decree setting aside deed made to sister by grantor, it was sufficient to show that grantor, when executing deed, was in an extreme condition of mental and physical weakness and that there was gross inadequacy of consideration.

2. Deeds 🔑211(1)

In suit to set aside deed made to sister by grantor, after executing will leaving property to niece, evidence supported findings that when deed was executed grantor, aged 72, was extremely weak and infirm and totally incapable because of physical infirmity of executing a valid deed, that there was no consideration except love and affection, that confidential relationship existed, and that deed was produced by activities of grantee.

3. Appeal and error 🔑989

The only function of appellate court is to determine whether record in suit to set aside deed supported finding of elements necessary to justify setting deed aside.

4. Appeal and error 🔑1050(1)

In suit to set aside deed, question to physician as to whether grantor was in condition, when physician observed her, to transact ordinary business, while erroneous as calling for a conclusion, was not prejudicial error where physician did not testify as to grantor's mental condition at time when she made deed.

5. Appeal and error 🔑673(2)

Devisee under previous will could attack deed executed by testatrix to another without showing reciprocal rights of inheritance although will described devisee as residing in Ireland, where record nowhere showed that devisee was an alien. Probate Code, § 259.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

In the matter of the estate of Margaret T. Brast, deceased. Petition by Annie Munnelly against Katherine G. Hanlon, individually, and as administratrix of the estate of Margaret T. Brast, deceased, for the cancellation of a deed. From a decree canceling the deed, defendant appeals.

Affirmed.

Joseph J. McShane and A. E. Levinson, both of San Francisco (Frank J. Fontes, of San Francisco, of counsel), for appellant.

John B. Ehlen, of San Francisco, for respondent.

GOODELL, Justice.

This is an appeal from a decree cancelling a deed of gift made by the decedent to the appellant on December 2, 1941.

Margaret T. Brast, a widow, died on December 19, 1941. On June 9, 1941, she had made a will wherein she named the Bank of America as executor, but the Bank renounced its right to act and the appellant, Katherine G. Hanlon, a sister of the testatrix, was appointed administratrix with the will annexed. The testatrix had owned a piece of real property, improved with flats, on Fell street between Scott and Divisadero streets in San Francisco, and by the will this property was devised to the respondent, Annie Munnelly, a niece of the testatrix, residing in Ireland. The will bequeathed to the respondent the furniture and furnishings in the flat occupied by the testatrix, personal effects and clothing, and named her as the residuary legatee and devisee. Two cash legacies of $300 each, and three of $200 each, were left to friends. To a niece the testatrix left $1. To each of her four sisters, including appellant, the testatrix left $1 with the comment that they were already well provided for.

On December 2, 1941, 17 days before her death, Margaret Brast made a deed of gift to the appellant of the Fell street property which by the will had been devised to the respondent.

Some sixteen months after letters had been issued a petition on respondent's behalf was filed in the probate proceeding alleging that no inventory had been filed; that the deed had been made when Mrs. Brast was extremely weak and infirm, totally incapable, because of her mental and physical weakness and infirmity, of executing a deed or of comprehending its significance and under undue influence, and that the appellant claimed under the deed adversely to the estate. For these reasons it prayed for the suspension or revocation of the appellant's letters and for the appointment of a special administrator to sue on behalf of the estate for a cancellation of the deed. Within a month thereafter an inventory was filed listing as the estate's only assets $1,019.09 in bank and an account in a savings and loan company appraised at $876.76. Thereupon the respondent filed a second petition repeating the allegations respecting the deed and the circumstances under which it was made, showing further that the inventory scheduled only the money and the savings and loan account as assets of the estate, and praying that the administratrix be compelled to disclose all transactions between herself and the decedent and all property obtained by her from the decedent. An answer was filed and a hearing on the issues resulted in the decree cancelling the deed. The appellant was neither suspended nor removed as administratrix.

Margaret Brast's death, at the age of 72 years, was caused by a cerebral hemorrhage suffered several months theretofore, which left her completely paralyzed on her left side. Her attending physician was first consulted by her at his office on August 15, 1941, before which time, he testified, she had suffered a slight stroke according to symptoms she then had, including numbness. Her memory then was poor and she seemed somewhat confused. She had marked arterio-sclerosis and high blood pressure. At that first visit she gave her medical history. After that "she evidently had another stroke" and September 20 the doctor ordered her to the hospital where she remained until October 27 when, on the doctor's recommendation, she was returned to her home, not because of her improvement, but because she was troublesome and there were conflicts between the appellant and the hospital people respecting the patient's care. After her return home and until her death seven weeks later, Mrs. Brast was cared for by a practical nurse who stayed at the home day and night. While she was in the hospital the doctor visited her practically every day and after her return to her flat on Fell street he called on her on October 30, November 6 and 30 and December 7, 13, 17 and 19. The doctor testified that almost every time he saw the patient, whether in the hospital or in her home, she "was very irrational, her mental condition was bad" and that the only time when her mind was fairly clear was the first time he saw her, on August 15, 1941. In the hospital, the doctor said, she was very hard to take care of. "Sometimes I could talk to her and she would answer very well, but her mind was bad." He did not talk any business with her. He was asked, "Q. In your opinion, would she know fully what she was doing in executing a deed of gift to her property?" to which he answered, "I could not answer that. She might have had some lucid intervals during the last part. I didn't see her every day; I saw her November 30th, and I didn't see her again until December 7th." The hospital charts showed that while Mrs. Brast was there she was very irrational and they were unable to get her history from her. The doctor admitted that in the hospital "she may have had some lucid intervals, but not very often." In his opinion "she was not competent to decide matters for herself." On the first visit Mrs. Brast, according to the doctor, told him that her memory was very poor. After that he never tested it "because she wasn't rational enough, and there was no necessity to do that." The doctor testified that he did not remember talking to the decedent about her will or of saying to Mrs. Hanlon or anyone else that Mrs. Brast was mentally capable of making a will. When asked flatly if in his opinion she was so capable he said "she was not."

The doctor was called in rebuttal and was asked by the Judge: "Q. If you were present in court and heard Mr. McShane testify, and also the notary who went there, Mr. Allen, they testified they had conversations with her and that she was perfectly normal, her mind was clear and she indulged in conversation on different topics, and that she knew what she was doing when she signed this deed and requested the notary to appear there, and wanted to give her house to her sister, would your testimony be the same?" To this he answered frankly: "A. No, it would not, but I would take the opinion of all these people that she must have had a clear space during that time. When you attend people who have cerebral hemorrhage their mind is frequently normal. Then there are times when it is perfectly irrational. Q. Can they clear up at times? A. They could clear up at times; you must remember the great French chemist, Louis Pasteur, had a cerebral hemorrhage when he was 47 and for six months could not do anything, yet most of his great work was done after that. A person can be paralyzed on one side and still have his mind clear, paralyzed I mean from a cerebral hemorrhage. But this patient of mine, this lady, when I attended her, she was not clear, she was awful when she was in the hospital, and even at home she tossed and turned, and while she may have answered some questions to me clear enough, as she certainly did when I signed the letter to the bank when I asked her, 'Do you want your sister to open the safe deposit box?' And I remember she said, 'Yes.' Then I said, 'Put your mark here,' and she did so, and I signed it." The foregoing is the only medical testimony in the case.

The evidence on the side of the appellant is substantially as follows: A woman friend who had known the decedent for 44 years came down from Sacramento about once a week while she was in the hospital, and visited her for a half hour or so. She visited her twice at her home, the second time 3 or 4 days before decedent died. She testified that before decedent had been taken sick decedent had told the witness that she had made an awful mistake, and that she should have left everything to Kate, who was good to her, and that she was going to change everything and leave everything to Kate. She repeated this later, including at the visit 3 or 4 days before her death. She testified that Mrs. Brast was very weak, and "spoke very low." When asked whether she had had an opportunity to form an opinion as to decedent's mental condition at the hospital she replied, "It was all right; she recognized me all right, and talked to me all right" and her conversation was rational. On the last visit, the decedent commented on the furs the witness was wearing, and told appellant to show the witness her leg, which was drawn up to her chest. She only talked to her a few minutes, for the nurse told her not to stay too long. She was not there on the day the deed was made.

Another woman friend had known the decedent ever since she (the witness) was 11 or 12 years old. She visited her in the hospital once or twice a week but had no conversation there respecting the property. About a week before her death, however, the decedent told the witness in the presence of the nurse, the appellant and another witness that she wanted Kate to have everything, that Kate had been very good to her. This witness was not questioned as to the decedent's mental condition.

A third woman friend, who had known the decedent for 30 years and had lived in the home with her for about 8 years, had visited her in the hospital every day. On the day when the deed was made, after its execution, she went in to see Mrs. Brast, said "hello," asked her how she felt to which she answered "fine." She was not questioned any further as to the decedent's mental condition *at that time*. Mrs. Brast had told her on several occasions that she was going to see that appellant had the house because she had been so good to her. As to Mrs. Brast's mental capacity she testified, "She was all right as far as I could see," perfectly normal; Mrs. Brast would ask her if everything was O. K. at the flat. She testified that the decedent had difficulty in talking at times, but not very often, and that after she came home from the hospital she was fine.

The nurse who took care of the decedent in the home, testified that shortly after she went there decedent told her appellant "had been very kind to her, and she had never willed her anything, and she was going to leave her those flats". When asked for the conversation at the time the deed was made she did not remember. Asked as to the decedent's mental capacity she answered "she was quite normal." The question "At what time, if at all, was Mrs. Brast of unsound mind while she was in your care?" was answered "Well, I couldn't say." When asked "Was she at any time?" she replied "She was a very lovely woman to take care of, sweet and nice."

A young woman was sent to the hospital on October 17 and to the home on November 12, to see that withdrawal slips for current expenses were properly signed and witnessed. These were executed by mark. This witness testified that the decedent "just acted like she was of sound mind, I mean like an ordinary person."

The appellant testified that she and the decedent had complete trust and confidence in each other; that immediately after her sister came from the hospital she told appellant over and over that "I wasn't in the will and she wanted me to get the flat because I had been kind to her"; that the decedent, not the appellant, had brought up the subject. The appellant was at the hospital all day, every day, and when her sister came home she spent the entire day, every day, with her. The appellant testified that when the deed was executed the decedent said appellant had been a wonderful sister and she wanted her to have the property. At that time the decedent "had no glasses on and she couldn't see, anyhow, her eyes were bad and she was very badly paralyzed, her left leg was drawn up to her chest and her left arm was cross this way on her chest (indicating) * * * and her mind and speech —her speech was not so good, but she could talk." The appellant said "her mind was always clear to me" but she admitted that: "She was a pretty sick woman; she didn't talk much and didn't like company * * *. As far as I know, her mind always appeared to me all right." "She was a very sick woman at the hospital and she was much better at home" said the appellant.

The circumstances attending the execution of the deed are substantially as follows: The will had been drawn by an attorney to whom the testatrix had been sent by the bank. The appellant called upon this attorney at his office for the purpose of getting the will. He said this was on December 1. He did not have the will and told the appellant that the bank presumably had it. He had his office copy but refused to let her have it, whereupon, according to the attorney, appellant "became very mad" and abusive, but "cooled down a bit." According to his testimony it was agreed that at 11 o'clock the following morning (December 2) he would go to the decedent's home for the purpose of making whatever changes she wanted to make, but on that next morning before the appointed hour appellant telephoned him "Never mind coming out, my sister is pretty low and the priest is there right now giving her the last rites of the Church and it will be impossible for anyone to see her"; she was "pretty far gone" or "too far gone." He testified that the next day after that he telephoned appellant to ask how her sister was and was told that she was about the same. He then suggested that he and a representative of the bank go out, to which appellant replied that it would be unnecessary because "I got another attorney yesterday and she made a deed of the Fell street property to me" by her mark. The only time this witness ever saw the decedent was when he drew her will. The appellant denied that she had cancelled the appointment. She said she told this attorney that she (appellant) had her own attorney. She claimed she never telephoned the first-mentioned attorney until after the decedent's death. It is uncontradicted that on December 2 another attorney, one who had theretofore acted in legal matters for the appellant, called at the home of decedent with a deed which he had prepared in his office. He had been sent for by the appellant (who testified that she acted at the decedent's request) and called on the decedent a day or two before and obtained the description and other details. He had never met the decedent before;

she had never before had an attorney of her own (except in the drafting of the will). On December 2 he was accompanied by a notary public from his office, and the deed was executed in the forenoon of that day.

The instrument is in the form of a deed of gift, reciting love and affection as its consideration, and grants and conveys all the right, title and interest of the decedent in the Fell street property to the appellant. It was executed by mark. There were present when it was executed the notary and the nurse, both of whom signed as witnesses. The evidence shows that before making her mark the decedent attempted to sign her name. The face of the deed shows, about an inch above the signing line, a poor attempt at a signature, the "M" being fairly legible, but the remainder being a mere indecipherable scrawl. The doctor testified that in his opinion Mrs. Brast was physically capable of writing her signature on this deed (she was right-handed, could normally write a good hand, and her paralysis was on her left side) but he attributed her inability to sign her name to her impaired mental powers, the doctor observing "It would indicate to me she was in the same mentally unbalanced irrational condition as she was when I treated her." Both the attorney who drew the deed and the notary in attendance gave testimony favorable to the appellant, as has already appeared. Before leaving this phase of the subject it should be noted that the appellant denied having said over the telephone on December 2 that her sister was then receiving the last rites. She testified that she did not receive the last rites on that day but had received them in the hospital. A letter was introduced in evidence written by the appellant to the respondent on December 2 reading as follows:

"Dear Annie: Just a few lines to let you know that Aunt Margaret has been very sick for about four months and is still very sick; she had three strokes and her left side is paralyzed; she is bedridden and we have a nurse for her. She was in the hospital two months, but it was a little expensive and it is worse home as laundry and everything runs into money. She had the priest this morning and got the last Sacrament, but she may live a long time as she is very strong, so we never know what is going to happen. Well, Aunt Mary is also given up for dead, is in a serious condition, received the last Sacrament also. Well, I guess their time has come, maybe. Well, now, my dear, I don't know what else to write as I am as busy as a bee, and so much sickness sure tires one out, so will close with love to you all from your loving Aunt Katherine Hanlon."

The court found that at the time when the deed was executed the decedent was 72 years of age, "extremely weak and infirm, and totally incapable, because of her mental and physical weakness and infirmity, of executing a valid deed * * * or of understanding or comprehending the meaning and significance of the execution of a deed * * *" and that there was no consideration for the deed except love and affection. The court went further and found inter alia that a confidential relationship existed between the sisters and that appellant had complete control of all the decedent's affairs; that appellant arranged to have her own lawyer attend to this transaction; that the decedent had no independent advice, and that the execution of the deed was produced by the suggestions and activity of the appellant.

The appellant contends that on this record the transaction should be upheld, and that the evidence is insufficient to support the findings and decree which upset it. More specifically she contends that the evidence is uncontradicted that *at the time of the execution of the deed* the decedent's mind was normal and clear. The foundation for this claim is the testimony of four witnesses, namely, the appellant, the nurse, the lawyer who drew the deed and the notary, combined with the fact that when the doctor was asked by the court whether, in view of their testimony he adhered to his former opinion, he answered frankly that the decedent "must have had a clear space during that time." (He had not seen the patient between November 30 and December 7.) The appellant in this contention relies on the rule that *"the actual mental condition of the testatrix at the time of the execution of the will is the question to be determined,"* citing In re Estate of Perkins, 195 Cal. 699, 235 P. 45, and In re Estate of Peterkin, 23 Cal.App.2d 597, 604, 73 P.2d 897; but such cases as these and In re Estate of Nolan, 25 Cal.App.2d 738, 78 P.2d 456, and In re Estate of Arnold, 16 Cal.2d 573, 107 P.2d 25, cited and relied on by appellant, are not in point for the reason that they deal with *testamentary capacity* while this case is concerned with the competency of the grantor in the execution of a deed. The two tests differ. See In re Estate of Sexton, 199 Cal. 759, 768, 251 P. 778, and Estate of Arnold, supra, where this difference is pointed out.

The respondent on the other hand relies on the doctrine of Allore v. Jewell, 94 U. S. 506, 24 L.Ed. 260, which was adopted as the law of this state in the case of Moore v. Moore, 56 Cal. 89. Presumably the trial court followed that rule for the record shows that the respondent drew to the court's attention the case of Shaffer v. Security Trust & Savings Bank, 4 Cal. App.2d 707, 712, 41 P.2d 948, where the rule was applied and the older authorities are cited.

[1] In the Moore case the court quotes from Allore v. Jewell as follows: "It is not necessary, in order to secure the aid of equity, to prove that the deceased was at the time insane, or in such a state of mental imbecility as to render her entirely incapable of executing a valid deed. It is sufficient to show that, from her sickness and infirmities, she was at the time in a condition of great mental weakness, and that there was gross inadequacy of consideration for the conveyance. From these circumstances, imposition or undue influence will be inferred." In Richards v. Donner, 72 Cal. 207, 210, 13 P. 584, 586, which has many points of similarity to the case at bar, this is said: "The learned judge of the court below evidently based his conclusion upon the doctrine enunciated and applied by this court in the case of Moore v. Moore, 56 Cal. 89. The court there refers to the case of Allore v. Jewell, 94 U.S. 506 [24 L.Ed. 260], and quotes approvingly from the opinion of Mr. Justice Field. That was an action brought to set aside a conveyance made by a person advanced in years, of great weakness of mind, though not amounting to absolute disqualification, for an inadequate consideration, and without independent advice. There was no showing or claim of undue influence on the part of the grantee. The court there said: 'It may be stated as settled law that whenever there is great weakness of mind in a person executing a conveyance of land, arising from age, sickness, or other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, a court of equity will, upon proper and seasonable application of the injured party or his representatives or heirs, interfere and set the conveyance aside.' See also Haydock v. Haydock's Ex'rs, [34 N.J.Eq. 570], 38 Am.Rep. 385." In Richards v. Donner, supra, as in this case, the deed of gift under attack had been made by a person who had suffered a paralytic stroke; the court had found that the deed had been made by the grantor "while in a condition of great mental weakness * * * without understanding the nature, effect, or consequences of his act." It was claimed that the plaintiff was not entitled to relief because he had "failed to show undue influence on the part of the donee, and because the mistake of the donor, as to the character of his act, was the offspring of his own weakness, with which the donee had nothing to do." With respect to this claim the court said: "It seems that the current of authority, English and American, is unvarying in its adherence to the same beneficent remedies * * * and, although judges have differed in the reasons given for the application of the rule, and the phases under which it has been applied are numerous and diverse, yet the conclusion reached is quite uniformly the same *whether the donee act in good or bad faith.*" And again *"The right of plaintiff to recover did not depend on the question of the donor's sanity or soundness, nor upon the question of the donee's good faith or undue influence."* (Emphasis ours.) See also Wilson v. Moriarty, 77 Cal. 596, 600, 20 P. 134; Klose v. Hillenbrand, 88 Cal. 473, 26 P. 352; Hays v. Gloster, 88 Cal. 560, 566, 26 P. 367; Swan v. Talbot, 152 Cal. 142, 146, 94 P. 238, 17 L.R.A.,N.S., 1066; Marron v. Marron, 19 Cal.App. 326, 332, 125 P. 914; Bryson v. Gross, 83 Cal.App. 638, 644, 257 P. 137; and Shaffer v. Security Trust & Savings Bank, supra, 4 Cal.App.2d 707, 712, 41 P.2d 948. In Burns v. Campbell, 17 Cal.2d 768, 773, 112 P.2d 237, 240, after stating the rule the court says: "It was therefore not necessary for him [respondent] to prove a complete lack of understanding upon the part of Mrs. Burns, and there is evidence to support the finding of the trial court that at the time Mrs. Burns executed the deed, 'her reason was not entirely dethroned, but at that time she was in an extreme condition of mental and physical weakness.' "

[2, 3] The findings bring this case squarely within the rule just discussed,

and they are amply supported by the evidence. There is found in this case a conjunction of at least two of the elements mentioned in the authorities (see 4 Cal. Jur. p. 782, sec. 18), namely, extreme mental weakness and "plain inadequacy of consideration", Hays v. Gloster, 88 Cal. 560, 566, 26 P. 367, 368, and under the authorities the only function of an appellate court is to determine whether the record supports the finding of such elements. In the recent case of George v. Soares, 54 Cal.App.2d 29, 31, 128 P.2d 377, 379, this court had occasion to consider the rule of Moore v. Moore, supra, and we there said it "is not a rule that in all cases where some of these elements are present the trial court must set aside the conveyance. The rule is that when the trial court, in the exercise of its judicial discretion, has found that the circumstances warrant such equitable relief the decree will not be disturbed on appeal."

[4] It is claimed that error was committed in allowing the question "In your opinion, based on what you observed during the time you acted as Mrs. Brast's physician, was she in a condition at any time when you observed her to transact ordinary business? A. At no time, except perhaps the first visit on August 15th, when she seemed to be—her mind seemed to be fairly clear, because I got her history then and talked to her quite a bit. At no time at the hospital visits, or at the visits to her home, in my opinion, was she competent to transact business". In re Estate of De Soberanes, 182 Cal. 525, 189 P. 103, is cited, where a somewhat similar question was asked and the court held it called for the conclusion of the witness and that the objection thereto was properly sustained. Langenbeck v. Louis, 140 Cal. 406, 411, 73 P. 1086, holds the same way, as does Coyne v. Pacific Mut. Life Ins. Co., 8 Cal.App.2d 104, 111, 47 P.2d 1079. There is, however, authority that such a question is not improper. In re Estate of Finkler, 3 Cal.2d 584, 594, 46 P.2d 149. While it called for the conclusion of the witness it was not prejudicial error in this case in view of the fact that the doctor did not testify as to the decedent's mental condition at the time when she made the deed, and in view of the rule of Moore v. Moore. The doctor's other testimony shows that whenever he saw the patient (with a few exceptions) she was irrational which meant, of course, that she was extremely weak mentally. His concession that she might have been lucid at times would not militate against the other evidence in the case (sufficient to sustain the findings) which shows that this patient was extremely weak mentally from the time he first attended her until her death.

In the briefs on both sides the evidence is discussed and authorities are cited on several phases of undue influence, but as we have seen (Richards v. Donner, supra), it is not necessary to consider such other phases of that subject under the rule invoked.

[5] The appellant makes the point that under section 259 of the Probate Code a non-resident alien cannot inherit without first showing that reciprocal rights of inheritance exist between this country and the country of which such alien is an inhabitant, and, consequently, that the respondent is not in a position to attack this deed. The answer to that contention is, that while the will describes Annie Munnelly as "of Ballaina, County Mayo, Ireland," the record nowhere shows that she is an alien.

The decree appealed from is affirmed.

NOURSE, P. J., and DOOLING, Justice pro tem., concur.

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70 Cal.App.2d 20

LEWIS v. KOHLS et al.

Civ. 7142.

District Court of Appeal, Third District,
California.

June 29, 1945.

1. Mines and minerals 🔑64

A deed, conveying "all right and title in and to" described mining claim and reciting that "interest hereby conveyed is one-third undivided interest" in such claim, conveyed whole of grantor's interest therein, not merely undivided third interest, so that grantee's successor in interest, after conveying sixth interest to another, retained five-sixths interest, not merely half interest, and hence was entitled to recover five-sixths of rentals due under lease. Civ.Code, §§ 1069, 1070.

2. Mines and minerals ⚷70(1)

Where lessees of mining claim were in default with respect to payment of rental and taxes and commencement and prosecution of operations when they tendered rental payments to lessor on condition that she sign receipt reciting that lessees were not in default, lessor was justified in refusing to accept such tender.

3. Mines and minerals ⚷64
Tenancy in common ⚷3

Lessee's acquisition of interest of one of two lessors in leased mining claim and remaining lessor's justifiable refusal of lessee's conditional tender of rental payments did not terminate lessors' rights under lease, nor change lessees' status to that of mere tenants in common with remaining lessor, who was still entitled to enforcement of lease as to her interest in land and to surrender of lessees' rights thereunder on lessees' failure to perform lease contract.

4. Judgment ⚷252(1)

In action by lessor of mining claim against lessees, who acquired sixth interest therein from plaintiff's former co-lessor, for declaration of plaintiff's rights and enforcement of defendant's obligations under lease, judgment for plaintiff was erroneous in part as exceeding relief prayed for.

◆

Appeal from Superior Court, Amador County; A. L. Pierovich, Judge.

Action by Lois D. Lewis against R. V. Kohls and others for rentals due under a mineral lease, a declaration of plaintiff's rights under the lease contract and specific performance thereof or surrender of the leased premises to plaintiff. Judgment for plaintiff, and defendants appeal.

Reversed, with directions.

Charles L. Gilmore, of Sacramento, for appellants.

Snyder & Snyder, of Jackson, and Gumpert & Mazzera and J. Calvert Snyder, all of Stockton, for respondent.

ADAMS, Presiding Justice.

Plaintiff brought this action upon a lease of a certain mining claim, executed by her and A. A. Bradley as lessors, and R. V. Kohls as lessee, on July 23, 1941. The complaint was in two counts. The first alleged that plaintiff was, at the time of the execution of the lease, the owner of an undivided five-sixths interest in the mining claim and that A. A. Bradley was the owner of an undivided one-sixth interest; that defendants were in possession under said lease, but that they had not paid the rentals or sums provided for therein, except the sum of $500; that a balance of $2000 was due and that plaintiff was entitled to recover five-sixths thereof, or the sum of $1666.66⅔. The second count alleged that a controversy had arisen between plaintiff and defendants relating to plaintiff's rights and defendants' duties under the lease; that defendants had violated certain specified provisions thereof, but that defendants contended that plaintiff had no right to require defendants to fulfill the contract in those respects. The prayer of the complaint was for a judgment for the sum of $1666.66⅔ and for a declaration of plaintiff's rights under the contract, and judgment that defendants fulfill the terms thereof within such time as the court might consider reasonable, or, in default thereof that they surrender the premises to plaintiff and that they "execute to plaintiff a conveyance of any and all title which said R. V. Kohls may have acquired in and to said premises"; and for general relief.

Defendants answered, denying for lack of information or belief that plaintiff was owner of a five-sixths interest in the property described in the lease or that she owned in excess of an undivided one-half. They alleged that they were not in default as to payments under the lease, asserting tender and refusal of plaintiff to accept the amount tendered. As to the second cause of action they admitted that a controversy had arisen between plaintiff and defendants regarding the terms of the lease, but denied that they had violated any of same; they further alleged that they had acquired Bradley's one-sixth interest in the leased property, and also that they had "acquired other outstanding interests, and said defendant corporation is now the owner and holder of an undivided one-half interest in and to said premises," but that plaintiff was the owner and holder of the remaining undivided one-half interest. They prayed that defendant Nevada-Wabash Mining Company be adjudged the owner of such one-half interest; that plaintiff be adjudged entitled to the proportionate part of moneys due under the lease, as evidenced by the percentage of her ownership, and that defendants, on making payment to plaintiff be adjudged the owners of an undivided one-half of the premises, or in the alternative, that it be adjudged that the lease be cancelled. Plaintiff made a motion for judgment on the pleadings, which was denied. When the cause came on for trial she introduced evidence which showed the acquisition by defendant Nevada-Wabash Company of the one-sixth interest previously held by A. A. Bradley, the failure of defendants to comply with certain provisions of the lease, and that the sum of $2000 under its terms was due and unpaid. She then proceeded to introduce documentary evidence to establish her ownership of an undivided five-sixths interest in the property and her consequent right to recover five-sixths of the $2000 unpaid upon the lease.

[1] Respondent, in her brief, asserts that the chain of her title as shown by the conveyances introduced by her leads inevitably to the conclusion that she owns five-sixths of the Wabash mining claim; that her interest originates either in an agricultural patent by the United States to Thomas E. Middleton issued in 1875, or a mining location made by Thomas J. Burke, Calvin Hammack and William Fleehart, in 1876, depending upon what portion of Section 6, T. 6 N., R. 11 E., M.D.B. & M., contains the claim involved and upon whether Middleton, in obtaining the agricultural patent fraudulently failed to disclose that the land was mineral; but that her interest is the same, under either the patent or the mining location. Specifically, she relies upon a grant deed from one J. W. C. Hammack to one Simon Prouty, executed in 1877, and subsequent conveyances by Prouty and his grantees. The construction to be put upon the said conveyance by J. W. C. Hammack to Prouty is thus conceded to be determinative of the extent of plaintiff's interest. That deed purported to "grant, bargain, sell and convey" to the grantee "all right and title in and to the following mining ground, described as follows, to wit: Bounded on the North by the Talisman Mining Claim; on the South by the Comet Company's Mining Claim; on the West by the North Start Mining ground; and on the East by agricultural land; the interest hereby conveyed, is one third undivided intest in and to the mining claim known as the Wabash mining ground situate in Section Six (6) in Township Six (6) North, Range Eleven (11) East, Mont. Diablo Base and Meridian, Amador County, California. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; To Have and to Hold all and singular, the said premises, together with the appurtenances unto the said party of the second part, and to his heirs and assigns forver."

Appellants contend that the foregoing deed conveyed but an undivided one-third interest, while respondent contends that it conveyed the whole of the interest of J. W. C. Hammack. If respondent is correct, she, by conveyances subsequent to the deed to Prouty, became the owner of the whole claim, and, as she thereafter conveyed a one-sixth interest to Bradley, she retained the five-sixths interest claimed by her. If, however, the disputed deed conveyed only a one-third interest, respondent at the time of the execution of the lease had acquired but a one-half interest, as claimed by appellants.

We shall therefore consider first the effect of the disputed deed. Respondent cites 9 Cal.Jur. 294, sec. 159, which states that "A general description of land, or interest therein, will not be restricted by a subsequent erroneous, uncertain or inconsistent particular description. * * * Thus, a grant of all the 'right, title and interest' of the grantor, followed by words particularly describing the interest granted, such as 'being a one-half undivided interest' * * * is not limited by the particular recital." She also cites McLennan v. McDonnell, 78 Cal. 273, 20 P. 566, 567.

In the latter case the deed granted "all the right, title, and interest of the party of the first part, the same being a one-half undivided interest in and to" described real property. It was contended that this deed conveyed only a one-half interest, but the court said, 78 Cal. at page 277, 20 P. at page 567: "This deed clearly conveys 'all the right, title, and interest' of Campbell. The words 'being a one-half undivided interest' are 'not words limiting the extent of the previous terms of conveyance, or excepting out any interest conveyed by the previous terms.' Dodge v. Walley, 22 Cal. [224], 228 [83 Am.Dec. 61]; Wilcoxson v. Sprague, 51 Cal. 640."

In Costello v. Graham, 9 Ariz. 257, 80 P. 336, the granting clause in a deed recited that the grantor bargained and sold "all his right, title and interest, being an undivided one-half of the following mentioned and described mining claims." In answer to the contention of appellant in that action, that the deed conveyed no more than an undivided one-half interest, the court said: "There is abundant authority to sustain the proposition that such a conveyance is in fact a conveyance of the whole interest owned by the grantor, and that a qualifying clause of similar import to the one in question is not to be construed as limiting the general clause of the grant and of excepting from the conveyance any part of the interest held by the grantor. Wilcoxson v. Sprague, 51 Cal. 640; McLennan v. McDonnell [78 Cal. 273], 20 P. 566; Hobbs v. Payson [85 Me. 498], 27 A. 519."

In Sequatchie Land Co. v. Sewanee Coal, Coke & Land Co., 137 Tenn. 313, 193 S.W. 106, 107, a deed conveyed "all right, title, claim and interest," followed by the words "being an undivided one-half interest." The court applied the rule that an instrument should be construed against the grantor when the description of the quantity of the estate affected is doubtful. It also laid down the rule that if a grantor conveys all his right and interest, and adds the words "being a one-half undivided interest," the latter words do not limit the extent of the previous terms of the grant, or except out any interest conveyed by the earlier words conveying all interest, citing McLennan v. McDonnell, supra, and other similar cases.

In Bourne v. Farrar, 180 N.C. 135, 104 S.E. 170, 172, a conveyance of "all his right, title, and interest, being one-third interest," was held to convey, in addition to the one-third interest, a contingent interest in the remainder of the land, the court invoking the rule that when the language in a deed is of doubtful meaning that which is most favorable to the grantee will control.

Also see Deaton v. Hutson, Tex.Civ.App., 261 S.W. 165, citing and following Sequatchie Land Co. v. Sewanee Coal, Coke & Land Co.; Costello v. Graham; and McLennan v. McDonnell, supra; Campbell v. Wells, 278 Ky. 209, 128 S.W.2d 592, and cases therein cited at page 596 of 128 S.W. 2d, which include McLennan v. McDonnell, and Costello v. Graham, supra; Hoover v. Roberts, 146 Kan. 785, 74 P.2d 152, 115 A.L.R. 182; Murphy v. Murphy, 132 N.C. 360, 43 S.E. 922; Rogers v. Kinney, 122 Okl. 73, 250 P. 890; Realty Securities & Discount Co. v. National Rubber & Leather Co., 122 W.Va. 21, 7 S.E.2d 49; Dodge v. Walley, 22 Cal. 224, 228, 83 Am.Dec. 61; Civ.Code, §§ 1069, 1070. Other cases are cited in a comprehensive note in 115 A.L.R. 192, 195, et seq.

Appellants cite no authorities in support of their contention that plaintiff has not established ownership of a five-sixths interest in the land. In support of their own claim of ownership of an undivided one-half interest they rely upon a quitclaim deed which they secured for $5 from one of the two sons of J. W. C. Hammack. They made no showing that said son had ever succeeded to the interest which they claim J. W. C. Hammack retained, nor any showing that the other son predeceased his father. In short, they signally failed to show ownership in themselves or any of them, of anything other than the undivided one-sixth interest formerly owned by Bradley, which it is conceded he acquired from plaintiff, and thereafter conveyed to Kohls. We are satisfied that plaintiff presented sufficient evidence of title to an undivided five-sixths interest in the leased land to entitle her to five-sixths of the rentals due, to wit, the sum of $1666.66⅔, as found by the court.

[2] Appellants' second contention seems to be that they are not in default under the lease because in February, 1942, they tendered to plaintiff one $500 payment due under the lease, and she refused to accept it. The evidence shows that plaintiff caused to be served on defendants or some of them, a notice to pay $500 which had become due on January 23, 1942, and constituted the third payment provided for by the lease; that on advice of counsel plaintiff refused to accept same because the tender was conditioned upon her signing a receipt therefor which recited that lessee was not in default under any of the terms of the lease—which was not the case. The trial court found that at the time notice was served upon defendants they were in default in the performance of the terms thereof in respect to payment of rental, payment of taxes, and in regard to operations which were agreed to be commenced and prosecuted within specified times. This finding is supported by the testimony of defendant Kohls, president of defendant Nevada-Wabash Mining Company, that defendant had paid taxes only upon the part claimed by the company, that they had failed to move and mill certain ore in a dump as agreed, and that they had milled some ore from the mine but had not paid plaintiff her agreed royalty on same.

It is therefore apparent that defendants were in default at the time of the alleged tender and that plaintiff was justified in refusing to sign the receipt as requested.

[3] Appellants now contend that the lease ceased to be effective after this tender and refusal, and that they ceased to be in possession of the property under the lease and are now in possession as tenants in common with plaintiff, that, as such, they cannot be ousted from possession, and that plaintiff cannot compel performance of the lease contract.

The acquisition of the one-sixth interest of Bradley as lessor did not terminate plaintiff's rights under the lease nor change defendants' status as lessees to that of mere tenants in common with plaintiff, Vucinich v. Gordon, 51 Cal.App.2d 434, 124 P.2d 868; Higgins v. California Petroleum & Asphalt Co., 109 Cal. 304, 41 P. 1087, and plaintiff's refusal of the $500 tendered did not terminate her rights under the lease. She was, and still is, entitled to have the lease enforced as to her five-sixths interest in the land, and upon failure of defendants to perform according to its terms to have a surrender by appellants of their rights thereunder upon the terms therein contained.

[4] Plaintiff has not waived or surrendered her rights as lessor. This action was brought to have her rights thereunder declared and enforced within a reasonable time, and, in default of performance by defendants, to secure compliance by them with such provisions of the agreement as are provided for in the event of such default. The court has adjudged that the lease is a subsisting binding agreement, that plaintiff is entitled to five-sixths of the rentals due thereunder, and that in default of performance by defendants thereunder plaintiff has the right to declare a forfeiture of said lease. And it has adjudged that upon failure of defendants to comply with the directions in the judgment, the rights of defendants shall terminate. It has, however, also provided that upon defendants' default plaintiff has the right to have surrendered to her "the property described in said lease, and including all property of every nature on the said premises and may require said R. V. Kohls and/or his assignee or assignees, to convey to the plaintiff any and all interest of every nature which he or they may have acquired in the said premises, since the execution of the said lease." It has also provided "that the defendants shall have ninety (90) days from and after notice to them of the entry of this judgment within which to comply with the directions hereinbefore contained, and, in default thereof, and in default of the execution and delivery of said deed as aforesaid, by the defendants this decree shall have the effect and operation at law, and, in equity, of such conveyance, so as to vest title to said premises in the said plaintiff in fee simple; and, in event of such default, the defendants and all persons claiming through or under them, other than the plaintiff, shall be and they hereby are forever debarred, restrained and enjoined from asserting any right, title, or interest in or to any of the above described premises and property, or any part thereof, after such default and the expiration of such ninety-day period hereinabove certified."

It therefore appears that the judgment entered in said action exceeds the scope of the relief prayed by plaintiff or such as is justified under the terms of the lease. Plaintiff throughout the trial contended, and in her brief on appeal reasserts, that her action is not one to quiet title but one to have her rights under the lease declared and defendants' obligations thereunder enforced. She does not deny that defendants have acquired and now own a one-sixth interest in the leased premises, and the trial court has so found. Therefore, the judgment, in so far as it provides that in the event of a forfeiture defendants shall convey to plaintiff *all* their interests in the leased premises and the property thereon, and in so far as it provides that in the event that defendants fail to meet the requirements of the judgment as to compliance with the provisions of the lease within the time fixed, title to the *whole* premises shall vest in plaintiff in fee simple, and defendants shall be debarred from asserting any right, title or interest in or to *any* of the described premises, is inconsistent with plaintiff's admission and the finding that defendants have a one-sixth interest acquired from Bradley. The judgment is therefore reversed with directions to the trial court to amend same so as to make it consistent with the finding that plaintiff is the owner of an undivided five-sixths interest in the leased premises and that Nevada-Wabash Mining Company is the owner of an undivided one-sixth interest in same; and to provide that upon defendants' default defendants shall surrender and convey to plaintiff only such interest in said premises, the property thereon, and said lease, as is consistent with her ownership of an undivided five-sixths interest in the leased premises.

PEEK and THOMPSON, JJ., concur.

69 Cal.App.2d 749

In re WHITE'S ESTATE.

WHITE v. AMERICAN TRUST CO.

Civ. 12810.

District Court of Appeal, First District, Division 1, California.

June 27, 1945.

1. Wills 🔑498

Life tenant's surviving widow and sole heir was not his "issue" within Code provision, in effect in 1917, providing that testamentary disposition to "issue" or certain other persons, without other words of qualification and when terms are used as words of donation and not of limitation, vests property in those who would be entitled to succeed to property of such person according to Code provisions on succession, hence life tenant's widow could not take as his issue under will of life tenant's mother, where to so construe will would defeat expressed intent of testatrix that her property should vest in others. Civ.Code, § 1334; Probate Code §§ 101, 108, 163, 220–231.

See Words and Phrases, Permanent Edition, for all other definitions of "Issue".

2. Executors and administrators 🔑315(5)

A decree directing distribution of a decedent's estate to trustees appointed under decedent's will is an adjudication of the validity of the testamentary trust.

3. Executors and administrators 🔑315(6)

A decree of distribution of assets of testatrix' estate is conclusive as to interpretation of the will, rights of legatees thereunder, property covered by will, and incidental matters necessarily involved in determination on those subjects, and decree cannot be collaterally attacked except for intrinsic fraud or certain jurisdictional defects.

4. Executors and administrators 🔑315(7)

After final decree of distribution, probate court or court of general jurisdiction retains power to compel distribution of trust property in accordance with decree. Probate Code, § 1120.

5. Executors and administrators 🔑315(6)

Where a decree of distribution has become final, such decree, whether right or wrong, controls in subsequent proceedings to measure rights of parties, in absence of showing that fraud concealed a fact which caused court, in such decree, to eliminate possible reversionary interest as set forth in will. Probate Code, § 1120.

6. Executors and administrators 🔑315(6)

Probate Code provision relating to jurisdiction of court after final distribution does not impair power and duty of court to render a decree of distribution which is final. Probate Code, § 1120.

7. Executors and administrators 🔑315(6)

Under will providing that on death of life tenant trust property should vest in his lawful issue and, if he should die without issue, one-third of trust property should be expended for erection of public memorial to testatrix' deceased husband, life tenant could have attacked memorial provision during his lifetime, and not having done so but, as a testamentary trustee, having accepted responsibility of trust and filed reports and accounts, the decree of distribution was conclusive on him and his widow and executrix. Probate Code, §§ 1020, 1120–1129.

8. Courts 🔑198

The Probate Code provision pertaining to trusts created by will gave probate court jurisdiction over practically all controversies which might arise between trustees and those claiming to be beneficiaries under trust. Probate Code, § 1120.

9. Executors and administrators 🔑315(6)

The rule that validity of testamentary trust cannot be attacked after decree of distribution has become final applies where there is a contingent remainder after termination of life estate because, in distribution of decedent's estate, probate court may pass upon equitable interests in property. Probate Code, § 1020.

10. Charities 🔑43
Trusts 🔑61(1)

A life beneficiary of testamentary trust who has obtained interest of a remainderman may not terminate the trust against interest of the unborn, but he may request court to define and decree the validity of a charitable bequest that may affect remainderman's disposition of the property. Probate Code, §§ 1020, 1129.

11. Appeal and error ⚷839(1)

A point not considered by trial judge is not a part of record on appeal.

12. Trusts ⚷329

On cross-petition objecting to report of testamentary trustee and to order directing trustee to expend portion of trust property for public memorial to settlor's husband of monumental character typical of banking development of state, and on appeal from decree and order denying such cross-petition, court could not pass on alleged impossibility of designing or erecting such a memorial, but the problem was for trustee to determine, subject to appropriate future judicial action if trustee should attempt to erect a memorial not in accordance with provisions of trust.

◆

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the estate of Laura Lyon White, deceased. From a decree and order denying the cross-petition of Ruth B. White, as executrix of the last will of Ralston L. White, deceased, overruling objections to the tenth report and account of American Trust Company, formerly the Savings Union Bank & Trust Company, trustee, and directing the trustee to expend one-third of the trust property of the estate of Laura Lyon White, deceased, in the erection of a public memorial to her husband of a monumental character, the cross-petitioner, opposed by American Trust Company, trustee, appeals.

Affirmed.

Sterling Carr, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellant.

Brobeck, Phleger & Harrison, of San Francisco, for respondent.

WARD, Justice.

This is an appeal from a decree and order denying the cross-petition of Ruth B. White, as executrix of the will of Ralston L. White, deceased, overruling her objections to the tenth report and account of American Trust Company, trustee, formerly the Savings Union Bank and Trust Company, and directing the trustee to expend one-third of the trust property of the estate of Laura Lyon White, deceased, in the erection in San Francisco, California, of a public memorial, to her husband, of a monumental character, the design to be selected by the trustee and to be typical of banking development in the State of California.

Laura Lyon White, the wife of Lovell White and the mother of Ralston L. White, died testate. Her will was admitted to probate in the early part of 1916. A decree of partial distribution was made by the court in 1916, and a decree of final distribution in 1917. By the terms of her will the residue of her estate was bequeathed to the Savings Union Bank and Trust Company, the predecessor of the American Trust Company, and Ralston Lovell White, in trust, one-half of the net income thereof to be paid Ralston White during the period of the trust. In the event he had no issue the whole of the net income was to be paid to him. The whole of the income was so paid him inasmuch as he had no children. Other children of the Lovell Whites had died in infancy. Upon the death of Ralston Lovell White, which occurred on September 26, 1943, the trust was to terminate and the property vest in his "lawful" issue. In the event he died without leaving issue the will provided for the following disposition of the property: one-third to Edith White, niece of the deceased husband of testatrix; one-third in trust for the benefit of the sister of the testatrix, Margaret L. Whitcomb, and the nephew of testatrix, Bonner Whitcomb, with a vested remainder in the trust property, insofar as Margaret L. Whitcomb's interest was concerned, to Bonner Whitcomb or his heirs, and lastly: "One-third (1.3) thereof to the Savings Union Bank and Trust Company, to be expended by it for the erection of a public memorial of a monumental character, to my deceased husband, Lovell White, the design of said memorial to be selected by the said Savings Union Bank and Trust Company in its discretion, provided that it shall be erected in the City and County of San Francisco, and it is desired that preferably it represent something typical of the banking development of the State of California." Ralston White died without issue so that the alternative provisions of the trust came into effect.

Ruth B. White, cross-petitioner and appellant, is the wife of Ralston White and his sole heir. She attacks the validity of that part of the trust appropriating funds for the erection of a monument. The reason for her contest appears in certain letters written by Ralston White. In 1935 he wrote her from Merano, Italy, as follows: "Dearest Ruth: It is my express wish that after I die, you shall, as soon as may be, commence suit to break, in your favor, the Laura Lyon White Trust, at American Trust Co. The terms of this Trust are, that if I shall die without issue, the capital sum of the Trust shall go to Margaret L. and Bonner Whitcomb, Edith White, and to a Memorial for my late Father, Lovell White.

"My mother established this Trust before her death in 1916, at a time when we, you and I, were possessed of a large and independent fortune of our own. My mother wished to provide for relatives that were not so fortunately situated financially, and to leave a fitting tribute to her husband's memory.

"But now the situation is entirely changed. We have lost our own fortune, and are now engaged in a struggle to pay off a debt of $47,000 incurred during the crash of 1929. Margaret and Bonner Whitcomb are both dead.

"I would wish to see Edith White get her share of the Estate, as provided. But the other two-thirds, (2/3's) should go to you, by every consideration of justice, equity, natural right, and the love that both my father and mother bore to you. The most fitting Memorial that could be established to my father's memory, and the one that he would most wish, would be to have ample provision made for his son's wife, whom in 1909 he welcomed to the family with the affection of a father for a daughter. And my mother, who loved you dearly, would wish, were she living to-day, to see you established as financially independent as her legacy could make you, and as is fitting for the nearest remaining member of her family.

"Therefore, my dearly beloved and most loyal and devoted wife, I counsel you, that upon my death, you shall at once engage the services of an excellent lawyer, one familiar with the practice regarding wills and testaments, and file a suit contesting the distribution of the Trust as at present provided, and claim for yourself at least a 2/3 share thereof. I feel sure that no court in the land will, under the changed circumstances, deny your just and equitable claims to a fair share of your natural inheritance. Your loving husband Ralston L. White." The following year Ralston White wrote from Munich as follows: "To American Trust Co. San Francisco, and to the Honorable, the Court having jurisdiction in the execution of the last Will and Testament of my mother, the late Laura Lyon White: —* * * May I invoke your attention to the consideration that no more fitting Memorial could, under the circumstances, be offered to my father's memory than a Trust Fund in the name of and for the benefit of his daughter-in-law, Ruth B. White. * * *" Less than six months before his death a second letter of similar import was written to the trustees and the court.

[1] Ralston White made plain his desire that the memorial fund should be diverted into a maintenance fund for his wife. The particular provision of the will directing the memorial in question was not to become effective until the death of Ralston White, and then only in the event he left no lawful issue. His parents, brother and sisters predeceased him and he left no children. In this connection it is argued that Ruth B. White, his widow and sole heir at law, is also the *"issue"* of Ralston L. White. This contention is based upon Civil Code, section 1334, in force at the time of the decree of distribution in his mother's estate. The section then read: "A testamentary disposition to 'heirs,' 'relations,' 'nearest relations,' 'representatives,' 'legal representatives,' or 'personal representatives,' or 'family,' 'issue,' 'descendants,' 'nearest' or 'next of kin' of any person, without other words of qualification, and when the terms are used as words of donation, and not of limitation, vests the property in those who would be entitled to succeed to the property of such person, according to the provisions of the title on succession, in this code." In 1931, section 1334 was re-enacted as Probate Code, section 108, and the reference to "issue" and "descendants" omitted. It is interesting to note that in the July 1931 number of the State Bar Journal the draftsman of the Probate Code, referring to the omission of the two words, stated: "It is not conceivable that by either of these words a person could mean ancestors or collateral relatives, altho they might be his heirs."

The word "issue" as used in the will is not without words of qualification. The word is definitely used in the sense of descendants. An examination of the will shows that certain property should go to the only son of the testatrix during his natural lifetime, with the remainder over to the oldest surviving son (a grandson), if existent, otherwise to his issue or, if none, to his heirs at law. The same idea is carried out in a provision relative to the property held in trust for the benefit of Ralston L. White and his "issue." One-half was to be accumulated and distributed to the oldest child of Ralston L. White, and in the event of his death during minority, to the other children. It was provided that upon the death of Ralston L. White the trust should cease and the property should vest in his "lawful issue." If there were no issue a portion of the property was to vest in the relatives therein named. These provisions show an intent to differentiate between "lawful issue" and "heirs at law." The use of the words "lawful issue" indicates that upon the happening of a contingency the property should go to the legitimate lineal descendants. Under the facts of this case the use of the word "lawful" is unimportant.

The word "issue" has been given a limited or a contrary meaning depending upon the evident intent of the word as used. Even in an enlarged sense, so far as we have been able to ascertain, it has never covered a surviving spouse. In this state in Re Estate of Cavarly, 119 Cal. 406, 410, 51 P. 629, 630, the court, citing Jarman on Wills, 109, said: "It is also true that the word 'issue' ordinarily means descendants to any degree." See, also, In re Estate of Blake, 157 Cal. 448, 108 P. 287. It is said in Vol. 3, Page on Wills, Lifetime Ed., sec. 1027: "Issue is a word whose primary meaning in the absence of anything to show a contrary intent, is that of legitimate lineal descendants indefinitely." This appears to be the rule generally (33 Cor.Jur., pp. 818, 819, § 5), and is the rule in California when used in the sense that offspring or children may share the estate of a parent. Under old Civil Code, sections 1383 and 1386, or under the Probate Code sections based upon the old section in reference to acquisition of property of one who dies without disposing of it by will, a clear distinction is made between the rights of a surviving spouse and issue. Probate Code, secs. 220–231. If, under the provisions of sec. 1386, subd. 4, "issue" means, as appellant contends, that the Ralston L. White trust property should go to his surviving spouse Ruth B. White, then the will would be contradictory and inconsistent with the expressed intent of the testatrix that "If said Ralston Lovell White shall die leaving no issue nor the issue of any deceased child, then the said trust property shall go to and vest as follows: One-third (1/3) thereof to Edith White, niece of Lovell White, the deceased husband of decedent, or her heirs at law; one-third (1/3) thereof to Savings Union Bank and Trust Company, in trust, nevertheless, to and for the following uses and purposes: * * *." Such construction would violate the rule that the interpretation of the terms of a will must be in accordance with the intent of the testatrix. Probate Code, secs. 163 and 101; In re Estate of Blake, supra; In re Estate of Northcutt, 16 Cal.2d 683, 107 P.2d 607; In re Estate of Lawrence, 17 Cal.2d 1, 108 P.2d 893; In re Estate of Smith, 58 Cal. App.2d 352, 136 P.2d 366.

[2, 3] Appellant argues that the trial court should have provided for Ruth B. White as "issue" in succession to the property but, if she is not issue, there is intestacy with respect to the property of decedent Laura Lyon White directed to be used for the purpose of a memorial because that trust is void. In finding against appellant on this point the trial court based its decision upon the fact that the decrees of partial and final distribution were conclusive on the validity of the trust. The decrees followed the language of the will.

When an estate of a deceased is distributed to trustees appointed under a will, the decree is an adjudication of the validity of the trust. In Cook v. Cook, 17 Cal.2d 639, 652, 111 P.2d 322, 330, the court said: "Whatever may be the merit of plaintiff's contentions, the decree of distribution in the probate proceeding in decedent's estate was conclusive as to the interpretation of the will, and the rights of legatees thereunder, and the property included or covered by the will, the existence, validity of and rights under any testamentary trust, and the incidental matters which necessarily are involved in a determination on those subjects whether right or wrong. It cannot be collaterally attacked except for extrinsic fraud or certain jurisdictional defects." No question of fraud is involved in this case. See, also, Vincent v. Security-First Nat. Bank, 67 Cal.App.2d ——, 155 P. 2d 63; Goldtree v. Allison, 119 Cal. 344, 51 P. 561. In Keating v. Smith, 154 Cal. 186, 191, 97 P. 300, 302, the court said:

"The validity of the trust is, however, no longer open to question. The decree of the superior court distributing the residue of the estate to trustees upon certain trusts is a conclusive adjudication of the validity of the disposition made by the testator." See, also, Matter of Trust of Trescony, 119 Cal. 568, 51 P. 951.

[4-6] Prior to the additions found in Probate Code, section 1120 (1931), the Supreme Court, construing former section 1699 of the Code of Civil Procedure in McAdoo v. Sayre, 1904, 145 Cal. 344, 350, 78 P. 874, 876, said: "We conclude, therefore, that in a proceeding of this character the court has the power, and it is its duty whenever the power is invoked, to ascertain who is entitled to the trust estate already delivered by the trustee, and also that which yet remains to be delivered, and make such orders as may be necessary to enable the trustee to make final settlement with the beneficiary in safety, and secure a final settlement of his account, which will entitle him to a discharge." This rule still continues. In Society of California Pioneers v. McElroy, 63 Cal.App.2d 332, 340, 341, 146 P.2d 962, 966, the court said: "After a final decree of distribution a probate court or a court of general jurisdiction retains the power to compel the distribution of trust property in accordance with the decree. In re Estate of Evans, 62 Cal.App.2d 249, 144 P.2d 625. In the present appeal we are prohibited from going back to the terms of the will. Right or wrong the decree controls unless it is void on its face." "The decree is the measure of the rights of the parties, unless it should appear, which the record does not disclose, that fraud concealed a fact which caused the court in the decree of distribution to eliminate the possible reversionary interest as set forth in the will." Probate Code, section 1120, as amended, does not impair the power and duty to render a decree of distribution which is final.

[7] Appellant contends that although Ralston L. White could not have attacked the trust during his lifetime, it may be attacked by his widow on the theory that Probate Code, section 1120, which re-enacted Code of Civil Procedure, § 1699, with some modifications, creates a means of determining to whom trust property shall pass in the event that issue has not previously been determined.

Ralston White could have attacked the provision in the will relative to the "memorial." Instead of doing so, he accepted, as one of the trustees named in the will of Laura Lyon White, the responsibility of the trust and filed reports and accounts. A decree of distribution is conclusive upon one who was in a position to attack the application for distribution. Crew v. Pratt, 119 Cal. 139, 51 P. 38.

Appellant is unable to conceive of any interest Ralston L. White could have had in assailing the provision of the trust here considered during his life. He enjoyed the income from the entire residue for life and appellant states that the trust provision attacked "was to come into being only upon his death." It is true that if successful in an attack upon the provisions of the trust Ralston White could not have enjoyed the property during his lifetime. He would, however, have become the owner of the remainder interest with power of testamentary disposition and would thus have been in a position to have provided for his wife.

The Probate Code provides that upon final settlement of an account, due notice of the application therefor having been given, the court "must" distribute the residue of the estate, and that "any person interested" may resist the application. Probate Code, sec. 1020. The decree of distribution determines whether trust property designated in the will shall pass. The court retains jurisdiction to determine "to whom the property shall pass" for certain "purposes hereinafter set forth." Probate Code, sec. 1120. The purposes are set forth in the next nine sections. Probate Code, sec. 1121, gives to any beneficiary the right to apply for a citation directed to a trustee to file an account. In re Estate of Rey, 31 Cal.App.2d 648, 88 P.2d 718; Willson v. Security-First Nat. Bank, 21 Cal.2d 705, 134 P.2d 800; In re Estate of Evans, 62 Cal.App.2d 249, 144 P.2d 625. Section 1122 empowers the court in its discretion to determine compensation. In re Estate of McLellan, 8 Cal.2d 49, 63 P.2d 1120. Under section 1123 a decree, when it becomes final, is conclusive upon all persons (Security-First Nat. Bank v. Superior Court, 1 Cal.2d 749, 37 P.2d 69) and the remedy of one dissatisfied is by appeal. McLellan v. McLellan, 17 Cal.2d 552, 110 P.2d 1034; Carr v. Bank of America, etc., Ass'n, 11 Cal.2d 366, 79 P.2d 1096; In re Estate of Evans, supra. Section 1124 provides for procedure upon a trustee's refusal to act; section 1125, for an appointment to fill a vacancy; section 1125.1, for resignation of a trustee after distribution; sections 1126 and 1127, for the appointment of a new trustee upon petition of anyone interested in the estate; section 1127, for the filing of a bond; and sections 1128 and 1129 for the transfer of trust proceedings to another county.

The first sentence of Probate Code, section 1120, provides: "When a trust created by a will continues after distribution, the superior court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction for the purpose of determining to whom the property shall pass and be delivered upon final or partial termination of the trust, to the extent that such determination is not concluded by the decree of distribution, or settling the accounts and passing upon the acts of the trustee and for the other purposes hereinafter set forth." In Thomas v. Superior Court, 17 Cal.App.2d 40, 61 P.2d 496, it was held that the court had jurisdiction, under section 1120, to determine the interest and conflicting claims of various assignees of the beneficial interests under a trust created by a decree of final distribution.

[8] In Re Estate of Smead, 12 Cal.2d 20, 24, 82 P.2d 182, 183, quoting from In re Estate of Smith, 4 Cal.App.2d 548, 41 P.2d 565, the court said: " 'We believe the language employed in the present section (1120) of the Probate Code was intended to broaden the jurisdiction of the probate court so as to give that court jurisdiction over practically all controversies which might arise between the trustees and those claiming to be beneficiaries under the trust.' " In Re Estate of Marre, 18 Cal.2d 184, 114 P.2d 586, 589, it was contended that section 1120 conferred jurisdiction only to the extent of hearing petitions *"brought by the trustee."* Citing the Estates of Smead and Smith, the court determined that the superior court had the right to direct the trustees under a testamentary trust to make payment to a beneficiary covering the period between the death of the decedent and the entry of the decree of final distribution. All of these cases in effect hold that questions relating to the operation of a trust are entirely different from the contention made herein that the validity of the trust may be attacked after the decree of distribution has become final.

[9] Appellant argues that where there is a contingent remainder after termination of a life estate in trust, a different rule applies. California has held to the contrary. In the distribution of a decedent's estate the court, acting in its probate capacity, may pass upon the equitable interest in the property. In re Estate of Scrimger, 188 Cal. 158, 206 P. 65.

[10] A life beneficiary who has obtained the interest of a remainderman may not terminate a trust against the interest of the unborn, but he may request the court to define and decree the validity of a charitable bequest that may affect the remainderman's disposition of property. "However, appellant's interest as the sole heir at law of his father if an intestacy exists under the terms of the will, or may arise by the lapse of any bequest, gives him the right to urge that any uncertainty in the will in this regard should be construed by the decree of distribution. When there is any question as to the effect of a will, the probate court should construe it and define the interest of each devisee. In re Estate of Scrimger, 188 Cal. 158, 165, 206 P. 65; Goldtree v. Allison, 119 Cal. 344 51 P. 561; 11B Cal.Jur., 773, 798. While appellant can have no interest in possession as to property concerning which there is an intestacy on termination of the trust, since it is to continue until his death, the effect of such an intestacy is to give him an interest of which he may dispose by will, or to which his heirs may succeed. In re Estate of Blake, 157 Cal. 448, 454, 469, 108 P. 287; In re Estate of Hamon, 136 Cal. App. 517, 29 P.2d 326." In re Estate of Easterday, 45 Cal.App.2d 598, 609, 114 P. 2d 669, 675.

In Re Estate of Hinckley, 58 Cal. 457, the court said: "The decree must be limited to defining the rights of the respective parties in the trust estate. As was said by the learned Judge of the Probate Court: 'It is, under our system, the necessary province of a Probate Court to inquire and determine whether a valid trust has been created. The mode of administering, the power to regulate and direct its subsequent administration, is quite separate and distinct from a question of whether a legal trust has been expressed. * * * Section 1665, Code Civ.Proc., provides that "the Court must proceed to distribute the residue of the estate among the persons who by law are entitled thereto."' With this view of the learned Judge, we are in full accord. We may add that it is within the province of the Probate Court to define the rights of all who have legally or equitably any interest in the property of the estate, ***deriv-***

ed from the will, whether they are entitled to any present enjoyment, *or their interests are contingent.*" (Second italics added.) See, also, Goldtree v. Allison, 119 Cal. 344, 51 P. 561; Siddall v. Harrison, 73 Cal. 560, 15 P. 130; Luscomb v. Fintzelberg, 162 Cal. 433, 123 P. 247; Jewell v. Pierce, 120 Cal. 79, 52 P. 132; In re Estate of Easterday, supra; In re Estate of Blake, supra.

[11] In view of the conclusion that the terms of the trust cannot now be attacked, it is not necessary to consider appellant's argument that the trust is void in that no charitable trust is created and therefore is violative of the rule against perpetuities. This point was not considered by the trial judge and therefore is not a part of record on appeal.

[12] The suggestion that it is impossible to design or erect a public memorial of monumental character to Lovell White, typical of California banking development cannot now be passed upon. That problem is in the hands of the trustee subject to appropriate future judicial action in the event the trustee should attempt to erect a memorial not in accordance with the provisions of the trust.

The order denying the cross-petition of the executrix and overruling objections to the account of the trustee is affirmed.

PETERS, P. J., and BRAY, Justice pro tem., concur.

PEOPLE v. WEATHERFORD.*

Cr. 3824.

District Court of Appeal, Second District, Division 1, California.

June 26, 1945.

Hearing Granted July 26, 1945.

1. Criminal law 🔑636(7)

In prosecution for murder where jury inquired of court through bailiff whether the prosecution or the defense had burden of showing defendant's whereabouts on date of murder, to which the court, in the absence of defendant and his counsel, answered that jury were not concerned with anything that was not in the evidence or the law as given by the court, procedure did not comply with statute and court committed error. Pen.Code, §§ 1043, 1138.

2. Criminal law 🔑1186(4)

"Miscarriage of justice" within constitutional provision that no judgment shall be reversed for any error in matter of procedure unless court shall be of opinion that the error complained of has resulted in a miscarriage of justice does not mean that a guilty man has escaped or that an innocent man has been convicted, but the phrase is equally applicable to cases where acquittal or conviction has resulted from some form of trial in which essential rights were disregarded or denied. Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

3. Criminal law 🔑1186(4)

Where the evidence of defendant's connection with the crime charged is weak, relatively unsatisfactory or approaching the borderland between guilt and innocence, a definite error in procedure may be sufficient to turn the scales against defendant who without the interposition of such error would have been acquitted. Const. art. 6, § 4½.

4. Criminal law 🔑1186(4)

Where evidence in murder prosecution was largely circumstantial and there was no confession and the allegedly incriminating circumstances were as consistent with innocence as with guilt and the jury through the bailiff asked court whether the prosecution or the defendant had burden of showing defendant's whereabouts on date of murder to which the court answered in the absence of defendant and his counsel that the jury were not concerned with anything that was not in the evidence or the law as given to them by the court, miscarriage of justice occurred and reversal was required. Pen. Code, §§ 1043, 1138; Const. art. 6, § 4½.

5. Criminal law 🔑1186(4)

In prosecution for murder, that jurors in advance of trial and outside the presence of defendant and his counsel were given 15-page pamphlet containing general instructions on the duties and responsibility of trial jurors, including statements inapplicable to such prosecution, was prejudicial error. Pen.Code, §§ 1127, 1043; Const. art. 6, § 4½.

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* Subsequent opinion 164 P.2d 753.

6. Criminal law ⚷1134(3)

The impaneling of a jury is an important step in the trial, and an error in giving jury printed instructions in advance of the trial out of the presence of the defendant and his counsel was subject to consideration on appeal from conviction. Pen.Code, §§ 1043, 1127.

7. Criminal law ⚷633(1)

That the same jury panel may be employed in the trial of various cases during the period of jury service does not affect the right of the defendant in a particular case to full compliance with constitutional provisions.

8. Criminal law ⚷636(7)

The law contemplates for a defendant in a criminal action a jury of his peers and not his betters or superiors, actual or presumed, and the distribution of pamphlets on duties and responsibility of jurors out of the presence of defendant and his counsel and in advance of trial is not authorized by law. Pen.Code, § 1043.

9. Criminal law ⚷1186(4)

The denial in a criminal action of constitutional and substantive statutory rights of the accused constitutes an error that is in no sense procedural within constitutional provision relating to harmless error, since "procedure" refers to adjective law as distinguished from substantive law. Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Procedure".

10. Criminal law ⚷1186(4)

Where prosecution's theory was that landlord had murdered tenant because she refused to vacate premises and in order to get possession of most of her property, exclusion of testimony that shortly before murder decedent had told a friend that landlord had purchased her property and had paid cash therefor which had been put in the bank, and that tenant was going to vacate premises within a few days was prejudicial error. Const. art. 6, § 4½.

11. Criminal law ⚷342

Where the perpetration of the crime has been brought home to the defendant, the motive of its commission becomes unimportant, but the absence of motive tends to support the presumption of innocence.

12. Criminal law ⚷1186(4)

In prosecution for murder where some of the defendant's requested instructions might well have been given and an instruction given by the court standing alone may have tended to unduly emphasize the alleged forgery of defendant, there was no material prejudice in view of the comprehensive charge given when viewed as an entirety. Const. art. 6, § 4½.

13. Criminal law ⚷1186(4)

In murder prosecution, keeping jury out from 10 a. m. on February 14, 1944, to 3 p. m. on February 21, 1944, was not prejudicial error where jury did not deliberate on Saturday or Sunday, and alternate juror was substituted on February 18, and 4 hours and 55 minutes were consumed in listening to court reporter read testimony to jury. Const. art. 6, § 4½.

14. Jury ⚷149, 150

In murder prosecution, the substitution of an alternate juror for a juror who had become ill after the jury had deliberated for four days was not error where defendant's counsel waived proof of juror's physical disability and no objection to the substitution was made. Pen. Code, § 1089.

15. Jury ⚷32(1)

The Penal Code provision relating to alternate jurors and their substitution for original jurors is constitutional. Pen.Code, § 1089.

16. Criminal law ⚷1134(1)

Where the evidence as between guilt and innocence is close and there is room for some doubt even though not room for a reasonable doubt, alleged errors on appeal will be scrutinized more closely than in cases where the evidence is convincing and no other result was reasonably probable.

17. Criminal law ⚷552(3)

Where the prosecution rests upon circumstantial evidence, the prosecution must not only show a set of circumstances consistent with guilt but inconsistent with any reasonable theory of innocence.

18. Criminal law ⚷552(2)

Circumstantial proof of a crime charged cannot be intermingled with circumstantial proof of suspicious prior occurrences in such manner that it reacts as a psychological factor with the result that proof of the crime charged is used to bolster up the theory or foster suspicion in the mind that the defendant must have committed the prior act, and the conclusion that he must have committed the prior act is then used in turn to strengthen the theory and induce the conclusion that he must have committed the crime charged.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Jackson M. Weatherford was convicted of murder in the first degree, and he appeals.

Judgment reversed and cause remanded for a new trial.

Morris Lavine, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Upon evidence almost entirely of a circumstantial nature, the defendant was convicted of murder in the first degree as charged in an indictment accusing defendant of killing Mary Annette Struck. The verdict fixed the punishment at imprisonment for life. On this appeal from the judgment the appellant has assigned the following errors: that the evidence was insufficient to sustain the conviction; that there was error in the exclusion of evidence; that instructions to the jury were erroneous; that the jury was instructed in the absence of defendant and his counsel; that pamphlet instructions were given to the jurors before the trial commenced; that the court erred in keeping the jury out an unreasonable length of time; and erred in substituting an alternate juror for a juror who became ill during the jury's deliberation.

The record discloses that the defendant, aged 70 years at the time of the trial, was a substantial property owner with a gross income from rentals of between $700 and $900 per month; that among other occupations defendant had been a farmer, carpenter, builder and real estate operator; there was no evidence that he had ever been arrested before; he was a married man with one son, and had been a resident of Highland Park, California, since 1922. Defendant owned, among other properties, a restaurant building known as the "Oh Johnnie's Cafe," and on December 1, 1942 the defendant and the deceased, Mrs. Struck, entered into a written agreement whereby the cafe was to be operated by Mrs. Struck who was to pay the defendant "5% of the gross earnings payable Monthly." After Mrs. Struck moved into the restaurant there were four ice boxes or frigidairs, two of them being Mrs. Struck's property and two the defendant's. From that date to the time of the murder, April 5, 1943, it appears that $22 was the total rent received by the defendant from Mrs. Struck, and that Mrs. Struck did not keep any cash register tapes or records of the business transacted in the cafe. "Some time the last part of January or the first part of February, 1943", and "about March 20th", one Steve Salatich, a cafe owner and operator, talked with the defendant about occupying the Oh Johnnie's Cafe; thereafter Salatich and defendant visited the cafe and Mrs. Struck showed Salatich what property was hers. After the defendant and Salatich had "made a deal" the defendant went back in the cafe and talked to Mrs. Struck and reported to Salatich that the lady had "told him it would be three or four days and it may be perhaps a week" before she would move, since "she wanted a few days to get rid of her food that she had on hand." Salatich told the defendant that he would pay $60 a month for three months and $75 a month thereafter, which was "O. K." with the defendant. Thereafter Salatich had several conversations with defendant wherein defendant said "he bought her (Mrs. Struck) out" for $350, and later that the defendant said "that he gave her $50.00 more in order to get her out, and I told him it was all right, whatever he paid I would stand half the expense. * * * We were just waiting for the lady to come back. She was supposed to be away." Salatich "saw Mr. Weatherford pretty near every day," and "Some several days before Mrs. Struck's body was found" (April 18, 1943) there was a conversation about trying to get into the cafe which had been closed since the day of the murder, April 5, 1943, wherein Salatich suggested that defendant telephone Salatich's attorney which the defendant did from Salatich's place of business, and reported that the attorney "suggested to him as long as he was the landlord and he had a bill of sale and there was no lease signed, that he could go ahead—go into the place." The transcript shows that Attorney William Ellis Lady did so advise the defendant in April, 1943; also that the defendant consulted with the Highland Park Police Department on April 17th about entering the restaurant, and stated that the tenant was gone and that he did not know where she was.

On April 18, 1943, at 9:35 a. m. the defendant, identifying himself, telephoned the police department that "the party had been murdered" at the Oh Johnnie's Cafe, and that defendant knew the woman had been dead several days because he had not seen her for several days. "He was very excitable; his speech was somewhat incoherent at first." Mrs. Struck's body was found in a highly decomposed condition on the floor in a corner of the restaurant storeroom, the immediate cause of death being a compound depressed fracture of the skull, which wound could have been produced by "the blunt end of a hammer, although any instrument of similar shape could do that." No bloody garments, weapons, or other incriminating objects connected with the murder were found in the defendant's possession; nor did the defendant at any time make any confession of guilt. Upon being interviewed by the police on April 21st, defendant voluntarily surrendered all keys in his possession so that his garages and apartments could be searched. In the cafe there were no broken dishes or furniture, and no fingerprints were discovered except those of the deceased. The place was well stocked with edibles and there was some money in the cash register, Mrs. Struck's purse and elsewhere. Wires to a telephone were cut but this fact was not readily noticeable. As stated in appellant's opening brief, "There seems to have been some dissatisfaction on his part, and also on her part, with the (rental) arrangement." It also appears that the defendant had reported Mrs. Struck to the Health Department, the Police Department, and the Office of Price Administration, for investigations in their respective fields, and had complained to neighbors that Mrs. Struck was insanitary.

The defendant testified that he was not inside the Oh Johnnie's Cafe on the evening of April 5, 1943 when the murder was alleged to have been committed and said, "I was working in my place on Colorado Boulevard, and stayed over there." The testimony of Paul Farmer, a boy 15 years of age who resided with his parents about 30 feet from Oh Johnnie's Cafe, was relied upon to identify the defendant as the murderer. This evidence was that on the night in question the boy had been left alone in the house while Mr. and Mrs. Farmer were attending a theatre; that upon hearing an unusual noise coming from the restaurant, described as two people arguing, Paul looked out of a window which overlooked the rear storeroom window of the cafe, recognized the voice and person of Mrs. Struck, but could not understand the words being used, except that he heard her say, "No, no, no," at which time her hands were raised, palms away from the body. The boy also observed a man's arm "about up to the elbow" clothed in "about medium gray" color, which garment he did not recognize. Paul Farmer testified that the man's voice did not sound familiar at all, and that he did not recognize it although he was familiar with defendant's voice and had seen Mrs. Struck and the defendant arguing in the restaurant on two occasions during the month of March, and "not very long" before April 5. On one such occasion Mr. Weatherford "seemed to be angry" and Mrs. Struck "was even angrier", and was cursing Mr. Weatherford; on the other occasion Mrs. Struck said, "I will get out when I get good and ready to."; that Mr. Weatherford "has always treated her nice." On cross-examination Paul Farmer again stated that the voice heard on the evening of the murder was not that of Mr. Weatherford; later, on being recalled by the prosecution Paul testified, "I remember that I didn't know whose voice that was; it sounded like—it was familiar to me, but I didn't know whose it was; it could have been Mr. Weatherford's and it could not have been Mr. Weatherford's", and that he was not able to definitely say whose voice it was. Paul further testified that the argument continued a few minutes, "somebody screamed", he became frightened, and that something black was put up over the cafe window.

In addition to the testimony just mentioned the respondent lists certain other circumstances claimed to identify the defendant as the murderer, namely that the defendant wore a grey suit-coat on week days and that the man's arm seen by Paul Farmer was clothed in grey; that defendant knew how to enter the cafe by means of a broken pane in the rear door; that defendant had ceased to speak harshly about Mrs. Struck after the murder; that a hammer was probably used in the murder and that "Defendant, with a carpenter's reflexes, would most naturally grab and use a hammer in a murder; that the defendant had objected to Mrs. Struck's habit of leaving neon lights on, and that the night of the murder the neon lights were turned out after the crime." Other alleged guilty actions after Mrs. Struck's murder included the fact that a gas jet in the cafe was found open and the gas turned off at the main, and that the defendant had at first denied and later admitted turning it off; that a boy, Patrick Shephard, had looked in the cafe window after the murder and had seen "something silver" which he thought was water running, and the defendant reported that the water was running when the body was found April 18th, but that "water consumption testimony indicates that on April 9th, when collecting the Farmer's rent and asking about 'noises' having been heard at cafe, defendant entered cafe and turned off the running water (which was a 'noise')"; that the same boy found the cafe door unlocked and when the murder was revealed it was found locked; that after discovering the body the defendant went several blocks away to report the crime from his own telephone instead of using the nearest telephone available; that the witness Deitz saw defendant enter the cafe at about 7 a. m. whereas the defendant claims he did not enter the cafe until about 9 a. m.; that four days after the murder, when collecting the Farmers' rent to the rear of the cafe, the defendant appeared ill and nervous, sat down to write contrary to his previous custom, and inquired if the Farmers had heard any "noises" in the cafe, saying that "he had just come from there and he couldn't arouse anybody."; that previous to the murder the defendant had parked his car in the neighborhood of the cafe but that after the murder he did not do so.

Two matters of evidence must now be mentioned upon which the prosecution appears to attach particular significance. The first of these is the so-called "hoax" of the defendant four days after discovery of the crime when he represented to the police and so testified at the trial, that he had been attacked at his apartment during the night, knocked out, and that when he woke up he found himself tied with a towel and with a quilt over his head which quilt was burning. Police officers testified that the defendant later told them, "Well I made it all up myself, it did not happen." The defendant testified that as many as five police officers got him down in a corner, that "one of them kept trying to punch me in the stomach," and that to keep them away defendant finally said, "Well, have it your own way."

Expert testimony was offered tending to show that a certain written memorandum or so-called bill of sale listing articles which Mrs. Struck had not sold to the defendant preparatory to her anticipated leaving, had been altered, erased and rewritten, the suggested effect of such alteration being that the paper had originally been "an informal bill of sale by Mrs. Struck to the defendant of certain of her articles in the cafe, including the ice box which defendant moved on March 25, 1943, to the Hurry Back Cafe, and given in exchange for the $350.00 that the defendant paid to Mrs. Struck,—if in fact he ever did pay it to her, * * *" as stated in respondent's brief, and that by such alteration the defendant "could avariciously benefit even by Mrs. Struck's death and get her property as against her estate, particularly the last of her two ice boxes." There was no evidence as to when such alleged alterations were made, whether the alteration was authorized or not, or whether it was intended as a mere memorandum or otherwise. Appellant's brief suggests that "It is not without significance that appellant showed the instrument to the prosecution witness Salatich, not only while Mrs. Struck was alive but under circumstances that rendered it exceedingly probable that its execution would be mentioned to her."

There was testimony by a cook, referred to as "3-fingered" Jack Branum, to the effect that he had expected to go into the kitchen of Oh Johnnie's Cafe on April 1, 1943 and operate it for Steve Salatich; that the defendant told Branum that Mrs. Struck was still in the cafe and "it didn't look like he could get her out" and said "If you will go down there and get that contract (between Mrs. Struck and defendant), put it in your pocket and bring it up here, I will pay you double what I owe you." (Branum had previously been cook for two men, Forbes and Burkes, who had operated the Oh Johnnie's Cafe, and claimed that the defendant should pay him $135 wages which said men had failed to pay.) This proposal to steal the contract Branum says he spurned with extreme indignation; that thereafter, on the street, Branum asked Weatherford for money and the latter said, "Do you want to make some money? * * * I will give you $2500.00 to get rid of that woman * * * Any way you can, for good," whereupon Branum "blew up" and left, saying, "If you could pay $2500.00 why don't you pay part of what you owe me", to which remark the defendant did not say anything. On cross-examination the witness Branum admitted that he did not like defendant, that there had been other arguments about the $135, that Branum had "cussed him out", called the defendant an old tightwad, and "told him he wouldn't pay a graveyard debt."

The defendant produced two witnesses who testified that the reputation of "3-fingered" Jack Branum for truth, honesty and integrity was bad and that witnesses would not believe Branum under oath.

Finally, the prosecution relied upon evidence showing that on November 3, 1943, police officers entered the defendant's apartment after pounding on the door and ringing the bell without response, and upon observing a moving shadow, went out on the roof where they saw the defendant running; that defendant said, "Don't shoot; don't shoot. I thought it was hold up men." In the apartment were found memoranda such as, "Mail letter. Pay gas Pay water," which defendant explained by saying that they were for his wife, that the Grand Jury had reopened its investigation and defendant was arranging his affairs so as to be prepared to go down to the District Attorney's Office. At that time the defendant had about $1400 in his pocket, and explained that "it is not unusual for me to carry money in my pocket, because I do a good deal of collecting"; that he was working in the cafe every day and every night, sleeping in the daytime, and didn't take time to go to the bank.

The briefs of appellant and respondent direct special attention to an alleged error of the trial judge in giving instructions to the jury in the absence of the defendant and his counsel. The record discloses that during the deliberations of the jury the forewoman requested the bailiff to ask the judge "Whether or not it was the duty of the prosecution or the defense to put the defendant on the scene," or according to another version "whether it was incumbent upon the prosecution to show the whereabouts of the defendant on April 5, 1943, or whether such duty rested upon the defense." The bailiff relayed such message to the trial judge and was told by the judge to advise the jury *"that they were not concerned with anything that was not in the evidence or the law as given to them by the court."* The bailiff so advised the forewoman in the presence of all the jurors, whereupon one juror said to the bailiff, "In other words, the rest of it isn't any of our business," or said, "In other words, its none of our business," to which the bailiff replied, "I guess that's it" or "That's just about it." Defendant's attorneys were not present during this procedure and were not advised concerning what had taken place.

[1] It is obvious that the procedure adopted by the trial court did not comply with Section 1043 of the Penal Code which provides that "If the prosecution be for a felony, the defendant must be personally present at the trial", and was in direct conflict with the procedure specified in Section 1138 of the Penal Code which reads as follows: "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the cause, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the district attorney, and the defendant or his counsel, or after they have [been] called."

[2] The respondent contends, however, that any error in this regard should be regarded as harmless, citing the case of People v. Alcalde, 1944, 24 Cal.2d 177, 189, 148 P.2d 627, 632, (1944) in which it appeared that the jury foreman sent to the judge a signed note asking, "May we render a decision of life imprisonment *and not eligible for parol?"* on which paper the judge made the notation, "The answer is 'No.'" The Supreme Court held the error harmless for the reason that "in this instance the court could not have responded by any other answer than 'No' or its equivalent, namely, that the jury was to be guided solely by the instructions already given." In that case the reviewing court had held that "the sufficiency of the evidence to prove premeditated murder may not fairly be questioned. The record is otherwise sufficient to support the conclusion of the jury that the inferences to be drawn therefrom were consistent with the defendant's guilt and inconsistent with any other rational hypothesis." It should also be noted that the Alcalde case stated *"that courts are practically unanimous in holding that private communications between court and jury are improper, and that all communications should be made in open court.* Dodge v. United States, 2 Cir., 258 F. 300, 169 C.C.A. 316, 78 A.L.R. 1510." From this and other cases it is apparent, therefore, that the practice in question is clearly bad, and as in the case of other error, the reviewing court must decide whether, under the facts of a particular case, such error can, in fairness to the defendant, be deemed harmless. Article VI, Sec. 4½ of the California Constitution provides that "No judgment shall be set aside * * * for any error as to any matter of procedure, unless, after an examination of the

entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." And, as was said in People v. Wilson, 23 Cal.App. 513, 524, 138 P. 971, 975, "The phrase 'miscarriage of justice' does not simply mean that a guilty man has escaped, or that an innocent man has been convicted. It is equally applicable to cases where the acquittal or conviction has resulted from some form of trial in which the essential rights * * * were disregarded or denied. The right of the accused in a given case to a fair trial, conducted substantially according to law, is at the same time the right of all inhabitants of the country to protection against procedure which might at some time illegally deprive them of life or liberty." While it is true that in the Alcade case previously cited and elsewhere, various errors have been deemed harmless in view of the overwhelming evidence of guilt, it is equally true, as the reverse of that proposition, that where the evidence of a defendant's connection with the crime charged, is weak, relatively unsatisfactory or approaching the borderland between guilt and innocence, a definite error in procedure may well be sufficient to turn the scales against a defendant who, without the interposition of such error, would have been acquitted. So in the present case, where the evidence was largely circumstantial; where proof of the defendant's presence at the scene of the crime rested upon the testimony of a frightened, fifteen year old boy who merely observed a man's arm clothed in grey, and who did not recognize the man's voice; where no bloody garments, weapons or incriminating objects were found in defendant's possession; where there were no confessions of guilt; and finally where many if not most of the alleged incriminating circumstances were as consistent with innocence as with guilt, the error in question cannot be regarded as having been without prejudice. During their deliberations the jurors sought the advice of the trial judge on a question of the most vital importance,—whether it was incumbent on the prosecution or on the defense to show the whereabouts of the defendant on the date of the murder. To this legitimate request, an answer was returned by the judge which, through collaboration of the bailiff and one of the jurors seems to have been interpreted as meaning, "In other words, its none of our business." The instruction in question was given privately without the presence of or notice to the defendant or his counsel, in direct conflict with Section 1138 of the Penal Code; furthermore it left the jurors in darkness concerning an important matter of evidence about which they were in doubt. In view of the inconclusive nature of the evidence and since the jurors may have drawn the conclusion from the instruction that evidence of the whereabouts of the defendant was not a matter with which they were to be concerned, the procedure in question must be considered reversible error.

[5] Appellant also complains that the court erred in giving pamphlet instructions to the jurors in advance of the trial and outside the presence of the defendant and his counsel. The booklet in question contained fifteen printed pages and was entitled "General Instructions concerning the duties and responsibility of trial jurors in the criminal departments of the Superior Court of Los Angeles County, California. Read and Study Them Carefully." Not only did such instructions deal with the general duties of jurors but they also contain captioned sections purporting to explain in considerable detail such matter as "Direct and Circumstantial Evidence", "Credibility of Witnesses", "Impeachment of Witnesses", "Declarations of the Accused." At the hearing of the motion for new trial the trial judge stated, "It happens to be a matter within the court's knowledge that these particular instructions were drafted at the request of the Judicial Council * * * and would have been printed for distribution throughout the state * * * but for the fact the Judicial Council did not have the finances to do it." It is the respondent's contention that distribution of such pamphlet to the entire jury panel was neither erroneous nor prejudicial but "a step in the right and intelligent direction." Such contention cannot be upheld, particularly in view of the fact that the pamphlet contained certain statements entirely inapplicable to the case on trial, such as the following: "A verdict of guilty does not necessarily mean a term of imprisonment in the state prison, but may, in some cases, result in a county jail sentence, a fine, or proceedings under the provisions of the probation law."

In People v. Cowan, 44 Cal.App.2d 155, 160, 112 P.2d 62, 65, jurors had been given a printed pamphlet of general instructions but there was "no showing as to what these general instructions were and nothing to indicate whether or not any possible prejudice could have resulted", consequently the reviewing court was unable to decide whether such practice was a denial of due process of law. In People v. Tennant, 32 Cal.App.2d 1, 7, 88 P.2d 937, 940, also cited by respondent, the trial judge, half an hour before the trial commenced, in the absence of the defendant but in the presence of one of his counsel, "gave the assembled veniremen a short summary of the general duties of jurors" and told them, "This is not intended, nor shall it be considered by you as being an instruction in any case, but merely an outline of your duties * * *." Where "a jury satisfactory to appellant was thereafter selected from this venire after exhaustive voir dire examination, and proper instructions * * * were given to that jury at the conclusion of the trial" it was held that the appellant was not entitled to complain.

In the instant case the pamphlet instructions are before the court. They were not a mere "short summary of the general duties of jurors" but detailed instructions on matters of law; they were apparently not seen by defendant or his counsel nor were they given in defendant's presence. Section 1127 of the Penal Code provides that "All instructions given (except such as may incidentally be given during the admission of evidence) shall be in writing, unless both parties request the giving of an oral instruction, or consent thereto." Nowhere is there any provision for the giving of *printed* instructions to the jury before the trial, as was done in this case, and until the legislature sees fit to change the present law, within constitutional limitations, the procedure followed in the instant case must be deemed a violation of the defendant's fundamental constitutional rights.

[6, 7] The impaneling of a jury is an important step in the trial itself, and the error in question is subject to consideration on an appeal from the judgment of conviction. The fact that the same jury panel may be employed in the trial of various cases during the period of jury service, does not affect the right of a defendant in a particular case to full compliance with the constitutional provisions; the impaneling of the jury in the first instance is as much a stage in the proceedings as the drawing of the jury on the day of trial. Ordinarily, the first appearance and selection of a jury panel is more or less perfunctory and the routine limited to but one function. Where, however, that routine is departed from and the panel is given general instructions that may or may not be appropriate in succeeding trials for which members of the panel may be chosen, an entirely different situation is presented. That prejudicial error could, and might be likely to, result from such practice, there can be no question. And this is especially true where pamphlets are so distributed.

[8] Moreover, the justice and wisdom of the doctrine that a defendant in a criminal action is entitled to be tried by "a jury of his peers", which means his equals, has never been disputed. The foregoing doctrine, in effect, denounces professional jurors or jurors specially educated or prepared for such service. Hidden notions of superiority or importance are qualities against which a defendant is not required to be on guard. The law contemplates for a defendant in a criminal action, a jury of his "peers" and not his betters or superiors, actual or presumed. The distribution of such pamphlets to a jury panel, however well intended, is not authorized by the law. Manifestly, such instructions given under the apparent authority of the court would be regarded as binding when, as a matter of law, the only binding instructions are those given at the trial. The defendant's counsel in a criminal action cannot be expected nor required to uncover prejudice resulting from such procedure. And to regard such a practice trifling is to ignore the basic doctrines of criminal jurisprudence.

The due process provision of the Fourteenth Amendment bears no resemblance to mere procedure. The right of a defendant in a criminal action to be present at all stages of the proceeding has been uniformly upheld. The only exception appears to be in the state of Massachusetts where, in the trial of a criminal action, a view of the premises by the jury, in the absence of the defendant, was held not to be in violation of the Fourteenth Amendment. Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674, 675, 90 A.L.R. 575. Such conduct was held to be valid, however, by reason of a state statute, a reason which does not apply in California. But, even in the Snyder case, the Supreme Court was divided. A dissenting opinion by Mr. Justice Roberts, concurred in by Justices Brandeis, Sutherland and Butler disputes the prevailing opinion despite the Massachusetts statute referred to. The reasoning in the dissenting opinion is especially applicable to the situation here presented.

[9] In the light of the record it must be held, as a matter of law, that the error referred to materially and adversely affected the substantial rights of the defendant. Abuse of statutory and constitutional guaranties, in such circumstances, are not errors "as to any matter of procedure" from which Section 4½ of the Constitution provides an escape. The denial, in a criminal action, of constitutional and substantive statutory rights of the accused constitutes an error that in no sense is procedural. In People v. O'Connor, 81 Cal.App. 506, 254 P. 630, 636, appears the following, "In the case of People v. Carmichael, 198 Cal. 534, 246 P. 62, the Supreme Court, quoting from People v. Wismer, supra [58 Cal.App. 679, 209 P. 259] followed the ruling had in that case and reaffirmed the statement that section 4½ of article VI cannot be relied upon to prevent reversal where the defendant has been deprived of a fundamental right in the impanelment of a jury." Although the term "procedure" is difficult to describe or define in its modern sense as applied to the law, nevertheless, it must of necessity have a definite meaning as used in Section 4½ of the California Constitution. Black's Law Dictionary, 2d Ed., page 947 contains the following definition, "This word is commonly opposed to the sum of legal principles constituting the substance of the law, and denotes the body of rules, whether of practice or of pleading, whereby rights are effectuated through the successful application of the proper remedies. * * *" The law of procedure is what is now commonly termed by jurists "adjective law". Bouvier's Law Dictionary, Rawle's Third Revision, vol. 2, at page 2729, with regard to the word "procedure" contains the following, "The methods of conducting litigation and judicial proceedings. 'Practice,' like 'procedure,' which is used in the Judicature Acts, denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which, by means of the proceeding, the court is to administer; the machinery, as distinguished from its product. The word "adjective" in the phrase "adjective law", manifestly must be held to mean "something added to a substantive as an attribute; in the nature of an adjunct" or, as further defined, "not standing by itself; dependent". In other words the use of the word "adjective" distinguishes the law referred to from what is commonly understood as substantive law. It is in this sense that the word procedure appears to be used in Section 4½ of the Constitution.

The record in the within action reveals that the pamphlet distributed to the jurors contained a variety of instructions wholly inapplicable to the issues involved. It cannot be assumed, in the circumstances, that they were not confusing, misleading and prejudicial.

Also assigned as error is the exclusion of the testimony of the witness Orpha Hayden concerning declarations by Mrs. Struck, made to the witness some two weeks before the murder, as to the intention of the deceased to move from the cafe, etc. After testifying to an acquaintance with Mrs. Struck whom the witness saw "practically every day," an offer of proof was made to prove that the "witness had a conversation with Mrs. Struck about two weeks before April 3rd, at which time Mrs. Struck told her that she sold Mr. Weatherford an ice box and other trinkets in Oh Johnnie's Cafe for $350.00; that she received $350.00 in cash from Weatherford; that she asked Mrs. Struck whether Weatherford paid her in cash or check, and she said that he had money in a money belt. Then the witness asked Mrs. Struck why she kept money around there in such large amounts, and Mrs. Struck replied that money was in a safe deposit in a bank. This witness will further testify that Mrs. Struck told her that she was going to leave Oh Johnnie's Cafe, give up her business there, in two weeks, because she had sold out her interest in there to Mr. Weatherford. * * * Yes, this witness will further testify that Mrs. Struck told her because she sold her business and was through down there she was going to take her trailer and go up in the mountains, and invited the witness to be with her, spend some time as a friend, take a rest." To which the court replied, "Objection sustained. That is purely hearsay, recital of a past fact. * * * You cannot prove motive or the absence of motive by hearsay testimony. So far as declarations as to where she intended to go, the intent of the deceased is not in issue, because there is no evidence as to her having gone anywhere. * * *"

[10-12] In People v. Alcalde, 1944, 24 Cal.2d 177, 185, 187, 148 P.2d 627, 632, cited

in support of the argument that such evidence should have been admitted, a declaration of the decedent "that she was going out with Frank (the defendant) that evening stated a present intention to do an act in the future," and was held admissible "for the limited purpose of showing the decedent's intention." The reviewing court further said that, "Elements essential to admissibility are that the declaration must tend to prove the declarant's intention at the time it was made; it must have been made under circumstances which naturally give verity to the utterance; it must be relevant to an issue in the case." While such statements "are not, strictly speaking, part of the transaction" so as to be encompassed within Section 1850 of the Code of Civil Procedure and therefore admissible on that ground, "They more properly fall within section 1870, subdivision 15, as one of 'Any other facts from which the facts in issue are presumed or are logically inferable.'" It is recognized in the Alcalde case, as it is in the briefs of both appellant and respondent herein, that declarations made by a decedent are only admissible as exceptions to the hearsay rule,—in the present case as in the Alcalde case, for the limited purpose of showing the declarant's intention. It is contended by the respondent that in the instant case the matter of deceased's intention was not relevant to any issue and therefore that declarations showing an intention to leave the cafe were inadmissible. However, it is to be noted that the excluded declarations of Mrs. Struck to the witness Orpha Hayden, concerning the former's intention to vacate the cafe because of the fact that the deceased had sold out to the defendant for $350, related directly to the two chief motives for the murder as set forth in respondent's brief, namely (1) that defendant murdered Mrs. Struck because she had refused to vacate and did not intend to leave, and (2) that defendant committed the murder as a part of an "Avaricious plan to possess most of Mrs. Struck's property * * *", in connection with an alleged forgery or alteration of a memorandum listing the items of equipment which Mrs. Struck was to keep. If, therefore, it be assumed for the purpose of argument, that Mrs. Struck did intend to leave the Oh Johnnie's Cafe, as indicated by her declarations, and that she had actually been paid $350 by the defendant for her equipment so that she would move, then it must follow that the motives relied upon by the prosecution lose their force and effect; the alleged forgery by the defendant becomes immaterial, and the appellant's testimony as to his purchase of the restaurant equipment, receives corroboration. While it is undoubtedly true, as declared in People v. Planagan, 1944, 65 Cal.App.2d 371, 150 P.2d 927, 943, that "When the perpetration of the crime has been brought home to the defendant, the motive for its commission becomes unimportant", nevertheless the "absence of motive tends to support the presumption of innocence," People v. Albertson, 23 Cal.2d 550, 567, 145 P.2d 7, 15, quoting from People v. Tom Woo, 181 Cal. 315, 328, 184 P. 389; or as said in People v. Kelley, 208 Cal. 387, 390, 281 P. 609, 610, "The absence of proof of motive is a fact to be reckoned on the side of innocence." The matter of motive, therefore, and the deceased's intention as bearing on the motives alleged in the instant case, were clearly relevant to the issues created by the prosecution. Finally, it may be said that the declarations in question appear to meet the limitations suggested in Wigmore on Evidence, 3d Ed., Sec. 1725, "namely the statements must be of a present existing state of mind, and must appear to have been made in a natural manner and not under circumstances of suspicion." Many cases are there collected in which this type of evidence has been admitted. In view of the peculiar state of the evidence in this case it cannot well be doubted that the jury's consideration of these declarations as indicative of Mrs. Struck's intention, had they been admitted, might reasonably have resulted in an acquittal. The error must therefore be deemed prejudicial. Appellant also contends that the court erred in instructing the jury on matters of law, and in particular complains of an instruction defining the crime of forgery and permitting the jury to consider evidence of the alleged forgery by defendant "as a circumstance going towards the motive for the commission of the crime with which he is charged, or as a fact and circumstances which might tend to connect the defendant with the commission of the crime with which he is charged." In this connection attention is called to the fact that the trial court refused all of the defendant's requested instructions, numbered 1 to 13, as not applicable, not the law, or as covered by the instructions given, endorsing the refused requests accordingly. While it is true that some of the requested instructions might well have been given, and that the instruction hereinbefore quoted, standing alone, may have tended to unduly emphasize the alleged forgery by the defendant, nevertheless, in view of the comprehensive charge given, viewed as an entirety, it cannot be said that the defendant herein has suffered any material prejudice in this respect.

[13] The same may be said with regard to the appellant's argument that the court erred in keeping the jury out from 10 a. m. on February 14, 1944 to the hour of 3 p. m. on February 21, 1944. Since the jury did not deliberate on Saturday or Sunday the actual time is reduced to six days, during which period an alternate juror was substituted when one of the jurors became ill. It further appears that for 4 hours and 55 minutes during Thursday morning and afternoon testimony was read to the jury by the court reporter. Note may also be taken of the point suggested by the respondent, that the alternate juror, substituted on February 18th, was entitled to a reasonable amount of time, after substitution, to deliberate with the jury. The only case cited by appellant in support of this assignment of error is Clemens v. Chicago, R. I. & P. R. Co., 163 Iowa 499, 144 N.W. 354, in which case after the jury had been out 50 hours it was given an instruction which was held to be coercive and then kept out for another 20 hours. However in People v. Selby, 76 Cal.App. 715, 719, 245 P. 792, 793, a conviction was affirmed although "nearly 71 hours had elapsed," and in People v. Phillips, 120 Cal.App. 644, 658, 8 P.2d 228, 233, the court said: "The mere fact that the jury was kept out for seventy-eight hours before they reached a verdict is not sufficient to show that the jury was coerced into a verdict." In People v. Montgomery, 32 Cal.App.2d 43, 48, 89 P.2d 184, 186, the court said, "We are unable to adopt the view of appellant that any reasonable inference, either in favor of, or against appellant, could be drawn from the fact that the jury took a considerable length of time in which to reach a conclusion." The amount of time consumed by the jury in the instant case, estimated as being slightly over 39 hours during a period of six days, appears to be more moderate than that held unobjectionable in other cases. See also 23 C.J.S., Criminal Law, § 1381, p. 1059, note 88.

[14, 15] In reference to appellant's final contention that the trial court erred in substituting an alternate juror for a juror who became ill after the jury had deliberated for four days, it is admitted by appellant's counsel that a similar issue had been decided to the contrary in People v. Love, 21 Cal.App.2d 623, 70 P.2d 202, and in People v. Lanigan, 22 Cal.2d 569, 140 P.2d 24, 148 A.L.R. 176. It appears from the record in the instant case that defendant's counsel waived proof of the juror's physical disability, and no objection to the substitution of the alternate juror seems to have been made. The substitution was effected pursuant to Section 1089 of the Penal Code which provides that, "If at any time, *whether before or after the final submission of the case* to the jury, a juror die or become ill, so as to be unable to perform his duty, * * * the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors." (Italics added.) With reference to the constitutionality of such section and the italicized amendment, the Supreme Court of this state, in People v. Lanigan, 22 Cal.2d 569, 578, 140 P.2d 24, 29, 148 A.L.R. 176, said: "The constitutionality of those provisions was sustained in People v. Peete, 54 Cal.App. 333, 202 P. 51, where it was held that the right to be tried by a jury of twelve was not thereby infringed. * * * The amendment was upheld in People v. Von Badenthal, 8 Cal.App.2d 404, 48 P.2d 82, 84, where an alternate was substituted 'after the jury had been deliberating for some time without arriving at a verdict.'" The present contention is therefore without merit.

[16-18] With regard to appellant's argument that, "There is not a single fact from which an inference of guilt could be made", the following rule stated by the trial judge at the hearing of defendant's motion for new trial, would seem to be applicable: "that where the evidence as between guilt and innocence is close, where there is room for some doubt, even though not room for a reasonable doubt, from the standpoint of the trial court and the Appellate Court, and I think properly, they should scrutinize alleged errors more closely than in those cases in which the evidence was convincing and no other result was reasonably probable." In reference to circumstantial evidence may be noted People v. Lamson, 1 Cal.2d 648, 653, 36 P.2d 361, 363: "Resting its case upon circumstantial evidence, the prosecution

must not only show a set of circumstances consistent with guilt, but * * * inconsistent with any reasonable theory of innocence." Likewise, attention is called to the case of People v. Albertson, 23 Cal.2d 550, 580, 145 P.2d 7, 22, where the Supreme Court held that "Circumstantial proof of a crime charged cannot be intermingled with circumstantial proof of suspicious prior occurrences in such manner that it reacts as a psychological factor with the result that proof of the crime charged is used to bolster up the theory or foster suspicion in the mind that the defendant must have committed the prior act, and the conclusion that he must have committed the prior act is then used in turn to strengthen the theory and induce the conclusion that he must also have committed the crime charged."

For the foregoing reasons the judgment appealed from is reversed and the cause remanded for a new trial.

YORK, P. J., and DRAPEAU, J. pro tem., concur.

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69 Cal.App.2d Supp. 814

PEOPLE v. POSTMA.

C. A. 6001.

Appellate Department, Superior Court,
Los Angeles County, California.
June 21, 1945.

1. Pleading 🔑8(6)

An allegation in complaint seeking to have money seized by arresting officers declared forfeited to state under statute providing for forfeiture of money and property offered for sale or distribution in violation of statutes relating to lotteries, that the sum "had been and was then and there being offered by such defendants, their agents, servants and employees for distribution in the operation and conduct of said books as aforesaid" in violation of statutes relating to lotteries, was but a conclusion of law, and added nothing to complaint as against a demurrer. Pen. Code, §§ 319, 325.

2. Lotteries 🔑3

Under statute, three elements are necessary to constitute a "lottery," namely, the disposition of property, upon a contingency determined by chance, to a person who has paid or promised to pay a valuable consideration for the chance of winning the prize, and upon understanding that it will be disposed of by chance. Pen. Code, § 319.

See Words and Phrases, Permanent Edition, for all other definitions of "Lottery".

3. Gaming 🔑62
Lotteries 🔑3

"Gaming," "betting" and "lotteries" are separate and distinct things in law and fact, and call for different treatment and varying penalties.

4. Lotteries 🔑3

A complaint which showed that defendants were engaged in bookmaking on horse races, under a plan whereby defendants accepted individual bets and paid winners regardless of amount of money defendants might have received from other betters, failed to establish that defendants were conducting a "lottery," so as to authorize forfeiture to state of money seized by arresting officers. Pen.Code, §§ 319, 325, 337a.

Appeal from Municipal Court of Los Angeles; Lucius P. Green, Judge.

Proceeding by the People of the State of California against William Postma to have forfeited to the State under section 325 of the Penal Code the sum which was seized at time of defendant's arrest. From a judgment sustaining a demurrer to the complaint, the plaintiff appeals.

Affirmed.

Fred N. Howser, Dist. Atty., and J. J. Sullivan and A. Alexander, Deputy Dist. Attys., all of Los Angeles, for appellant.

William G. Kenney and William Mayhew, both of Los Angeles, for respondent.

SHAW, Presiding Judge.

This is an appeal by the plaintiff from a judgment entered against it after the sustaining of a demurrer to the complaint. The complaint purports to be filed under section 325 of the Penal Code, which provides that "All moneys and property offered for sale or distribution in violation of any of the provisions of this chapter are forfeited to the state, and may be recovered by * * * any action brought * * * by any district attorney, in the name of the state." The provisions of the chapter referred to relate only to lotteries, which are defined by section 319, a part of the chapter, as follows: "A lottery is any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share or any interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift-enterprise, or by whatever name the same may be known."

The question for consideration is whether the complaint shows that defendants were conducting a lottery, as so defined. It alleges that defendants were engaged in bookmaking on horse races which were run at various tracks in the United States. They had scratch sheets, betting markers and all the usual paraphernalia of such a place. "[P]ersons known as bettors * * * would select horses upon which horses such bettors would then lay, make and place bets in money. Said defendants would then accept such bets and wagers." Bets were placed on a horse to "win," "place" or "show," and defendants made a record of them. Although the complaint does not directly so allege, apparently the amounts bet by these bettors were deposited with the defendants, for "All money bet on horses not completing the races as indicated by the bettors was kept by the defendants." The odds or prices paid bettors making bets on winning horses were determined at the race tracks at which the respective winning horses raced. The description of the manner in which this was done at the tracks shows that it was by what is commonly known as the pari-mutuel system. These odds or prices were relayed to defendants and they "would then, in cash, pay a similar price to such bettor who had bet on the winning horses." It is obvious from the allegations above reviewed that defendants paid the winning bettors the amounts determined at the tracks, regardless of the total amount of the bets placed with them, and even though on any particular race such amount was not sufficient to pay the winners.

[1] Defendants were arrested on September 18, 1944, the cause of the arrest not appearing, and the arresting officers then seized and took possession of the sum of $634, which "had been and was then and there being offered by said defendants, their agents, servants and employees for distribution in the operation and conduct of said 'book' as aforesaid in violation of the provisions of,"—citing the parts of the Penal Code above mentioned. The allegation just quoted is but a conclusion of law and adds nothing to the strength of the complaint against a demurrer. Smith v. Bentson, 1932, 127 Cal.App.Supp. 789, 793, 15 P.2d 910. The question of lottery or no lottery must be determined from the allegations showing defendants' actual mode of operation.

[2] Under our statute, three elements are necessary to constitute a lottery: (1) The disposition of property,—the prize—, (2) upon a contingency determined by chance, (3) to a person who has paid or promised to pay a valuable consideration for the chance of winning the prize, and upon the understanding that it will be disposed of by chance. People v. Hecht, 1931, 119 Cal.App.Supp. 778, 784, 3 P.2d 399; People v. Cardas, 1933, 137 Cal.App. Supp. 788, 790, 28 P.2d 99; People v. Babdaty, 1934, 139 Cal.App.Supp. 791, 793, 30 P.2d 634; Niccoli v. McClelland, 1937, 21 Cal.App.2d Supp. 759, 762, 763, 65 P.2d 853. If any of these elements is lacking, there is no lottery. People v. Hecht, supra.

The Supreme Court of Arizona, considering a case which was substantially the same as that before us, as far as the activities of the bookmaker are concerned, held that the bookmaker there was not conducting a lottery. Its decision to this effect was based on its conclusion that horse racing is not a matter of chance, or at least chance is not its dominating element. Engle v. State, 1939, 53 Ariz. 472, 90 P.2d 988, 993. The court's definition of a lottery was substantially the same as that above set forth from our Code. In other cases it has been held that the operation of the pari-mutuel system of betting on horse races does not constitute a lottery, for the same reason, that the winnings are not determined by chance. Commonwealth v. Kentucky Jockey Club, 1931, 238 Ky. 739, 38 S.W.2d 987, 992; People v. Monroe, 1932, 349 Ill. 270, 182

N.E. 439, 85 A.L.R. 605, 613; Utah State Fair Ass'n v. Green, 1926, 68 Utah 251, 249 P. 1016, 1022, 1023. In each of these cases the question for decision was whether a statute authorizing the pari-mutuel system of betting on horse races violated a constitutional provision forbidding lotteries, and it was held not to do so, for the reason stated. In the Utah case the principal stress is laid on a constitutional prohibition of games of chance, which on examination is found to run against lotteries also, and the statute was held to violate neither prohibition. In People ex rel. Laurence v. Fallon, 1897, 152 N.Y. 12, 46 N.E. 296, 37 L.R.A. 227, 229, 57 Am. St.Rep. 492, it was held that a statute authorizing horse racing for prizes did not violate a constitutional prohibition of lotteries, because the decision of a horse race does not rest on chance. There are cases holding that a horse race is a matter of chance, Irving v. Britton, 1894, 8 Misc. 201, 28 N.Y.S. 529, 531; State v. Lovell, 1877, 39 N.J.L. 458, 462; State ex rel. Sorensen v. Ak-Sar-Ben Exposition Co., 1929, 118 Neb. 851, 226 N.W. 705, 709, but they appear to be in the minority. See Commonwealth v. Kentucky Jockey Club, supra, where they are reviewed. But we do not find it necessary to decide in this case whether chance predominated, because for other reasons we conclude that there was no lottery.

The operations of defendants fell short of constituting a lottery under our statute for the reason that they did not involve "the disposal or distribution of property * * * among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property," as required by Penal Code, section 319. There was nothing put up as a prize. According to the complaint, the various "bettors" selected horses and upon them would "lay, make and place bets in money" and the defendants would "accept such bets." This shows simply betting or wagering, each bettor for himself dealing with the defendants as the other bettor. To be sure, the amount bet by the defendants was uncertain at the time the bet was made, but the mode for determining the amount was then known. A bet is not the less a bet because of uncertainty as to the amount. In re McDonald, 1927, 86 Cal.App. 362, 367, 260 P. 842. In this case it was held that sums put up by persons contributing to a pool much like that arising under the pari-mutuel plan were bets, and that the operators of the scheme were violating the provisions of section 337a of the Penal Code penalizing the making of bets on races and other contests. When two persons bet with each other, it cannot be said that either of them, or the stakeholder, if there is one, has offered any property for disposal or distribution to persons who have paid a consideration for the chance of obtaining it. Each bettor has put up his own property on a venture and at risk of losing it, but has not paid for the chance of winning that of the other bettor. This is true at least where but two persons or two opposing sets of persons are concerned in the bet, as here. In the case of a pari-mutuel pool to which many persons contribute, there are, perhaps (eliminating the question of chance), more persuasive reasons for considering the scheme a lottery than we find here. See State v. Ak-Sar-Ben Exposition Co., supra, 118 Neb. 851, 226 N.W. 705, 709, State v. Lovell, supra, 39 N.J.L. 458, 462, and Irving v. Britton, supra, 8 Misc. 201, 28 N.Y.S. 529, 531, where such a pool selling scheme was held to constitute a lottery; also People v. Reilly, 1883, 50 Mich. 384, 15 N.W. 520, 522, 45 Am.Rep. 47, and Reilly v. Gray, 1894, 77 Hun. 402, 28 N.Y.S. 811, 815, where the contrary was held.

[3, 4] We have no such pooling scheme presented here, but only individual bets, which defendants must pay to the winners regardless of the amount of money the defendants may have received from other bettors or even though they have received none at all, all bets being on the winning horse. As the court said in Commonwealth v. Kentucky Jockey Club, supra, 1931, 238 Ky. 739, 38 S.W.2d 987, 994, "Gaming, betting, and lotteries are separate and distinct things in law and fact, and have been recognized consistently as calling for different treatment and varying penalties. The distinctions are well developed, clearly marked and in most instances rigidly maintained." In other cases already cited, the courts have referred to other laws prohibiting betting or bookmaking as indicating an intention to distinguish between such matters and lotteries. Reilly v. Gray, supra; People v. Reilly, supra. In this state the same distinction may well be drawn. In Penal Code, section 337a, enacted in 1911, there is a very complete prohibition of bookmaking and

pool-selling on races, contests and matters of chance, and of betting on races and other contests. This section was first enacted in 1909, and while then not so extensive as now, it prohibited bookmaking and pool-selling on races, contests and matters of chance. If all these matters were already covered by the Code sections against lotteries, which had been in the Code since its enactment in 1872, it would not seem necessary to cover them again by these sections. But however that may be, the enactment of these special sections shows an intent to discriminate between lotteries on the one hand, and betting, bookmaking and pool-selling on the other, and is quite consistent with our conclusion here that the complaint fails to show that defendants were running a lottery.

The judgment is affirmed.

BISHOP and KINCAID, JJ., concur.

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70 Cal.App.2d Supp. 857

MOSS v. ALASKA PACKERS ASS'N.

No. 1665.

Superior Court of California, City and County of San Francisco.

April 3, 1945.

1. Seamen 🔑11(1), 16

A deck engineer was "in vessel's service" while on shore leave so as to be entitled to wages, maintenance and cure after leaving service of vessel on account of injury sustained when struck by persons unknown while drinking at a bar, since shore leave is an elemental necessity in the sailing of ships.

See Words and Phrases, Permanent Edition, for all other definitions of "In Vessel's Service".

2. Seamen 🔑4

Seamen's cases are liberally viewed by the courts and remedial legislation for the benefit and protection of seamen is liberally construed to attain that end.

3. Seamen 🔑11(1), 22

A corporation acting as general agent for United States to manage the business of a vessel taken over by United States and operated by War Shipping Administration and such agent, could not avoid liability for wages, maintenance and cure of a seamen injured while in vessel's service on ground that United States and not the corporation was owner of the vessel. Act Cong. March 24, 1943, 57 Stat. 45.

4. United States 🔑50, 78

Whatever the reciprocal rights, duties and obligations of the United States, the War Shipping Administration, and a private corporation acting as general agent of United States to manage the business of a vessel taken over by the United States and operated by War Shipping Administration and such agent, they are not the measure of the rights of third parties against any of them for their torts. Act Cong. March 24, 1943, 57 Stat. 45.

5. Seamen 🔑11(1), 22

The act of 1943 amending and clarifying the law relating to functions of the War Shipping Administration with respect to vessels taken over by the United States does not exempt a private shipowner from suit and under its provisions, the private shipowner and not the United States is to be considered as employer of seamen as respects liability for maintenance, cure, wages and damages. Act Cong. March 24, 1943, 57 Stat. 45.

◆

Appeal from Municipal Court of San Francisco, Department No. 1; Clarence W. Morris, Judge.

Suit by Shelton H. Moss against Alaska Packers Association, a corporation, to recover allowances for wages, transportation, maintenance and cure after leaving service of vessel which plaintiff of necessity had to abandon on account of an injury. Judgment for plaintiff, and defendant appeals.

Judgment affirmed.

Andersen & Resner, of San Francisco, for plaintiff and respondent.

Henry W. Schaldach and Edward R. Kay, both of San Francisco, for defendant and appellant.

MURPHY, Judge.

Shelton H. Moss, plaintiff and respondent, was a deck engineer on the Steam Ship Homer Lea, a ship owned by the United States of America and operated by and through the War Shipping Administration and the Alaska Packers Association, a corporation. The latter corporation is the defendant and appellant herein. The Alaska Packers Association acted as general agent for and on behalf of the United States of America in accordance with the terms of a General Agency Agreement (Exhibits B and C).

Plaintiff and respondent, on shore leave, having had five drinks of straight scotch whiskey in a bar at Hobart, Tasmania, was struck on the head by a person or persons unknown. He required and received immediate hospitalization in Tasmania. Thereafter he was returned to San Francisco on another vessel. He then sued the Alaska Packers to recover allowances for wages, transportation, maintenance and cure, after leaving the service of the Steam Ship Homer Lea, which he of necessity had to abandon on account of his injury. The United States of America was not joined in the suit, nor was the War Shipping Administration.

Appellant's position is that respondent Moss cannot recover allowances for wages, maintenance and cure because at the time of the injury he was not in the vessel's service, nor about its business, nor within the so-called "going and coming rule", but rather was pleasure bent.

Appellant also contends it cannot be held liable for wages, maintenance and cure because it is not the owner or operator of the vessel, but merely the general agent of the United States of America and that privity of contract, as evidenced by the shipping articles, was between the United States of America and plaintiff and respondent Shelton H. Moss, Deck Engineer.

Appellant also complains of certain instructions given by the trial court.

[1] Plaintiff and respondent was admittedly on shore leave, properly granted by the vessel's officers. In my opinion, he was "in service" while on shore leave.

To hold the agent liable only for injuries incident to the perils of the actual voyage is not consistent with the nature of the employment, nor with the custom among seafaring men. "Shore leave is an elemental necessity in the sailing of ships, a part of the business as old as the art, not merely a personal diversion." Aguilar v. Standard Oil Co. of New Jersey, 318 U.S. 724, 63 S.Ct. 930, 935, 87 L.Ed. 1107. The philosophy of the Aguilar case is sound.

When one considers the nature of a seaman's service to his vessel, including long days or weeks at sea, it would appear that shore leave is a necessity in the maintenance of the crew's morale, without which the efficiency of the ship's operations would be seriously impaired.

There is a complete absence of evidence of either misconduct or intoxication on the part of plaintiff and respondent. That he was injured in a bar while drinking is of itself insufficient to establish misconduct.

[2] Seamen's cases, just as railroad men's cases, have long been liberally viewed by the courts. In Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 431, 59 S.Ct. 262, 266, 83 L.Ed. 265, Chief Justice Stone wrote as follows: "Seamen are the wards of admiralty, whose traditional policy it has been to avoid, within reasonable limits, the application of rules of the common law which would affect them harshly because of the special circumstances attending their calling. * * * It is for this reason that remedial legislation for the benefit and protection of seamen has been liberally construed to attain that end."

It is to be noted that in the case before us, the agent, at least partially and for practical purposes to some extent, admitted its responsibility to plaintiff and respondent. Hotel, lodging and hospital bills in Hobart were paid; also his plane transportation to Australia, where the agent (Alaska Packers) maintained plaintiff and respondent. The Alaska Packers also gave him a $50 advance in San Francisco. With this in mind it is difficult to conjure a reason why the company should be permitted to avoid the completion of its obligation under the rules applicable to seamen's wages, cure and maintenance.

[3] The contention of appellant that it cannot be held liable for wages, maintenance and care because it is not the owner, but merely the general agent of the United States of America, is untenable for the following reasons.

Concededly, the United States of America owns the Steam Ship Homer Lea. Exhibit B, the service agreement, provides that the Alaska Packers Association is to maintain, manage and conduct the business of the ship. True, the master, provided by Alaska Packers, is designated in the agreement as an employee of the United States of America. But the agreement also sets forth that the ship's crew (including plaintiff and respondent) be obtained in accordance with customary practices. Thus, plaintiff and respondent, a seaman and member of the

Marine Firemen's Union, was sent, as is regular and customary, from his union hiring hall to the ship, where he reported to his superior, the first engineer.

The Assistant Secretary of the Alaska Packers testified that the crew's wages, including the wages of plaintiff and respondent, were paid by subagents of the company, even though the money came from the government.

It is further to be remarked that the union agreement with Alaska Packers provides that the company is to employ through the union, which it did. This was the practice prior to ownership by the United States of America of any ships. There was no change in that operation with the advent of war.

The statement of policy announced by the War Shipping Administration, in explanation of that part of the service agreement having to do with the hiring of merchant seamen, specifically provides that agreements between unions and private ship owners be continued and that seamen be employed pursuant to such agreements. It would seem, therefore, that the spirit of the agreement, as well as its letter, is that seaman retain their status as servants of the private ship owners.

[4] In our case, the plaintiff and respondent went directly to the company and the vessel. He had no dealings with the War Shipping Administration or the United States of America. It is reasonable to assume he was not more than vaguely cognizant, if at all, of any relation between the War Shipping Administration, the United States of America, and the company. There was not the slightest suggestion or intimation that the seaman was an employee of the United States of America. He was a sea-faring man. He looked to his company, his ship and his officers to pay him and protect him. This, under the facts presented, he had a right to do, and a duty to do nothing more. Whatever the reciprocal rights, duties and obligations of the United States of America, the War Shipping Administration, and the Alaska Packers Association, they are certainly not the measure of the rights of third parties against any of them for their torts. In this connection, attention is called to the language in Brady v. Roosevelt Steamship Co., 317 U.S. 575, 63 S.Ct. 425, 428, 87 L.Ed. 471, which is applicable: "The liability of an agent for his own negligence has long been imbedded in the law. * * * 'An instrumentality of the goverment he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts.'"

[5] Appellant raises the point that Public Law 17, Act of March 24, 1943, 78th Congress, 57 Stat. 45, makes only the United States suable. It is my opinion that this law does not exempt the private ship owner from suit. Public Law 17 provides that seamen shall have the same rights they always had. They are not to be classified as employees under federal compensation laws. The law also reads that claims for maintenance, cure, wages and damages shall be presented to the private ship owner and not to the United States of America. Thus, the law examined in its entirety leads me to conclude that the private ship owner and not the United States of America is to be considered as the employer.

I find no error in the instructions. That the Alaska Packers Association may make and be responsible for its own contracts with its employees has been sufficiently adverted to herein. To hold that the injuries must be sustained within the so-called "going and coming rule" is to place a narrow and stringent construction upon the reasoning in the Aguilar case, supra.

For the foregoing reasons I believe the judgment should be affirmed.

FRITZ, J., and GRIFFIN, P. J., concur.

26 Cal.2d 656

PEEBLER et al. v. OLDS et al.
L. A. 19063.

Supreme Court of California.
June 29, 1945.

1. Appeal and error 🔑772

The reviewing court has a broad power to grant relief from default in failing to file opening brief within required 30-day period. Rules on Appeal, rule 16(a), 17(a), 53(b).

2. Appeal and error 🔑773(3)

Where, at time of filing motion to dismiss appeal because of 11-day default in filing of opening brief, motion to strike reporter's transcript was also filed, uncertainty as to whether transcript would be stricken excused further delay in filing opening brief so that appeal would not be dismissed because of such delay. Rules on Appeal, rules 16(a), 17(a).

3. Appeal and error 🔑2

Where notice of appeal was filed before effective date of Rules on Appeal, law in effect prior thereto governed motion to strike reporter's transcript. Rules on Appeal, rule 53(b).

4. Appeal and error 🔑607(1)

Prior to effective date of Rules on Appeal, notice requesting a reporter's transcript was not jurisdictional and delay in giving such notice could be excused by trial court.

5. Appeal and error 🔑629

Prior to effective date of Rules on Appeal, matter of diligence in preparation of record was almost entirely committed to trial court's discretion, and its action in certifying a belatedly prepared reporter's transcript relieved appellants of any asserted lack of diligence.

6. Appeal and error 🔑629

Delay, consequent upon objections to proposed bill of exceptions and absence of trial judge because of illness, justified trial court in relieving appellants from effect of delay in obtaining reporter's transcript.

7. Appeal and error 🔑624

Under Rules on Appeal, trial court may extend time for completing record only for limited period upon application made before expiration of any prescribed time, and cannot grant relief from default, which is exclusively for reviewing court.

TRAYNOR, J. dissenting in part.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Byron Peebler and another against B. C. Olds and others. Judgment for the plaintiffs, the defendants appeal and motions were filed to strike the reporter's transcripts and to dismiss the appeal.

Motions denied.

Prior opinion 152 P.2d 345.

J. M. Danziger, in pro. per., and H. A. Andrews, both of Los Angeles, for appellants.

Roland Maxwell, of Pasadena, for respondents.

PER CURIAM.

The matters before us arise upon an appeal from a judgment granting a permanent injunction. On May 26, 1944, the clerk's and reporter's transcripts were filed in the reviewing court. On July 6, forty-one days later, respondents noticed a motion to be heard September 27, to strike the reporter's transcript on the ground that it was not prepared and certified within the time or in the manner prescribed by law. Included in the same document and designated to be heard at the same time, was a motion to dismiss the appeal for failure of the appellants to file their opening brief.

[1] The time for the filing of an opening brief is prescribed in rule 16(a) of the Rules on Appeal, and an opening brief not filed within the thirty-day period there prescribed, or within any valid extension allowed thereunder, is in default. Therefore, in the absence of any valid extension of time, appellants' opening brief was due thirty days after filing of the record, or on June 25, 1944. When respondents on July 6 filed their motion to dismiss, appellants were in default for a period of only eleven days. Rule 17(a) provides, in part, that "If the appellant's opening brief is not filed within the time prescribed in subdivision (a) of Rule 16, the clerk of the reviewing court shall notify the parties by mail that if the brief is not filed within 30 days after

the date of mailing of the notification, the appeal will be dismissed, unless good cause is shown for relief. * * *" It is thus apparent from rule 17(a) that the reviewing court has a broad power to grant relief from default. See, also, rule 53(b). It is true that the rules contemplate that some explanation be offered for the default and while the record herein does not affirmatively reveal any specific reason for the eleven-day delay we are satisfied that the failure to explain the same as well as the further delay in the filing of the brief is traceable to the second part of respondents' motion which was directed at the striking of the reporter's transcript. It is apparent from the record herein that it was the latter motion which principally absorbed the attention of the parties.

[2] As stated above, when respondents on July 6 moved to dismiss the appeal because of the eleven-day default in the filing of the opening brief, they also noticed a motion to strike the reporter's transcript. Both motions, as indicated above, were designated to be heard on September 27, a period of two and one-half months in the future. Confronted with this bifurcated motion—a portion of which potentially might alter or change the nature of the record on which the appeal was to be presented—any further delay in the filing of appellants' opening brief is understandable and excusable. Obviously, while the motion to strike the reporter's transcript was pending appellants could not intelligently prepare their brief for if the reporter's transcript were stricken they would have to proceed on the clerk's transcript or judgment roll. The character of the record would make a material difference in the substance of their brief. While correct practice should have suggested that they seek additional time for the filing of the brief, particularly when the clerk's transcript was on file and unchallenged, nevertheless, under all the circumstances, the default occurring while appellants were availing themselves of their right to present their appeal upon a full and proper record should be relieved. Cf. Riskin v. Towers, 24 Cal.2d 274, 277, 148 P.2d 611, 153 A.L.R. 442. After the motion, the uncertainty arising from the proceedings in connection with the record offers a reasonable explanation for appellants' default in the filing of the brief. Moreover, the brief has been since served on respondents and was tendered for filing at the time of the oral argument herein. We are of the opinion, therefore, that appellants should be relieved of any default in connection with the filing of their opening brief and the same may be filed.

[3] This leaves for consideration the motion to strike the reporter's transcript. Inasmuch as the notice of appeal was filed before the effective date of the new Rules on Appeal, the law in effect prior thereto governs this motion. Rule 53(b). It appears that originally appellants had elected to appeal on a bill of exceptions. A period of several months elapsed in the consideration of objections thereto, proposals for amendment and efforts to terminate the proceeding. Finally, appellants themselves terminated the proceeding and were allowed by the trial court ten days within which to give notice requesting a reporter's transcript. Respondents unsuccessfully attempted to restrain this new proceeding for a record by petition for a writ of prohibition. Peebler v. Superior Court. 63 Cal.App.2d 651, 147 P.2d 34.

[4-6] Under the law in effect prior to the new Rules on Appeal, the notice requesting a transcript was not jurisdictional, and delay in giving such notice could be excused by the trial court. The matter of diligence in preparation of the record was almost entirely committed to the discretion of the trial court, and its action in certifying a belatedly prepared reporter's transcript relieved the appellants from any asserted lack of diligence. Troy v. Troy, 127 Cal.App. 489, 492, 16 P.2d 290; Crocker v. Crocker, 76 Cal.App. 606, 245 P. 438; Sekt v. Superior Court, 24 Cal.2d 73, 77, 147 P.2d 568; Wood v. Peterson Farms Co., 131 Cal.App. 312, 315, 21 P.2d 468; Smith v. Jaccard, 20 Cal.App. 280, 128 P. 1023, 1026; Hohnemann v. Pacific Gas & Elec. Co., 31 Cal.App.2d 692, 88 P.2d 748. The record herein does not show any abuse of the trial court's discretion. The delay consequent upon the objections to the proposed bill of exceptions and the absence of the trial judge because of illness, furnished sufficient basis for the trial court's action in relieving appellants from the effects of the delay in completing the record. The motion to strike the reporter's transcript must therefore be denied.

[7] In order to obviate confusion, it is well to state that under the new Rules on

Appeal the trial court may extend time only for limited periods upon application made before the expiration of any prescribed time. It cannot grant relief from default. The reviewing court is given exclusive power to do so. Rules on Appeal, rule 53(b); Averill v. Lincoln, 24 Cal.2d 761, 763, 151 P.2d 119; Jarkieh v. Badagliacco, 68 Cal.App.2d 426, 156 P.2d 969; 17 So.Cal.L.Rev. 232, 292.

For the foregoing reasons, the motions to strike the reporter's transcript and to dismiss the appeal are denied.

TRAYNOR, Justice (dissenting in part).

I dissent from that part of the majority opinion dealing with the granting of relief from appellant's conceded default in the filing of his opening brief. It fails to meet the basic issue in this proceeding, for it considers the problem as if the default took place in the course of an appeal pending in this court. If this were the case, and appellant's request for relief from default were addressed to us, it would be entirely appropriate to consider his excuses, and either grant or deny relief in our own discretion. The appeal was pending, however, in the District Court of Appeal, Second Appellate District, Division Two, for determination, and the record and briefs had to be filed in that court. The delays and default took place there; the motion to dismiss the appeal was made in that court, argued there, and decided, after submission, by a written opinion. A petition for hearing was thereafter filed and granted by this court.

The Rules on Appeal recognize, of course, that the "reviewing court," which has the power to grant or deny relief from default, is the court in which the appeal is pending. Rule 40(b). Hence, the power to relieve from default in the instant case originally resided in the District Court of Appeal. In its decision granting the motion to dismiss and in the accompanying opinion, that court set forth its determination that appellant's neglect was inexcusable and did not justify relief. The question before us is not, therefore, as the majority opinion assumes, what showing must be made by an appellant to call for the exercise of our discretion to grant relief from a default, but a much more important question: to what extent will the Supreme Court undertake to regulate the exercise of such discretion by the District Court of Appeal?

When the petition for hearing in this court was granted, the decision and opinion of the District Court of Appeal were, of course, superseded, and the case was set at large for a new and independent decision by the Supreme Court. This court thereby became the reviewing court, with the same power to grant or deny relief from default as if the case had originally been appealed here. Rule 40(b). It does not follow, however, that in the exercise of this power we should entirely ignore the action previously taken by the District Court of Appeal, and attach no presumption of correctness to the conclusion reached by that court after mature consideration of the record and argument presented to it. In following that course the majority opinion simply advises the District Court of Appeal that its determination of procedural matters within its jurisdiction is entitled to no weight. This view is in striking contrast to the deference that this court showed to the superior courts during the period preceding the new Rules on Appeal, when those courts had power to relieve from defaults in connection with the record. The rule was established by many well considered decisions, some of which are cited in the majority opinion, that the trial judge had a broad discretion in these matters, and that on an appeal or other proceeding to review his determination, that discretion was to be upheld unless plainly abused.

If we adhere, as I think we should, to this traditional approach, it would seem to follow that the respective functions of the District Court of Appeal and the Supreme Court in the situation before us may thus be differentiated: (1) On the meaning and effect of a rule, a question of law, this court should exercise its usual reviewing power regarding any petition for hearing after a decision by the District Court of Appeal. (2) When the issue is whether the party has in fact complied with a particular rule, this court should likewise exercise its usual reviewing power. (3) If it appears from the record, however, that the party is actually in default by his failure to comply with a rule, and has sought to be relieved from such default, the decision of the appellate court in the exercise of its discretion in granting or refusing such relief should not be disturbed except where there is manifest miscarriage of justice. Accordingly, our task here was to decide whether the appellate court had plainly abused its discretion under the circumstances of this case, and such a conclusion could only be reached if it appeared that the appellants had so persuasive a reason for their failure to file the opening brief that it necessarily called for an application of the power to grant relief.

The majority opinion does not suggest that any such showing was made; it does not recite all of the circumstances and considerations that impelled the District Court of Appeal to dismiss the appeal. This method of handling the case may well prove to be an unfortunate precedent. I am entirely in sympathy with the view that hearings on the merits should be encouraged and that excusable neglect should be relieved by the appellate court having jurisdiction of the appeal. But it is of equal importance to litigants and the courts that dilatory tactics of counsel be discouraged and that the appellate courts not be hampered in carrying out their duties.

The appellants have offered two reasons for their neglect. They contend that they were not actually in default, since the District Court of Appeal clerk failed to give the notice under rule 17(a). This misconception finds no justification in the rule and is contrary to the holdings of prior cases. See Peak v. Nicholson, 61 Cal.App.2d 355, 359, 143 P.2d 78; Witkin, New California Rules on Appeal, 17 So. Cal.L.Rev. 80,142. Accordingly appellant's conduct must be regarded, not as the result of an excusable mistake, but as a plain disregard of the rule.

The other explanation offered by appellants is that while the dispute concerning the record was in progress, they were uncertain as to whether they would eventually obtain a reporter's transcript or would be compelled to take their appeal solely on a clerk's transcript, and that this uncertainty made it impossible for them to write an opening brief with reference to the actual record in the case. Had this explanation been addressed to the appellate court by way of a request for extension of time (see rule 16(a)) it would undoubtedly have been favorably received. A sound reason for requesting an extension of time, however, is not a justification for completely disregarding the rule. It is commonplace in all practice that the party whose time is running on the many steps required in trial and appellate procedure, and who has a good ground for extension of that time, must present it before his time expires. Otherwise his position becomes entirely different, and his only recourse is to seek relief from his default by a showing that he allowed the time to run against him by inadvertence or excusable neglect. There is no such showing in the instant case. Appellants, insisting upon an erroneous interpretation of the rules, have deliberately failed to comply with their plain language. Previous delays occasioned by disputes over the record had already resulted in postponing the hearing on the appeal for over a year, and it was incumbent upon appellants to exercise reasonable diligence to avoid additional delays.

It appears, therefore, that the District Court of Appeal acted well within the limits of its discretion in denying appellants relief from their default in failing to file their opening brief on time.

Every court, and in particular every reviewing court, bears a heavy responsibility for the prompt and efficient handling of its business, and it can discharge that responsibility only if it is permitted a reasonable discretion and control over its affairs. The new Rules on Appeal are designed to secure the speedy determination of appeals (see rule 53(a)) and to that end each appellate court is given supervisory power over the procedural steps in the taking of appeals. The Supreme Court should not undertake to reexamine the various considerations that enter into the discretionary determination to grant or deny relief from default. The appellate courts cannot successfully carry out their duties if such determinations are subject to an independent review and reconsideration by the Supreme Court.

26 Cal.2d 618

PEOPLE v. HOUGH.

Cr. 4633.

Supreme Court of California.

June 28, 1945.

1. Criminal law ⚷997

Denial of writ of error coram nobis was justified on ground that defendant who was sentenced to death on his plea of guilty of murder did not establish that pleas were secured by illegal means rendering his conviction void as depriving him of life without due process of law. U.S.C.A. Const. Amend. 14.

2. Jury ⚷31(11)

Penal Code provision authorizing court upon a plea of guilty to fix penalty after determining degrees of crime is not violative of state Constitution guaranteeing the right of trial by jury. Pen.Code, § 190; Const. art. 1, § 7.

3. Jury ⚷29(4)

Where defendant elected to plead guilty to charge of murder, he was not deprived of his right to trial by jury under state Constitution in that sentence was fixed by the court. Pen.Code, § 190; Const. art. 1, § 7.

In Bank.

Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

Proceeding on the application of William Leva Hough for a writ of error coram nobis to have vacated the judgments and sentences of death previously entered upon his pleas of guilty to two counts of murder. From an order denying the petition, plaintiff appeals.

Affirmed.

Morris Lavine and Milton B. Safier, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

PER CURIAM.

This is an appeal from an order denying a petition for a writ of error coram nobis, by which petition defendant sought to have vacated the judgments and sentences of death previously entered upon his pleas of guilty to two counts of murder as charged in an amended indictment.

The extreme penalty had been imposed after the trial court had taken evidence to determine the degree of the crimes and to fix the punishment, and the judgments had been affirmed on appeal. People v. Hough, 24 Cal.2d 535, 150 P.2d 444. During the pendency of said appeal, defendant filed in this court a petition for a writ of habeas corpus contending that the judgments of conviction were illegal and violative of the Fourteenth Amendment of the Constitution of the United States, and deprived him of his life without due process of law. After giving full consideration to defendant's claims, including the claim that his pleas of guilty were secured and induced by improper and illegal means which allegedly rendered his conviction void and of no legal effect, this court denied the relief sought by defendant in said habeas corpus proceeding. In re Hough, 24 Cal.2d 522, 150 P.2d 448. Defendant thereupon filed a petition in the Supreme Court of the United States for a writ of certiorari, which was denied. Hough v. People of State of California, 323 U.S. 780, 65 S.Ct. 192.

An examination of defendant's petition for a writ of error coram nobis, which was thereafter filed in the trial court, shows that he was seeking relief upon the same grounds which he had previously urged in this court on the habeas corpus proceeding. Before any evidence was taken in the trial court in support of the petition, respondent moved to dismiss the proceeding upon the ground that all matters alleged in the petition had been considered and determined by this court in the habeas corpus proceeding. The trial court denied the motion, stating "The man's life is at stake, and I feel constrained to proceed." Defendant was then given the widest latitude in presenting evidence in support of his petition. At the conclusion of the evidence offered by defendant, respondent again moved to dismiss the petition. This motion was denied and respondent presented its evidence. After argument and a consideration of all the evidence, the trial court denied the petition. It is argued by respondent that the trial court should have granted the motions to dismiss the proceeding, but it is unnecessary to decide that question. The trial court considered the petition on the merits, without reference to the doctrine of res adjudicata, and we are satisfied that its order denying the petition upon the merits must be affirmed.

[1] A review of the record shows that substantially the same evidence was presented by defendant in this proceeding as had been presented by him on the habeas corpus proceeding. Reference is hereby made to the opinion of this court on the habeas corpus proceeding, In re Hough, 24 Cal.2d 522, 150 P.2d 448, for a summary of that evidence and also for a discussion of the claims made by defendant in that proceeding as well as the claims made in the proceeding now under consideration. It would therefore serve no useful purpose to repeat that summary of the evidence or to repeat that discussion here. It is true that there was an extended hearing in this proceeding in which witnesses were orally examined and cross-examined, but the substance of the testimony offered by defendant remained the same. Any additional evidence offered by defendant in support of the petition for a writ of error coram nobis was merely cumulative. On the other hand, there was evidence offered by respondent which tended strongly to refute the main claim of defendant to the effect that he had entered his pleas of guilty in reliance upon some assurance or guarantee that the punishment would be life imprisonment rather than the extreme penalty. That evidence showed that he had expressed his intention of pleading guilty shortly after his arrest and prior to the time that he had any discussions with counsel; that after the indictment had been filed, and before arraignment, he talked of getting the "hot seat"; and that while the trial court was taking evidence following his pleas of guilty, he said to one of the officers, "I wonder what the judge will give me." It therefore appears that the trial court was justified in determining that defendant had not entered his pleas of guilty in reliance upon any assurance or guarantee respecting the penalty; and it further appears that the trial court was justified in concluding upon the entire evidence, some of which was conflicting in its material aspects, that defendant was not entitled to the relief demanded.

Defendant cites and relies upon People v. Gilbert, 25 Cal.2d 422, 154 P.2d 657, but that case is not helpful to defendant. It is sufficient to point out that the "unqualified factual representations" set forth in that opinion were quite different, and that the decision on defendant's habeas corpus proceeding, In re Hough, 24 Cal.2d 522, 150 P.2d 448, was distinguished in the cited case at page 667.

[2, 3] There is perhaps one new point of law which is presented by defendant for the first time on this appeal. Defendant contends that the provisions of section 190 of the Penal Code, authorizing the court, upon a plea of guilty, to fix the penalty after determining the degrees of the crime, are repugnant to the constitutional provisions guaranteeing the right to trial by jury. Const., art. I, § 7. A similar question was decided adversely to defendant's claim in the early case of People v. Noll, 20 Cal. 164, at page 166, where it was said: "The proceeding to determine the degree of the crime of murder after a plea of guilty is not a trial. No issue was joined upon which there could be a trial. There is no provision of the Constitution or of any statute which prevents a defendant from pleading guilty instead of having a trial by jury. If he elects to plead guilty to the indictment, the provision of the statute for determining the degree of the guilt for the purpose of fixing the punishment, does not deprive him of any right of trial by jury." See, also, People v. Lennox, 67 Cal. 113, 7 P. 260; People v. Chew Lan Ong, 141 Cal. 550, 75 P. 186, 99 Am.St.Rep. 88; and People v. Hickman, 204 Cal. 470, 268 P. 909, 270 P. 1117. Authorities from other jurisdictions, cited by defendant in support of his claim that, despite his pleas of guilty, he was entitled to have a jury determine the penalty, have no relevancy here. They involved statutes unlike our own in that they expressly conferred upon the jury the right to fix the punishment on a plea of guilty. Typical of defendant's cited authorities are Wartner v. State, 102 Ind. 51, 1 N.E. 65; Wilson v. State, 117 Neb. 692, 222 N.W. 47; and State v. Best, 44 Wyo. 383, 12 P.2d 1110.

The order denying defendant's petition for a writ of error coram nobis is affirmed.

70 Cal.App.2d 213

Ex parte EVANS.

Cr. 1916.

District Court of Appeal, Third District, California.

July 17, 1945.

Hearing Denied Aug. 13, 1945.

1. Criminal law ⚷1111(5)

Where the record of proceedings in trial court is in conflict, it will be harmonized, if possible; but where that is not possible, that part of record will prevail which, because of its origin and nature or otherwise, is entitled to the greater credence.

2. Criminal law ⚷1111(5)

Whether recitals in clerk's minutes should prevail, as against contrary statements in reporter's transcript, must depend upon the circumstances of each particular case.

3. Habeas corpus ⚷85(1)

Recitals in clerk's minutes, including order of commitment, that accused personally pleaded guilty, corroborated by testimony of district attorney and defense counsel and direct statement of judge to accused at time of sentence, that he had personally entered such plea which, when made, was not contradicted by accused or counsel, should prevail so as to sustain validity of sentence in habeas corpus proceeding as against accused's testimony, supported by reporter's transcript, that defense counsel and not accused entered the plea. Pen.Code, § 1018; Code Civ.Proc. § 273.

Proceeding in the matter of the application of James T. Evans for a writ of habeas corpus directed to Robert A. Heinze, Warden of the California State Prison at Folsom.

Writ discharged and petitioner remanded.

Floyd H. Bowers, of Roseville, and James T. Evans, in pro. per., for petitioner.

Robert W. Kenny, Atty. Gen., by James O. Reavis, Deputy Atty. Gen., for respondent.

PEEK, Justice.

The sole contention of petitioner is that his confinement in the state prison at Folsom, which is predicated upon a plea of guilty to a charge of grand theft, is unlawful in that at no time did he personally enter such a plea, and that therefore the trial court was without jurisdiction to proceed to judgment and sentence against him.

In support of his contention petitioner has filed herein a transcript of the proceedings at the time of pronouncing sentence, a portion of which reads as follows:

"The above entitled matter coming on for hearing at 2:00 o'clock P.M., on Monday, May 29, 1944, in Department One of the above named Court before the Honorable Charles L. Allison, Judge, the People of the State of California being represented by Jerome B. Kavanaugh, Esq., District Attorney of San Bernardino County, and the defendant being present in person and being represented by Raymond E. Hodge, Esq., his Attorney, the following proceedings were had: * * *

"The Court: Are you ready for arraignment?

"Mr. Hodge: Yes.

"The Court: The defendant will stand up. Evans you are informed that on this, the 29th day of May, 1944, the District Attorney of this County filed an information in this Court charging you with the crime of grand theft, a felony, in which information you are charged under the name of James T. Evans. Is that your true name?

"The Defendant: Yes, sir.

"The Court: Do you waive the reading of the information?

"Mr. Hodge: We waive the reading of the information.

"The Court: With respect to plea, what do you wish to do?

* * * * *

"The Court: You plead guilty?

"Mr. Hodge: We plead guilty to grand theft, as alleged."

Petitioner then concludes that as a plea of guilty "can be put in by the defendant himself only in open court" (section 1018, Penal Code), and as the reporter's transcript of the proceedings as prima facie evidence of such proceedings (section 273, Code of Civil Procedure) stands as proof of the particular facts therein set forth until it is both contradicted and overcome by other evidence, Miller & Lux Inc. v. Secara, 193 Cal. 755, 227 P. 171, the superior court had no jurisdiction to pronounce and enter judgment against him.

Citing In re Brain, 70 Cal.App. 334, 233 P. 390, and cases therein cited.

An examination of the record in the Brain case discloses a decided similarity in certain aspects in relation to the factual situation therein and the present case. The transcripts of the hearings show that the pleas of guilty were entered by counsel, and in both cases the recitals in the clerk's minutes contradict the reporter's transcript in this particular. However, the remaining portions of the two cases are easily distinguishable. In the Brain case the respondent conceded the veracity of the reporter's transcript while in the case now before us the transcript is attacked as not being a correct report of the proceedings. In support of such contention the attorney who represented defendant at the time of pronouncement of sentence and the district attorney who prosecuted the case were called as witnesses and so testified. Such testimony was categorically denied by the defendant.

In the present case the clerk's minutes of May 29, 1944, state:

"The District Attorney files an information against the above named defendant, who is present in Court, charging him with the crime of Grand Theft a felony.

"Raymond E. Hodge appears as counsel for defendant.

"Defendant is duly arraigned.

"Defendant pleads that he is guilty of the offense of Grand Theft.

"Defendant is duly arraigned for sentence.

"Continued for pronouncement of judgment to June 2nd, 1944 at 9:30 o'clock A.M."

In addition to the proceedings on May 29th, further proceedings were taken on June 2, 1944, the date to which the time for sentence had been continued. The transcript of the latter provides in part:

"The Court: Evans you are informed that on the 29th day of May, 1944, the District Attorney of this County filed an amended information in this Court charging you with the crime of grand theft, a felony. * * *

"The Court: On the charge stated in said information you were duly arraigned, you appeared by counsel, and after having been informed of your rights in the premises *you personally, in open Court and in the presence of your counsel, entered a plea of guilty of the charge stated in this information,* namely the crime of grand theft. Thereupon this time and place was fixed as and for the time and place for pronouncing judgment. Now have you any legal cause to show why judgment should not at this time be pronounced upon you?

"Mr. Hodge: No legal cause." (Italics ours.)

A portion of the order of the court appearing in the minutes of June 2, 1944, recites: "Whereas the said James T. Evans having duly pled guilty in this Court of the crime of Grand Theft, a felony."

At the time of the hearing before this court the defendant testified that the transcript was a true and accurate report of the proceedings and that he at no time entered a plea of guilty to the offense charged. However, the district attorney testified that he had no recollection of the defendant's attorney stating "we plead guilty to grand theft, as alleged" as shown in the transcript, but to the contrary it was his "recollection * * * that * * * the defendant actually and personally entered a plea of guilty." The attorney who represented the defendant at the time of the arraignment and plea in the superior court, testified he did not make the quoted statement attributed to him in the transcript and likewise testified that the defendant "himself entered a plea of guilty" stating "I am guilty."

[1, 2] It may be said that as a general rule that when, as in this case, the record is in conflict it will be harmonized if possible; but where this is not possible that part of the record will prevail, which, because of its origin and nature or otherwise, is entitled to the greater credence. 24 C.J.S., Criminal Law, § 1776, p. 555. Therefore whether the recitals in the clerk's minutes should prevail as against contrary statements in the reporter's transcript, must depend upon the circumstances of each particular case. People v. Litchman, 17 Cal.App.2d 252, 61 P.2d 1229.

[3] Under all of the circumstances and in support of the regularity of the proceedings and the verity of the judgment, we conclude that the recital of the proceedings by the clerk of the court, in his minutes thereof, including the order of commitment, corroborated as they are by the statements of the district attorney and defendant's counsel that petitioner personally entered a plea of guilty, and the direct

statement by the judge to the defendant at the time of sentence that he had personally entered such a plea which, when made, was not contradicted by either the petitioner or his counsel, should prevail as against petitioner's testimony and the reporter's transcript.

The writ is discharged and the petitioner is remanded.

ADAMS, P. J., and THOMPSON, J., concur.

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70 Cal.App.2d 132

PEOPLE v. CLARK.

Cr. 3907.

District Court of Appeal, Second District, Division 2, California.

July 10, 1945.

1. Robbery 🔑10

Where accused took money from company's purchasing agent, appropriated it to his own use, and, after locking agent in another room, departed from the premises with the money, whether defendant conveyed the money any distance from agent's presence was immaterial for asportation as an element of the robbery. Pen. Code, § 211.

2. Robbery 🔑10

Robbery is complete when robber unlawfully and by means of force or fear gains possession of the movable property of another in the presence of its lawful custodian and reduces it to his manual possession, his escape with the property not being necessary. Pen.Code, § 211.

3. Robbery 🔑23(3)

The unsatisfactory explanation of $1,600 being concealed in defendant's bedroom under a pillow and in the bedclothes was a circumstance properly considered by the court on the element of asportation in finding defendant guilty of robbery. Pen. Code, § 211.

4. Robbery 🔑24(1)

Evidence sustained conviction of robbery. Pen.Code, §§ 211, 211a.

5. Criminal law 🔑1159(2)

The conviction of a crime will not be set aside for lack of sufficient evidence unless it clearly appears that upon no hypothesis whatever is there substantial evidence to support a trial court's finding.

6. Criminal law 🔑1159(2)

Where evidence has been properly weighed by trial court, weighing the evidence is not a duty of the appellate court.

◆

Appeal from Superior Court, Los Angeles County; Harold S. Landreth, Judge.

Joseph Clark was convicted of robbery, and he appeals.

Judgment affirmed.

Walter L. Gordon, Jr., of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant was convicted by the court without a jury of the crime of robbery. His felonious act consisted of taking $4,200 from the possession of one John Dees against his will and by the use of force and by putting his victim in fear by the use of a revolver. The only question for decision is whether the evidence is sufficient to sustain the judgment.

Section 211 of the Penal Code thus defines robbery: "The felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by mean of force or fear." Section 211a makes the offense robbery of the first degree when the criminal is armed with a dangerous or deadly weapon.

The judgment is attacked upon the grounds that neither asportation nor ownership of the money was proved. The record discloses ample evidence to warrant such finding.

The complaining witness, Dees, was purchasing agent for the Interstate Company. On the occasion of the crime he was engaged in computing the payroll of his company in order to inclose the amounts due the employees in envelopes. He had in his possession in excess of $7,000, about $4,500 of which was in currency in a single package. While he was sitting at an adding machine in pursuit of his work he was suddenly knocked to the floor, the money was scattered and appellant held the muzzle of his revolver within two feet of the unfortunate man. Appellant took a bag from the agent, stuffed it with the package of currency taken from the possession of Dees and, after pushing the latter into another room and locking him in, departed from the premises with the package of currency and the bag. On hearing a call for help the witness Jacobson, a fellow employee, entered the room of the robbery where he saw appellant aiming his revolver at Mr. Dees.

[1, 2] Whether appellant conveyed the money one yard or one mile from the presence of his victim is immaterial insofar as the element of asportation is concerned. He took the money from its lawful possessor by the use of both force and fear and appropriated it to his own use. The crime of robbery is complete when the robber unlawfully and by means of force or fear gains possession of the movable property of another in the presence of its lawful custodian and reduces it to his manual possession. His escape with the loot is not necessary to complete the crime. People v. Beal, 3 Cal.App.2d 251, 39 P.2d 504.

[3, 4] Further proof of the asportation of the currency from the scene of the crime is found in the testimony of Officer Leach who found in the room of a hotel occupied by appellant and his female companion the bag taken from Mr. Dees and currency in a purse, under a pillow and in the bed clothes, aggregating $1,600.00. Under questioning the unsatisfactory explanation of the presence of so large a sum of money concealed in his bedroom was a circumstance properly to be considered by the court in finding appellant guilty of robbery.

[5, 6] The conviction of a crime will not be set aside for lack of sufficient evidence unless it is made clearly to appear that upon no hypothesis whatever is there substantial evidence to support the finding of the trial court. People v. Abrams, 58 Cal.App.2d 157, 136 P.2d 46; People v. Fleming, 58 Cal.App.2d 37, 136 P.2d 88; People v. Hennessey, 201 Cal. 568, 258 P. 49. It is not the duty of the appellate court to weigh the evidence where that has been done by the trial court according to law. People v. Stern, 94 Cal. App. 85, 270 P. 706.

The authorities cited by appellant (People v. Ammerman, 118 Cal. 23, 26, 50 P. 15; People v. Sylvis, 72 Cal.App. 632, 237 P. 802; People v. Foss, 85 Cal.App. 269, 259 P. 123) are not pertinent. In those cases the record was void of the proof of the essentials of the crimes charged.

The judgment is affirmed.

W. J. WOOD and McCOMB, JJ., concur.

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70 Cal.App.2d 192

TUDERIOS v. HERTZ DRIVURSELF STATIONS, Inc., et al.

Civ. 14804.

District Court of Appeal, Second District, Division 2, California.

July 13, 1945.

Rehearing Denied July 31, 1945.

Hearing Denied Aug. 30, 1945.

1. Automobiles 🔑207

The statute regulating use of center lane of three-lane highway, clearly marked, was inapplicable where one dividing line of three-lane highway was temporarily obliterated by repair work. Vehicle Code, § 526(b), St.1935, p. 182.

2. Automobiles 🔑245(79)

Whether motorist driving on highway under construction in dim-out zone kept as far to right as was practicable was for jury. Vehicle Code, § 525, St.1941, p. 2722.

3. Appeal and error 🔑999(3)

A jury finding that motorist driving on highway under construction in dim-out zone kept as far to right as was practicable would not be disturbed by reviewing court. Vehicle Code, § 525, St.1941, p. 2722.

4. Automobiles 🔑245(78)

Whether motorist suing for injuries sustained in head-on collision was driving at excessive speed was for jury.

5. Appeal and error 🔑999(3)

A jury finding that mortorist suing for injuries sustained in head-on collision was not driving at excessive speed was binding on reviewing court.

6. Automobiles ⚷246(15)

An instruction that, if jury found that driver of automobile rented it from owner, jury should find that driver was operating automobile with consent of owner, even though it was rented in name of another whose driver's license was exhibited to owner, was not erroneous. Vehicle Code, § 402, St.1937, p. 2353.

7. Automobiles ⚷192(6)

An automobile owner was liable for its negligent operation notwithstanding that operator had rented it from owner by using another person's name and exhibiting such person's driver's license. Vehicle Code, § 402, St.1937, p. 2353.

8. Appeal and error ⚷1170(9)
Automobiles ⚷246(60)

Where witnesses testified in detail as to plaintiff motorist's conduct, instruction on presumption of ordinary care, including statement that jury should weigh other evidence against presumption, was erroneous but not prejudicial. Const. art. 6, § 4½.

◆

Appeal from Superior Court, Ventura County; Louis C. Drapeau, Judge.

Action by Paul Tuderios against the Hertz Drivurself Stations, Inc., and others for injuries sustained in an automobile accident. From a judgment for plaintiff, defendant Thomas I. Petersen appeals.

Affirmed.

Crider, Runkle & Tilson, of Los Angeles, for defendant-appellant Petersen.

Morin, Newell, Brown & Hamill and Harry M. Hunt, all of Pasadena, for plaintiff Tuderios.

McCOMB, Justice.

From a judgment in favor of plaintiff, after trial before the court with a jury, in an action to recover damages for personal injuries sustained by plaintiff and damages resulting from the death of his wife and minor daughter in an automobile accident, defendant Petersen appeals.

The evidence discloses these facts:

Defendant was engaged in the automobile business in Santa Barbara and he rented an automobile to Mr. T. K. Hasbruck. Mr. Hasbruck represented himself to defendant's manager as Gerald McCoy Brown and presented a Michigan driver's license issued in the name of Mr. Brown. Mr. Hasbruck signed the rental agreement "Gearld Brown." So far as defendant or his manager knew, Mr. Hasbruck was in fact Mr. Brown. After renting the automobile, Mr. Hasbruck started to drive south toward Ventura on the coast highway. At about 7 p. m., after dark, while driving toward Ventura he collided head on with a Plymouth Coupe owned by plaintiff. The accident resulted in the death of Mr. Hasbruck, plaintiff's wife, minor daughter and injuries to plaintiff.

On the morning of November 8, 1942, plaintiff, his wife and minor daughter at about 11 a. m. drove from Santa Barbara to Ventura. During the trip to Ventura they passed the point where the accident occurred. At this point the highway extends east and west, Santa Barbara being to the west and Ventura to the east. For at least two years prior to the accident the highway had been a three-lane type with the lanes marked by two white lines. The paved portion of the highway at the point of the accident was thirty feet ten inches wide and each lane was approximately ten feet wide. Plaintiff was thoroughly familiar with the highway and knew that it consisted of three lanes and that drivers were supposed to stay in their extreme right-hand lane except when passing automobiles going in the same direction.

For at least a week prior to the accident repair work consisting of resurfacing the pavement had been in progress in the north two-thirds of the highway, that is, in the west-bound lane and in the center lane. The new surface was black and entirely obliterated the white line on the north side which divided the west-bound lane from the center lane for a distance of 3/10 of a mile beginning at a point 150 feet west of the point where the automobiles collided. Thus Mr. Hasbruck in driving in an easterly direction toward Ventura had driven only 150 feet of the area under construction and where the white line was obliterated, whereas plaintiff had traveled the entire length of the 3/10 of a mile less this 150 feet. This obliteration of the white line on the north side of the highway was temporary and resulted from the repair work; there being no intention to change the general three-lane character of the highway.

The west-bound lane was entirely opened to traffic throughout its length without obstruction thereon at the time of the accident. Plaintiff was driving in a dim-out zone with only small parking lights at the top of his fenders and he could see only nine or eleven feet in front of him. He drove in the west-bound lane on the north side of the highway watching the white line which divided his lane from the center lane to the point where this white line on his side ended. He then turned his car and moved over to the center lane and after following the remaining white line on the south side of the highway, which line divided the east-bound lane from the center lane, he kept his car to the right of such line. While driving at a speed of about 25 miles per hour in the above described position on the highway, he collided head on with the coupe driven by Mr. Hasbruck. Plaintiff, as he approached the point of the accident or at the time thereof, was not passing any automobile going in his direction.

Defendant relies for reversal of the judgment on three propositions which will be stated and answered hereunder seriatim:

First: *Plaintiff was guilty of contributory negligence as a matter of law which proximately contributed to the accident in that plaintiff (a) violated section 526(b)*[1] *of the Vehicle Code, St.1935, p. 182, and (b) violated section 525*[2] *of the Vehicle Code, St.1941, p. 2722, and (c) was driving at an excessive and negligent rate of speed at the time of the accident.*

This proposition is untenable.

[1] a) Section 526(b) of the Vehicle Code is applicable only when the highway has been divided into three or more clearly marked lanes for traffic. In the present case the undisputed evidence discloses that the accident occurred on a strip of highway 3/10 of a mile long which was not divided into three or more clearly marked lanes for traffic, it only being divided into two clearly marked lanes for traffic. Hence it is evident that section 526(b) of the Vehicle Code has no application to the instant case.

b) Section 525 of the Vehicle Code requires drivers on a public highway to drive on the right half and as close as practicable to the right hand curb or edge of the roadway.

[2, 3] It was a question of fact for the jury to determine whether or not from the evidence, in view of the dim-out restrictions and the fact the highway was under construction and so marked in the area and at the point where the accident occurred, plaintiff was driving upon the right-hand half of the highway and as close as practicable to the right-hand edge of the roadway. The jury having impliedly found that in view of the circumstances above related plaintiff was driving as near to the right-hand side of the highway as was practicable, its finding will not be disturbed by this court. Jolley v. Clemens, 28 Cal.App.2d 55, 66, 82 P.2d 51; Shannon v. Thomas, 57 Cal.App.2d 187, 197, 134 P.2d 522; Mathers v. County of Riverside, 22 Cal.2d 781, 784 et seq., 141 P.2d 419.

[4, 5] c) It was likewise a question of fact for the jury to determine from all the evidence whether plaintiff was driving at an excessive rate of speed prior to and at

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[1] Section 526(b) of the Vehicle Code reads thus:

"526. Driving on Roadways Laned for Traffic. Whenever any roadway has been divided into three or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply: * * *

"(b) [Driving in center lane.] Upon a roadway which is divided into three lanes a vehicle shall not be driven in the center lane except when overtaking and passing another vehicle where the roadway ahead is clearly visible and such center lane is clear of traffic within a safe distance, or in preparation for a left turn or where such center lane is at the time allocated exclusively to traffic moving in the direction the vehicle is proceeding and is signposted to give notice of such allocation."

[2] So far as applicable, section 525, Vehicle Code reads:

"525. [Driving] on Right Side of Roadway.

"(a) [Vehicle to be driven upon right half of roadway: Exceptions.] Upon all roadways of sufficient width a vehicle shall be driven upon the right half of, and as close as practicable to the right-hand curb or edge of, such roadway, except as follows:

"(1) When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement.

"(2) When placing a vehicle in a lawful position for, and when such vehicle is lawfully making a left turn.

"(3) When the right half of a roadway is closed to traffic while under construction or repair.

"(4) Upon a roadway designated and signposted for one-way traffic."

the time of the accident, and having impliedly found that he was not, such finding is binding upon this court.

Second: *The trial court committed prejudicial error in instructing the jury as follows:*

"If you find from the evidence that Thomas K. Hasbruck rented the Plymouth automobile which he was driving at the time he collided with the plaintiff's automobile from the defendant Thomas I. Petersen, the owner thereof, you shall find that said Thomas K. Hasbruck was using and operating said automobile at the time of said accident with the permission and consent of said Thomas I. Petersen, even though it may appear from the evidence that said automobile was rented by said Thomas K. Hasbruck in the name of Gerald Brown, and that said Thomas K. Hasbruck exhibited the Michigan operator's license of said Gerald Brown, and that said Gerald Brown did not accompany Thomas K. Hasbruck at the time of said renting."

[6, 7] This proposition is also untenable. Defendant contends that since Mr. Hasbruck misrepresented who he was when he rented the automobile from death, defendant is not liable to plaintiff under the provisions of section 402 [3] of the Vehicle Code, St.1937, p. 2353. This contention we believe to be without merit. Section 402 of the Vehicle Code reads in part: "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle * * * by any person *using or operating the same with the permission, express or implied, of such owner* * * *." (Italics added.)

In the present case the undisputed evidence shows that defendant expressly permitted Mr. Hasbruck to take an automobile owned by defendant and permitted him to operate it. It is entirely immaterial as to the name of the driver of the car. The statute was designed for the protection of the public and places upon the owner of a motor vehicle the responsibility of ascertaining the character, ability and responsibility of the person to whom he intrusts his automobile. Mr. Hasbruck was the *very person* to whom defendant intrusted the possession of his automobile without any limitations as to its use. Since defendant had the opportunity of making such investigation as he deemed necessary to satisfy himself as to the identity of the person to whom he intrusted his automobile, he should not be permitted to escape liability to a third party because of any fraudulent misrepresentation made by the renter of the car to him.

Third: *The court committed prejudicial error in instructing the jury as follows:*

"At the outset of this trial, each party was entitled to the presumptions of law that every person takes ordinary care of his own concerns and that he obeys the law. These presumptions are a form of prima facie evidence and will support findings in accordance therewith, in the absence of evidence to the contrary. When there is other evidence that conflicts with such a presumption, it is the jury's duty to weigh that evidence against the presumption to determine which, if either, preponderates. Such deliberations, of course, shall be related to, and in accordance with, my instructions on the burden of proof."

[8] This proposition is also untenable. It was error to give the foregoing instruction. Rogers v. Interstate Transit Company, 212 Cal. 36, 38, 297 P. 884; Campbell v. City of Los Angeles, 28 Cal.App.2d 490, 492, 82 P.2d 720. However, in view of the fact that witnesses produced by plaintiff and defendant testified in detail as to plaintiff's acts and conduct prior to and at the time of the collision the erroneous instruction could not have influenced the jury's verdict, and therefore such error must be disregarded by us pursuant to the mandate of Article VI, section 4½ of the Constitution. Rogers v. Interstate Transit Co., supra, 212 Cal. at page 39, 297 P. at page 886.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

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[3] So far as applicable, section 402 of the Vehicle Code reads:

"402. Liability of Private Owners. (a) Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages."

70 Cal.App.2d 182

ZAVALNEY v. DONOVAN et ux.

Civ. 12777.

District Court of Appeal, First District, Division 2, California.

July 13, 1945.

1. Evidence ⚿7

That cracked and broken glassware may cut or injure a hand under pressure is common knowledge.

2. Landlord and tenant ⚿164(3, 6, 7), 168(1)

Tenant of furnished apartment, having continued to use hot water faucet for 11 months notwithstanding obvious crack in porcelain handle which she observed on moving in and without advising landlords of defect, could not hold landlords liable for injury to hand when handle splintered, in absence of evidence that landlords knew of defect at beginning of tenancy, inspected bathroom during tenancy or attempted to make repairs to handle or in or about bathroom.

3. Landlord and tenant ⚿164(7), 168(1)

In absence of special warranty or agreement, a landlord is not liable to tenant for injuries from open and obvious defects in the premises let.

4. Innkeepers ⚿3

That landlord in addition to furniture supplied linen, janitor service, and delivered the mail did not create relation of innkeeper and guest as a matter of law in face of tenant's positive testimony showing that parties intended relation of landlord and tenant.

◆

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Bertha Zavalney against Alexander Donovan and Julia Donovan, husband and wife, for injuries sustained when handle of hot water faucet in furnished apartment rented by plaintiff and her sisters from defendants splintered as plaintiff attempted to shut off the water. From a judgment of nonsuit, plaintiff appeals.

Judgment affirmed.

Vincent W. Hallinan and James Martin MacInnis, both of San Francisco, for appellant.

Charles V. Barfield, of San Francisco, for respondents.

NOURSE, Presiding Justice.

In February, 1941, plaintiff and her two sisters rented a furnished apartment on a monthly basis from defendants. On moving in plaintiff noticed a crack in the porcelain handle of the hot water faucet of the bath tub. In January, 1942, plaintiff suffered a cut in her hand when the handle splintered as she attempted to shut off the water. She has framed her complaint in two causes of action—one based upon alleged negligent repairs by defendants, the other based upon the defendants' alleged knowledge of the defective condition of the faucet handle at the time of renting and their fraudulent concealment of that fact from the plaintiff. No evidence was offered in support of the first cause of action and plaintiff's testimony required an abandonment of that issue. At the close of plaintiff's case defendants' motion for a nonsuit was granted and the appeal is from the judgment following:

[1] A brief statement of the facts is sufficient. At the outset of her tenancy plaintiff noticed that the handle of the hot water faucet was cracked and continued to use it for eleven months without complaint. There is no evidence that either defendant had knowledge of that condition at the time the premises were let. There is testimony given by the plaintiff that, at the time of her injury, Mr. Donovan told her that "it was one of those old cracked faucet handles that he had intended to replace." Whether he implied knowledge of the condition of this particular handle from the fact of the injury or from previous observation or information does not appear. There is no evidence that either defendant made or attempted to make any repairs to the handle or in or about the bathroom. The evidence is that the handle was constructed of white porcelain, that the crack had turned brown, or a dark color, and was plainly visible to any one using the bath tub; that plaintiff and her sisters used the tub daily, and plaintiff saw that the handle was cracked, whereas there was no evidence that either defendant inspected the bathroom at any time during the eleven months tenancy, or had been informed of any defect, other than that the faucet leaked. Appellant labors the point that the respondents admitted frankly and hon-

estly that they knew that a broken handle was a source of danger, whereas she was led to testify that she had no knowledge of the danger—a matter of common knowledge like the knowledge that cracked and broken glassware may cut or injure a hand under pressure.

[2, 3] On these facts the settled rules relating to landlord and tenant demand a holding that the respondents were not liable for the injuries of the appellant, and the order of nonsuit was properly entered. In Kearns v. Smith, 55 Cal.App.2d 532, 534, 131 P.2d 36, 37, this court, in a similar case, held:

"It is settled law that a landlord is not liable to his tenant for injuries from open and obvious defects in the premises let.

"'In the absence of special warranty or agreement, the tenant in taking the leased premises assumes all risks arising from damages which are obvious to ordinary observation.' 15 Cal.Jur. 705; Bernhardy v. Marian Realty Co., Ltd., 129 Cal.App. 579, 19 P.2d 7; Nelson v. Myers, 94 Cal. App. 66, 75, 270 P. 719. 'If the defects or dangers are such as would be apparent to the lessee on a reasonably careful inspection there is no obligation upon the lessor to notify him of their existence.' 3 Cooley on Torts, 4th Ed., 216; 36 C.J. 205; 32 Am.Jur. 516."

In the same case the court quoted from Underhill on Landlord and Tenant (vol. 2, p. 788) the following statement, which had theretofore been approved in Hassell v. Denning, 84 Cal.App. 479, 481, 482, 258 P. 426:

"'As to all patent defects which may be discovered by an examination of the premises, the rule of caveat emptor applies. The tenant will be charged with constructive notice or knowledge of patent defects which exist in that portion of the premises leased to and actually occupied or used by him. As to concealed defects attended with personal danger to the tenant, and which no examination upon his part would reveal, the rule is otherwise. The landlord is bound to disclose concealed defects, if their existence is known to him at the date of the letting, provided they are such as the incoming tenant would not discover by a reasonable inspection in order that the latter may guard against them.'"

In harmony with the foregoing are Dorswitt v. Wilson, 51 Cal.App.2d 623, 125 P.2d 626; Shotwell v. Bloom, 60 Cal. App.2d 303, 140 P.2d 728; Ayres v. Wright, 103 Cal.App. 610, 284 P. 1077; Ellis v. McNeese, 109 Cal.App. 667, 293 P. 854; Watwood v. Fosdick, 212 Cal. 84, 297 P. 881; Chapman v. Title Ins. & Trust Co. 68 Cal.App.2d 745, 158 P.2d 42; Stone v. Heyman Bros., 124 Cal.App. 46, 12 P.2d 126; 32 Am.Jur. 538–541; 15 Cal.Jur. p. 705; Rest.Torts, vol. II, secs. 352, 353.

The ambit of liability in cases of this type is thus stated in Dorswitt v. Wilson, supra, 51 Cal.App.2d at page 624, 125 P.2d at page 627: "It is not the dangerous condition which renders the landlord liable but its concealment, and the concealment is no longer a factor in the injury to the tenant once the dangerous condition is discovered by him."

[4] The appellant now argues for the first time that respondents were innkeepers and that she was a guest or lodger. Goldstein v. Healy, 187 Cal. 206, 201 P. 462, and Adams v. Dow Hotel, 25 Cal.App.2d 51, 76 P.2d 210, are cited in support of the argument that an innkeeper owes a greater duty in the maintenance of his premises for the protection of his guests. The record does not support that kind of a case. At the outset appellant stressed the relation of landlord and tenant. She is reported to have said, in a statement made to an insurance adjuster, that she rented the premises "furnished, lights and gas extra, at rent of $32.50 per month. We take care of our own housework and do very little cooking in the apartment." In addition to the furniture respondents supplied linen, and some janitor service, and delivered the mail. There was nothing in these arrangements which would create the relation of innkeeper and guest as a matter of law in face of the positive testimony of the appellant showing that the parties intended the relation of landlord and tenant.

The judgment is affirmed.

STURTEVANT, J., and DOOLING, Justice pro tem., concur.

70 Cal.App.2d 142

PEOPLE v. WHALEN.

Cr. 38.

District Court of Appeal, Second District, Division 3, California.

July 11, 1945.

1. Criminal law ⇐1036(1)

In prosecution for statutory rape, commission of lewd or lascivious acts with infant females, and participation in sex perversion, defendant, not objecting to admission of evidence that children first complained of defendant's acts to their father over two years after last alleged act and cross-examining them at length as to their feelings toward defendant and reasons for not confiding in their parents on theory that their silence during such long period tended to discredit them and weaken their testimony, cannot be heard to say on appeal from conviction that such evidence should not have been admitted. Pen.Code, §§ 288, 288a.

2. Criminal law ⇐369(8)

In prosecution for statutory rape, lewd or lascivious acts with infant females, and sex perversion, testimony of defendant's daughter that defendant repeatedly endeavored to have sexual intercourse with her and that she complained to infants' parents of defendant's conduct and such parent's testimony as to daughter's complaints and statements to them were inadmissible as tending to prove other offenses than those charged and tending to degrade defendant. Pen.Code, §§ 288, 288a.

3. Criminal law ⇐369(2)

Evidence tending logically, naturally, and by reasonable inference to establish any material fact for the people or overcome any material matter sought to be proved by defense, is not inadmissible because it tends to show defendant's guilt of another offense than that charged.

4. Witnesses ⇐331½
Criminal law ⇐683(1)

In prosecution for statutory rape, lewd or lascivious acts with infant females, and sex perversion, testimony of defendant's daughter and infants' parents as to defendant's attempts to have sexual intercourse with daughter and her complaints to parents of defendant's conduct, and mother's testimony that she and her husband had asked defendant to leave their home because he was bothering his daughter, was inadmissible to impeach or rebut defendant's testimony that he left parents' home because he had night-time job and was told that parents did not wish day sleeper therein and denying facts to which daughter testified. Pen.Code, §§ 288, 288a.

5. Criminal law ⇐369(8)

Defendant's right to fair trial on charges of statutory rape, lewd or lascivious acts with infant females, and sex perversion is violated by receipt of evidence of his commission of acts similar to those charged with other than prosecutrix.

6. Criminal law ⇐369(1)

Prosecution is forbidden not only to prove defendant's commission of another crime than that charged, but to introduce evidence of defendant's conduct falling short of crime merely for purpose of degrading and prejudicing him in jury's mind.

7. Criminal law ⇐369(8), 1169(11)

In prosecution for statutory rape, lewd or lascivious acts with infant females, and sex perversion, admission of testimony of defendant's daughter and questions on defendant's cross-examination as to his attempts to have sexual intercourse with daughter were improper and prejudicial to defendant.

8. Criminal law ⇐419(1)

In prosecution for statutory rape, lewd or lascivious acts with infant females, and sex perversion, testimony of defendant's daughter as to what she told infants' parents about defendant's attempts to have intercourse with daughter was inadmissible as hearsay.

9. Criminal law ⇐1169(1)

Evidence of defendant's guilt of statutory rape, lewd or lascivious acts with infant females, and sex perversions was not so strong and convincing as to require affirmance of conviction thereof notwithstanding errors in admission of evidence against defendant, in view of evidence of animosity of children's parents toward defendant before children complained to them of defendant's acts, absence of evidence corroborating children's testimony and evidence that they remained silent under defendant's mistreatment until told that his taking the furniture away from their home was unjust to them.

10. Infants ⚿20
Rape ⚿55
Sodomy ⚿7

Cases of alleged statutory rape, lewd or lascivious acts with children, and sex perversion should be tried with greatest of care. Pen.Code, §§ 288, 288a.

11. Witnesses ⚿344(2)

In prosecution for statutory rape, lewd or lascivious acts with infant females and sex perversion, cross-examination of defendant's daughter as to whether she had had sexual relations with infants' father was not proper for purpose of impeaching credibility of her testimony as to defendant's attempts to have sexual intercourse with her. Pen.Code, §§ 288, 288a.

12. Witnesses ⚿344(1)

Witnesses canot be impeached by proof of specific wrongful acts committed by them.

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Willard L. Whalen was convicted of statutory rape, commission of lewd and lascivious acts on or with the bodies of children under 14 years old, and participation in sex perversion, and he appeals.

Reversed.

S. C. Stoner, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Fred N. Howser, Dist. Atty., and Robert Wheeler, Deputy Dist. Atty., both of Los Angeles, for respondent.

SHINN, Justice.

Defendant was convicted in a trial before the court of one offense of statutory rape, and four offenses of violations of sections 288 and 288a of the Penal Code, the subjects being two females aged 11 and 14, respectively. He was sentenced on all five counts, the terms to run concurrently. Upon the appeal he urges errors in the admission and exclusion of evidence and error in the allowance of amendments of the information.

[1] One of the alleged errors complained of was the admission of evidence that the children first complained of defendant's alleged acts to their father, Mr. Tipton, more than two years after the date of the last alleged act and that the testimony was inadmissible because of this long delay. It is unnecessary to discuss this point, for the reason that the testimony came in without objection. The children were living with their parents at all times. Their testimony was that similar acts of the defendant had been committed at intervals during several years—as to one of the children at least four years—preceding the final act. They were cross-examined at length as to their feelings toward defendant and their reasons for not confiding in their parents. It is apparent from the record that defendant's counsel did not deem the testimony with reference to the complaints to be detrimental to the defense, but that, upon the contrary, he regarded the silence of the children during this long period as a fact which tended to discredit them and to weaken their testimony. Defendant has had the full benefit of this argument and may not now be heard to say that the evidence should not have been admitted.

[2] A second claim of error has merit. Defendant's daughter, 19 years of age, was allowed to testify, over defendant's objection, that defendant had repeatedly endeavored to have sexual intercourse with her and that she had made complaint to Mr. and Mrs. Tipton, the parents of the children, respecting defendant's conduct. Also the parents were allowed to testify as to the complaints and statements made to them by defendant's daughter. This evidence tended to prove offenses other than the ones for which defendant was on trial, it tended to degrade him, and was inadmissible. A discussion of the point requires a general statement of the evidence.

[3] Defendant, who is now 45 years of age, had known the parents in the east. He had preceded them to California, had corresponded with them and when they came to California in 1936 he took up his home with them as a boarder and roomer. He was then a widower. He lived with them until July, 1942, when he moved elsewhere in Los Angeles, but he continued to see them occasionally. He married his present wife in November, 1942. He testified that during all of this time he lived in a meretricious relationship with the mother of the children. This she denied. He further testified that the reason he left the home was that he took a nighttime job and was told that the parents did not wish a day sleeper living in the home. Defendant was questioned, upon cross-examination, and over his objection,

whether he had not, on several occasions, asked his daughter to have intercourse with him and whether he had not, in the home of his uncle, attempted an act of intercourse with her. His answers consisted of denials. For the avowed purpose of impeachment and to prove that defendant's testimony as to the circumstances of his leaving was untrue, the People called as a witness in rebuttal defendant's daughter and elicited from her testimony as to defendant's conduct with her and the fact that she had complained to the parents concerning the same. She testified that she had been separated from her father for many years, living in the homes of friends and relatives; that she came to California with her father in July, 1941, and thereafter lived in the home of Mr. and Mrs. Tipton, where her father was living, and that she remained there until she was married in September, 1942. She testified that in July of 1942 she told the parents that her father had tried to have sexual relations with her within two weeks after her arrival in California; that he endeavored to force them upon her, and that he continued his efforts thereafter, sometimes every two or three weeks, sometimes once or twice a week, but that he had never succeeded. Then the parents were called by the People and questioned as to the complaints made by defendant's daughter. The father testified to hearing a commotion in the daughter's room, the door being closed, and of hearing defendant insist that his, defendant's, daughter have sexual relations with him and of hearing the daughter crying. He testified that he heard defendant accuse his daughter of having had sexual relations with him, the witness. The mother of the two children was called in rebuttal and testified that she and her husband asked defendant to leave the home because he was bothering his own daughter and that they told him that that was the reason they wished him to leave. The People seek to sustain the admission of all of this testimony under the rule that where evidence tends logically, naturally and by reasonable inference to establish any material fact for the People or to overcome any material matter sought to be proved by the defense, it is not rendered inadmissible by the fact that it may have a tendency to show defendant guilty of an offense other than the one with which he is charged. This is a well established rule of criminal law but it has no application to the instant case.

[4] If defendant had left the home after the date when, according to the testimony, the children first complained of his conduct, and if he had testified that the complaints of the children had not been mentioned and that he parted with the family upon friendly terms, such testimony would have been material and subject to impeachment. But the children had not yet made their accusations, and did not make them for some two years thereafter. Or if defendant had testified that he was asked to leave the home under circumstances which would have tended to prove that the parents acted from malicious motives or if they had threatened him or otherwise exhibited animosity, it would have been proper to rebut defendant's testimony upon those points. That, however, is not the situation. Defendant's leaving the home under the circumstances had no possible connection with his treatment of the two little girls and his testimony tended to disprove any feeling of animosity on the part of the parents at that time. There was nothing in his testimony which called for rebuttal. The purported impeaching testimony related to testimony of the defendant which was not only immaterial but also was not unfavorable to the prosecution.

[5-8] The authorities are unanimous in holding that a defendant's right to a fair trial in this sort of case is violated by the receipt of evidence of the commission of acts similar to those charged, with a person or persons other than the prosecutrix. People v. Asavis, 1937, 22 Cal.App.2d 492, 71 P.2d 307, and cases cited. The People insist that even if the evidence was improperly admitted, it was not prejudicial, for the reason that it did not establish the commission of a criminal offense. There are two good reasons why this position cannot be sustained. A fair inference from the testimony of the daughter would be that defendant was guilty of acts of assault. But if this were not so the evidence was equally inadmissible. As stated in People v. Glass, 1910, 158 Cal. 650–655, 112 P. 281, 293, "Not only is the prosecution thus forbidden to prove another crime, but the law does not sanction the introduction of evidence falling short of crime and designed merely to degrade and prejudice the defendant in the minds of the jury." The testimony which the daugh-

ter gave was shocking. It would be difficult to imagine accusations of misconduct which would have tended more strongly to arouse prejudice against defendant in the mind of the court. There is no room for speculation as to the extent of the harm occasioned by the receipt of such evidence. The implication in the questions asked upon cross-examination of defendant that he had been guilty of offenses against his daughter was highly improper and prejudicial. People v. Anthony, 1921, 185 Cal. 152, 158, 196 P. 47. Even in the cases where it is proper to prove the fact that a complaint was made by the victim, it is never proper to prove anything more than that. All of the testimony of the daughter which consisted of a recital of what she had told the Tiptons was hearsay and inadmissible. People v. Adams, 1939, 14 Cal.2d 154, 93 P.2d 146; People v. Wilmot, 1903, 139 Cal. 103, 72 P. 838. That the testimony in question deprived defendant of a fair trial admits of no doubt.

[9] The only question remaining is whether the evidence of defendant's guilt was so strong and convincing as to require an affirmance, notwithstanding the serious errors in the admission of evidence. The conclusion which we reach is that upon the entire record the conviction appears as a miscarriage of justice, as that term has often been defined. The whole case is one of the credibility of witnesses. We are unable to tell from the record with what degree of confidence the trial court accepted the testimony of the children as true. Although there is nothing in the testimony itself which would indicate that it was untrue, there are important circumstances to be considered in determining the strength of the case of the People. There was evidence of bitter feeling on the part of the parents toward defendant before they had heard complaints from their children; that in December, 1942, defendant had gone to their home intending to take therefrom furniture which he claimed, consisting of a bed, mattress and springs, a dresser, chest of drawers, blankets, a table, and other articles; that after discussing the matter with the parents he left the articles there for the time being, and that the father of the children then said to one of the witnesses that if defendant "ever tried to take the furniture out again that he would put him away where he would not bother anybody for a good long time, he was going to prefer rape charges against him." This statement was stricken out on motion of the People on the ground that it was hearsay, the court saying: "If you want it stricken, I will strike it. I think it helps the People's case but I will strike it. It may be stricken." Mr. Tipton, it will be recalled, testified that he overheard defendant accusing his (defendant's) daughter of having had sexual relations with Tipton. Shortly before July 7, 1944, defendant made a demand upon Mr. and Mrs. Tipton for possession of the furniture which was in the home. On July 7 he brought an action in claim and delivery against them and he and his wife drove to the home with two officers to take possession of the furniture. The officers testified to the occurrences at the home. They asked Mrs. Tipton to allow defendant herein to come in to identify the property; she allowed him to enter but refused admission to his wife. According to the officers, Mrs. Tipton said to defendant: "Well, I never thought you would do it. I didn't think you had nerve enough, but you have finally gotten up enough nerve to do what you were going to do" and that she said "it would be the sorriest day that he ever lived, that he had done what he was doing" and she also told her children, "Well, you see what he has done, he is going to make it so that you are going to have to sleep on the floor, or you are not going to have a bed to sleep in." According to the evidence it was on the second day after this occurrence that the two girls made a complaint to their father of defendant's conduct. Defendant testified that some months after he left the home Mr. Tipton accused him of being the father of a baby, born to Mrs. Tipton after defendant came to California, and threatened to kill him. There was also evidence that Mrs. Tipton upon numerous occasions refused to speak to defendant's present wife and exhibited an unfriendly attitude toward defendant after he married. This evidence of animosity prior to the date of the children's complaints, the absence of evidence, corroborating the testimony of the children, and the fact that they remained silent, under defendant's alleged mistreatment, until they were told that his taking the furniture away was an injustice to them, make it impossible for us to say that in spite of the errors we have mentioned, defendant has been justly and legally convicted.

[10-12] We have one additional observation to make which seems appropriate in view of the record. It has been emphasized time and again that cases of this nature should be tried with the greatest of care. Reversals are inevitable if this admonition is not observed. There was a good deal of evidence received which was wholly irrelevant to the issues in the case. After defendant's daughter had testified to his alleged conduct toward her and of her complaint to the Tiptons, the case took a turn in which the rules of admissibility of evidence and the consideration of evidentiary values were lost sight of. The daughter was questioned on cross-examination, over the objection of the District Attorney, whether she had not had sexual relations with Mr. Tipton, and answered in the negative. In overruling the objection the court stated: "It goes to her credibility." The objection should have been sustained. The methods of impeachment of witnesses are well defined; proof of specific wrongful acts is not among them. Court trials would be greatly complicated and oftentimes impeded by reluctance to give testimony if the law deemed credibility to be dependent upon or commensurate with chastity. As an illustration, the ruling in question was followed by testimony by Mr. Tipton that he had not had improper relations with defendant's daughter, and by testimony of the daughter's divorced husband that he had found his wife in bed with Tipton on several occasions, and by evidence that this last witness was serving a term in the county jail for some undisclosed offense. All of this line of improper testimony resulted from the original error in the cross-examination of the defendant and the subsequent receipt in evidence of the testimony of the daughter and the Tiptons. Whatever the conclusion of the court may have been upon this collateral issue, it should not have been accorded any weight in considering the credibility of the witness. The implication is, however, that a conclusion in favor of her chastity would have added something to her credibility. The cross-examination of the witness with reference to specific wrongful acts was wholly improper. The mere fact that she testified against her father demonstrated her unfriendly attitude and if this had not been sufficient, she testified to her unfriendliness in answer to a direct question. Neither the improper cross-examination of the witness nor any of the evidence which followed could be justified on the theory that it was an inquiry as to the bias or prejudice of the witness. Not only the fact that she testified against defendant, but her direct testimony of animosity should have foreclosed further inquiry along that line. The foregoing remarks are added to emphasize the fact that accepted rules of evidence should be followed with great strictness in cases of this nature.

It is unnecessary to consider other alleged errors urged by appellant.

The judgment and order denying a new trial are reversed.

DESMOND, P. J., and PARKER WOOD, J., concur.

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70 Cal.App.2d 190

PEOPLE v. HERNANDEZ.

Cr. 3899.

District Court of Appeal, Second District, Division 1, California.

July 13, 1945.

1. Assault and battery ⇨92

Evidence sustained conviction of assault by means of force likely to produce great bodily injury.

2. Criminal law ⇨1035(3)

In absence of request at trial for designation of interpreter for defendant, failure to make such designation could not be raised for the first time on appeal.

3. Criminal law ⇨457

Evidence of drunkenness is not limited to expert testimony.

◆

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Julian Hernandez was convicted of assault by means of force likely to produce great bodily injury, and he appeals.

Affirmed.

Paul Shapiro, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Carl S. Kegley, Deputy Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from a judgment of conviction of the offense of assault by means of force likely to produce great bodily injury.

It is appellant's contention on appeal that the evidence is insufficient to support the judgment; that opinion evidence was improperly admitted and that the court's failure to provide means for the translation of the proceedings for the defendant amounted to a violation of defendant's constitutional and statutory rights.

There is no merit to any of appellant's contentions.

The assault occurred about midnight shortly after defendant and three friends left a cafe and were about to enter their automobile to return home. All of them were drunk. A quarrel developed, the details of which are unimportant, during which defendant is alleged to have struck the two victims on the head with an iron bar or some such object.

[1] The evidence of the injury inflicted, its extent and location, considered in connection with the testimony of eyewitnesses, was evidence of circumstances sufficient to establish the offense charged. Although the evidence of the identity of defendant as the offender was conflicting, nevertheless, as pointed out by respondent, "While making no claims for the quality of intelligible and understandable evidence evinced on behalf of respondent herein, * * * And whatever may be said of the qualitative value of the entire oral testimony, the trial court must be trusted herein to have wisely chosen from the demeanor, conduct, expression and apparent trustworthiness of these persons presented as witnesses to it unfavorably to appellant on the evidence submitted." In connection with the foregoing, it should be noted, that the trial was before the court without a jury.

[2] With regard to appellant's contention that the failure to designate an interpreter for defendant's benefit was error, it is sufficient to note that no request was made at the trial for such assistance and manifestly, it is too late to raise the question for the first time on appeal. A consideration of the merits incident thereto are therefore unnecessary.

[3] Appellant's objection to opinion evidence refers to opinion testimony as to drunkenness. It is well settled that such evidence is not limited to expert testimony and is a matter about which any witness may express an opinion.

The evidence is sufficient to support the judgment. There being no errors in the record, the judgment appealed from is affirmed.

YORK, P. J., and WHITE, J., concur.

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70 Cal.App.2d 174

KOSLOSKYE v. CIS et al.

Civ. 12827.

District Court of Appeal, First District, Division 1, California.

July 13, 1945.

Hearing Denied Aug. 30, 1945.

1. Trusts 🔑1

A deposit in trust without more will support a finding of intent to create trust. Gen.Laws 1937, Act 652, § 15a; Civ.Code, § 2280.

2. Appeal and error 🔑996

If different inferences are possible from facts, one that tentative trust was intended and one that it was not, trial court's finding is conclusive.

3. Trial 🔑142

Whether particular inference can be drawn from evidence is a question of law, but whether the inference shall be drawn in any given case is a fact question for jury.

4. Appeal and error 🔑1009(1)

Whether bank accounts, created by deposit of husband's separate property in name of himself as trustee for named sons of his brother, were held in trust for such nephews, was for trial court in absence of further evidence of intent to create trust, where husband and wife lived harmoniously until husband's death without funds except such bank accounts, and husband had lived on charity of wife's relatives and had quarreled with his brother. Gen. Laws 1937, Act 652, § 15a; Civ.Code, § 2280.

5. Trusts ⚷42

General evidence of family situation and financial circumstances of alleged creator of trust may be considered on question of intent to create trust.

6. Trusts ⚷42

In absence of direct evidence, other than form of bank deposit, of intent to create a trust in deposit, court must consider all relevant facts relating to family relationship of depositor to ascertain probability of intent to create trust. Gen. Laws 1937, Act 652, § 15a; Civ.Code, § 2280.

◆

Appeal from Superior Court, City and County of San Francisco; Robert McWilliams, Judge.

Separate actions by Anthony Kosloskye, as administrator of the estate of Domenico Cis, deceased, against Annie Cis and others to determine ownership of bank deposits, wherein Enrico Cis and Clemente Cis, Jr., minors, by their guardian ad litem, Clemente Cis, Sr., filed cross-complaints and the two cases were consolidated. From a judgment for plaintiff, the cross-complainants appeal.

Affirmed.

J. Elwood Andresen and Eugene T. Nebiolo, both of Oakland, for appellants.

Harold F. Sawallisch, of Richmond, and Elden C. Friel, Arthur B. Dunne, and Dunne & Dunne, all of San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff, as the administrator of the estate of Domenico Cis, brought separate actions to determine ownership of two bank deposits, one in the Crocker First National Bank, and the other in the Bank of America. Cross-complaints were filed by two minor nephews of the deceased through their father as guardian ad litem, each nephew claiming title to one of the deposits. The two cases were consolidated and tried upon an agreed statement of facts. The trial court determined that the administrator was entitled to recover the deposits from the banks, that title to the deposits, subject to administration, was in the heirs at law of decedent, and that the nephews have no right therein. From this judgment the nephews appeal.

For many years prior to April 13, 1933, the decedent had two savings accounts in his own name in the two banks above mentioned. The money therein was his separate property, having been acquired by him before his marriage to Annie Cis, his surviving widow, whom he married in January of 1928. Domenico died intestate July 22, 1941, leaving his wife surviving him. Unless the two accounts are part of his estate he left no other property of any kind or nature.

On April 13, 1933, Domenico had $2,882.32 on deposit with the Crocker bank. On that date he withdrew the entire sum and opened a new account, #25226, which was entitled: "Mr. Domenico Cis, Trustee for Enrico Cis." Enrico Cis is the nephew of Domenico, and at the time the deposit was made Enrico was about nine years of age. No withdrawals were ever made from this account and the only deposits appear to be of interest which was allowed to cumulate. The signature card was signed by Domenico alone. At the time of death the account totaled $3,447.20.

On April 6, 1933, Domenico had $3,282.01 on deposit with the Bank of America. On that date he closed this account and withdrew the entire sum. On April 13, 1933, he opened a new account with the same bank, #2470, in which he deposited $3,282.01 and which account was entitled: "Domenico Cis, Tr. for Clemente Cis." Clemente Cis is another nephew of Domenico, is a brother of Enrico, and at the time the deposit was made was about three years of age. On September 8, 1939, the decedent withdrew $4.40 from this account. There were no other withdrawals. The only deposits were of interest which was permitted to cumulate. The signature card was signed by Domenico alone. At the time of death this account totaled $3,947.80.

It appears from the agreed statement of facts that neither the nephews, nor their parents, nor any person on their behalf, had any knowledge of the deposits until long after decedent's death. It also appears that the surviving widow knew nothing of the deposits until more than a year after the death of Domenico, when the deposit books were discovered in a safe deposit box in the Bank of America. The agreed statement also discloses that

Domenico was married to Annie in 1928; that they lived together continuously until his death in 1941; that except for the two deposits the decedent left no property of more than nominal value; that the surviving widow has no property of her own; that during 1931-1934 decedent was unemployed a considerable part of the time and did not earn enough to support his household with the bare necessities; that during this period, children of Annie by a former marriage furnished Domenico and his family with money for living expenses; that such persons have never been reimbursed for these advances; that during 1937 decedent quarrelled with his brother, the father of Enrico and Clemente, and thereafter did not visit or communicate with his brother or his brother's family.

The trial court on these facts concluded that the two accounts were part of the estate of decedent and that the two nephews had no interest therein.

The appellants concede that no gifts of the accounts were made, and that no irrevocable trusts in the accounts were created during the lifetime of Domenico. They urge, however, that tentative trusts, revocable at the will of Domenico, were created by the deposits, and that upon the death of Domenico before the beneficiaries, and without revocation by him, a trust arose which may be enforced by the beneficiaries. There are at least two lines of authority on this subject. There is a very definite line of authorities, headed by cases from New York, holding that accounts in such form raise a presumption or inference that trusts were intended, and that upon the death of the depositor the beneficiary may enforce such a trust. Another line of authorities, headed by cases from Massachusetts, hold that the mere deposit in a trustee account is not sufficient evidence to support a finding of an intent to create a trust. This conflict of authorities was noted in Kuck v. Raftery, 117 Cal. App. 755, 758, 4 P.2d 552, 553, where the court stated:

"* * * there are two lines of authority upon the subject which are founded respectively upon the New York and Massachusetts decisions. The two rules are well stated by the Supreme Court of Minnesota in Walso v. Latterner, 140 Minn. 455, 168 N.W. 353, 354: 'Where the depositor dies without withdrawing the deposit, the authorities are in conflict. In Massachusetts it is settled by a long line of decisions that the mere fact of such a deposit being made "in trust for" another, coupled with the retention of the passbook by the depositor, is not sufficient evidence of a trust to entitle the beneficiary to the deposit on the death of the depositor. (Citing cases.)

"'In New York the rule is the other way. The doctrine of the New York cases at the present time is best stated in Matter of Totten, 179 N.Y. 112, 71 N.E. 748, 70 L.R.A. 711, also reported with an elaborate note in 1 Ann.Cas. 900. We quote: "A deposit by one person of his own money, in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration such as delivery of the passbook or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor." * * *

"'The authorities are practically in accord on the proposition that the existence of the trust in every such case is a question of fact involving the intention of the donor and an apt declaration of that intention. See above note in 1 Ann.Cas. at page 904, and cases cited. The conflict between the New York decisions and those in Massachusetts is not at all over the validity of such a trust, but wholly as to what is sufficient evidence to make a question for the jury on the issue of the intention of the depositor. Even in Massachusetts, where the evidence shows declarations of his intention to create a trust, or to give the money to the beneficiary, the court refuses to disturb a finding that the trust is complete and enforceable on the death of the depositor. (Citing cases.)'"

The rule of the New York cases has, at least, in part, been adopted by the Restatement of the Law of Trusts. Section 58 reads as follows:

"Where a person makes a deposit in a savings account in a bank in his own name as trustee for another person intending to reserve a power to withdraw the whole or any part of the deposit at any time during his lifetime and to use as his own whatever he may withdraw, or otherwise to revoke the trust, the intended trust is enforceable by the beneficiary upon the death of the depositor as to any part remaining on deposit on his death if he has not revoked the trust." A portion of Comment (a) following the section reads as follows:

"a. If a person makes a savings deposit in a bank in his own name 'as trustee' for another person, his intention may be either (1) to create a revocable trust, or (2) to create an irrevocable trust, or (3) not to create a trust. Evidence may be admitted to show which was his intention.

"In the absence of evidence of a different intention of the depositor, the mere fact that a deposit is made in a savings bank in the name of the depositor 'as trustee' for another person is sufficient to show an intention to create a revocable trust. To such a trust the rule stated in this Section is applicable. Such a trust is called a 'tentative trust.'

"Evidence may be admitted, however, to show either that the depositor intended to create an irrevocable trust or that he did not intend to create a trust."

[1] Just what the rule is in California is not entirely clear from the authorities. In addition to Kuck v. Raftery, supra, the problem has been discussed in Sherman v. Hibernia Savings & Loan Soc., 129 Cal. App.Supp. 795, 20 P.2d 138; Evinger v. MacDougall, 28 Cal.App.2d 175, 82 P.2d 194; In re Estate of Alberts, 38 Cal.App. 2d 42, 100 P.2d 538, and Hyman v. Tarplee, 64 Cal.App.2d 805, 149 P.2d 453. All of these cases cite, and most of them quote, from the leading New York case of in Matter of Totten, supra. In none of the cases was it indispensable to unequivocally adopt the tentative trust doctrine, but in most of the cases the doctrine is referred to with apparent approval. Moreover, § 15a of the Bank Act (Deering's Gen.Laws, Act 652) provides that where such deposits have been made in trust, upon the death of the trustee, the bank may pay the deposit to the beneficiary. While the doctrine is somewhat anomalous in view of our rigid law of wills, and in view of the provisions of § 2280 of the Civil Code, it is based upon a sound public policy. See 28 Cal.L.Rev. 202. For the purposes of this opinion it may be assumed that a deposit in trust, and nothing more, will support a finding of an intent to create a trust.

It will be noted that the New York cases, the Restatement and the California cases, all recognize that the problem is one of intent of the depositor, and that this is a question of fact for the trier of the facts. The Totten case states that where the depositor who has made a trustee deposit dies before the beneficiary without revocation, or some decisive act of disaffirmance "the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor." 71 N.E. at page 752. In later New York cases the court has held that the form of the deposit, without other evidence, gives rise to an "inference" only. The case of In re Herle's Estate, 165 Misc. 46, 300 N.Y.S. 103, 115, states the modern New York view as follows: "Under the doctrine of Matter of Totten, 179 N.Y. 112, 125, 71 N.E. 748, 70 L.R.A. 711, 1 Ann.Cas. 900, the opening and continuance of an account in so-called 'trust' form creates no more than a presumption that it was the intention of the depositor that the avails of the account should become the property of the beneficiary on the death of the depositor. [Citing cases.] This so-called 'presumption' is, however, wholly different in effect from the true presumption of law relating to the survivorship rights resulting from the opening of a joint account in statutory survivorship form [citing cases] and is, in reality not properly classifiable as a presumption at all [citing cases]. It is a mere inference of fact, which, like other inferences, is subject to rebuttal by contrary evidence or stronger inferences. [Citing cases.] Such controverting demonstration may be made either by a showing that there was no initial intention to confer a benefit upon the nominal cestui que trust (Morris v. Sheehan, supra [234 N.Y. 366, 138 N.E. 23]), or that, after the opening of the account with this wish in mind, the sentiments of the depositor on the subject changed." See, also, Krause v. Krause, 285 N.Y. 27, 32 N.E.2d 779, and In re Reich's Estate, 146 Misc. 616, 262 N.Y.S. 623, where it was held that the form of the deposit creates an inference only.

[2, 3] Whether the form of the deposit, without other evidence, creates a rebuttable presumption or an inference need not be determined in this case. Of course if different inferences are possible, one that a tentative trust was intended and one that it was not, the finding of the trial court

would be conclusive. In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689. Moreover, it is the rule, that "whether a particular inference can be drawn from certain evidence is a question of law, but whether the inference shall be drawn, in any given case, is a question of fact for the jury." Blank v. Coffin, 20 Cal.2d 457, at page 461, 126 P.2d 868, 870. Thus, if the form of the deposit creates but an inference, it is obvious that the finding of the trial court cannot be attacked successfully. If the form of the deposit creates a presumption, such presumption is, of course, a rebuttable one. Evidence is admissible to show the true intent of the decedent. The trial court, in holding that the evidence indicated that it was not the intent of the decedent that his nephews should have the balance in the accounts, was impressed by the following factors, as indicated by the opinion filed in the case and made a part of the record on appeal:

1. Other than the form of the deposits there is no evidence of an intent to create a trust.

2. The decedent and his wife were married in 1928 and lived together continuously, and apparently harmoniously, until his death in 1941. Unless these accounts are part of his estate the wife will be left penniless. The trial judge in weighing these facts stated: "It is a legitimate inference that may properly be drawn from the situation thus presented that the decedent would have desired that his wife be left with some means of support rather than that his whole estate would go to his two nephews between whom and decedent there does not appear in the record to have been any bond of affection other than the somewhat attenuated one that might normally flow from such relationship."

3. During the years 1931-1934 decedent was unemployed for most of the time and lived on the charity of his wife's relatives.

4. During 1937 decedent quarrelled with his brother, the father of the appellants, and did not thereafter communicate with or visit his brother or his brother's family.

[4-6] For these reasons the trial court determined that the evidence showed an intent not to create a trust. Under the facts here disclosed, we think this was a question of fact for the trial court, and that its finding is supported by substantial evidence or reasonable inferences therefrom. Where, as here, there is no direct evidence of intent, the trial court must, of necessity, determine the factual question upon the reasonable probabilities. In such a case the trial court must, of necessity, rely upon general evidence of the family situation and financial circumstances. That such facts may properly be considered on the question of intent is well-settled. See many cases collected and commented upon in 1 Bogert on Trusts and Trustees, § 47, p. 217. Assuming that the case starts with a presumption in favor of a trust, the trial court, in the absence of any direct evidence of intent other than the form of the deposit, must consider all relevant facts relating to the family relationship in order to ascertain whether it is reasonably more probable that a trust was intended or reasonably more probable that one was not. While the facts disclosed by the present record are not as clear on the issue of intent as might be desired, they are sufficient, in our opinion, to support the finding that the decedent did not have an intent to create a trust.

The judgment appealed from is affirmed.

WARD, J., and BRAY, Justice pro tem., concur.

Hearing denied; SHENK and TRAYNOR, JJ., dissenting.

70 Cal.App.2d 71

FLICK et al. v. DUCEY & ATTWOOD ROCK CO.

Civ. 14736.

District Court of Appeal, Second District, Division 1, California.

July 5, 1945.

Hearing Denied Aug. 27, 1945.

1. Highways ⚷17

In action for injuries to boy who was driving on defendant's private roadway, when automobile fell into defendant's gravel pit, evidence did not warrant recovery on theory that roadway had public character, over which public acquired an easement by prescription.

2. Dedication ⚷43
Highways ⚷17

Testimony that roadway "was open to the public," and that witness traveled over it at least as recently as five years ago, was not admissible to show acquiescence to public use, prescription, or implied dedication.

3. Mines and minerals ⚷118, 119

Where gravel "plant" had been closed for six months but owner carried on business of selling rock, sand and gravel and maintained office at gravel pit, pit was not "abandoned" within statute requiring protection of abandoned excavation dangerous to passers-by or livestock. St.1939, p. 966, § 24400.

See Words and Phrases, Permanent Edition, for all other definitions of "Abandoned".

4. Mines and minerals ⚷118

A boy who had traveled a quarter of a mile in an automobile on private road before automobile fell into gravel pit was not a "passer-by" entitled to protection of statute requiring covering or fencing of abandoned excavation dangers to passers-by or livestock. St.1939, p. 966, § 24400.

See Words and Phrases, Permanent Edition, for all other definitions of "Passer-by".

5. Mines and minerals ⚷118

The Quarry Safety Rules issued by Industrial Accident Commission and requiring railings for quarries were intended to govern working conditions for employees and could not benefit boy whose automobile fell into gravel pit, and hence evidence thereof was properly excluded in action against owner of pit.

6. Mines and minerals ⚷118

Owner of gravel pit owed no duty to public which was violated by maintenance of unguarded pit into which automobile fell after driving without owner's permission on private driveway.

7. Mines and minerals ⚷118

Boys driving automobile, who turned into private road by mistake while seeking to get home and without having any business with owner of gravel pit which maintained such road, were "trespassers" rather than "business invitees", as affecting liability of owner for injuries when automobile fell into pit.

See Words and Phrases, Permanent Edition, for all other definitions of "Business Invitees" and "Trespassers".

8. Mines and minerals ⚷118

A gravel pit was not a "trap" as basis for recovery from pit owner by boy who was injured when automobile in which boy was trespassing fell into pit.

See Words and Phrases, Permanent Edition, for all other definitions of "Trap".

9. Mines and minerals ⚷118

Evidence established that boys were contributorily negligent in driving automobile along private roadway maintained by gravel pit owner in such manner that automobile fell into gravel pit.

◆

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Robert Flick, a minor, and Frank Flick, his guardian ad litem, and another against Ducey & Attwood Rock Company, for injuries suffered when automobile fell into defendant's gravel pit. From a judgment for defendant, plaintiffs appeal.

Affirmed.

Roland Maxwell, of Pasadena, for appellants.

George P. Kinkle and John S. Hunt, both of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from a judgment in favor of the defendant in an action for personal injuries sustained by Robert Flick, who at the time of the accident was a boy 15 years of age. The respondent had carried on a rock and gravel business near the City of Pasadena over a period of years and in connection therewith maintained a rock and gravel pit upon leased premises, which was reached by a private dirt road leading westerly from New York Avenue for about a quarter of a mile. This private road terminated in a wide level area on which were several buildings used by respondent, a rock crusher, equipment, and piles of gravel. Before reaching the pit the private road made a turn to the left and then to the right. While New York Avenue was a paved two-lane highway, this private roadway was a dirt road, not paved, narrow, and "it wasn't too rough." At its intersection with New York Avenue there was a sign reading either "Private Property" or "Personal Property" of the Ducey

& Attwood Rock Co., which sign, however, was broken in two at the time in question. While no gravel was actually being removed from the pit at the time of the accident, the premises were in use by respondent for the sale of sand and gravel, and an office was maintained on the premises.

The accident occurred about 11 P.M on the evening of March 19, 1943 when appellant Robert Flick and two other boys aged about 16 years, while riding in a 1931 Model A Ford roadster driven by one of the other boys, became lost and entered upon the above-described private roadway. The three boys, riding together in the front seat of the roadster, were proceeding home after having visited a skating rink and a bowling alley. Reaching a point on New York Avenue where such street was closed by a barricade, they turned around, "found this dirt road and started across," and after traveling some two or three blocks, the automobile toppled over into respondent's gravel pit, approximately twelve to fifteen feet deep, at which place there was neither fence nor barricade. The boys knew that it was necessary to get across a certain "wash" in the vicinity in order to take one of them home, and with this in mind had turned westerly into the private road. Charles R. Coye, the driver of the car, testified that the headlights showed the roadway ahead with clear vision "up to 150 feet", and about 25 feet on either side. The speed of the automobile was estimated at "About 20 or 25 miles an hour" and the brakes were not applied. About a block before the automobile fell into the pit, the boys were talking and the driver would turn his head to talk to the other two boys "a little bit", but thereafter was looking "straight ahead, I suppose." The car landed in the pit bottom side up and the three boys were pinned thereunder until rescued the next morning, from which accident the plaintiff suffered serious injuries. During the course of the trial, court was adjourned to the premises in question for a view of the private roadway and the conditions surrounding the scene of the accident. The trial court adopted the procedure of determining the question of liability before receiving evidence with respect to damages, and after hearing the evidence on this question concluded that there was no liability on the part of the defendant. In this connection the court found that the plaintiff's injuries "were the result of an unavoidable accident in so far as the defendant * * * was or is concerned"; further, "that the plaintiff Robert Flick did not exercise ordinary care, caution or prudence for his own welfare or safety, or to avoid the happening of said accident, and by his failure so to do thereby directly and proximately contributed to the happening of said alleged injuries". The court further found that "the plaintiff Robert Flick and the driver of the automobile in which said plaintiff was riding entered upon said defendant's premises without right or invitation and not upon any business connected with the defendant, and that they were trespassers upon said premises."

[1] It is the appellant's contention that "The roadway being used at the time of the accident had a public character and, therefore, plaintiff, Robert Flick, and his companions had a legal right to be thereon," and that the court erred in excluding offered evidence "tending to show public use of the road over a long period of years." After hearing the evidence and making a personal inspection of the roadway in question, the trial court found "that it is not true that said or any road or passageway leading from the public highway to the said gravel pit or to any portion of defendant's premises was open to the public generally or was open for travel by automobile, or otherwise, to plaintiff Robert Flick." There is nothing in the record to justify any other possible conclusion. As stated in the respondent's brief, "Appellants seek to make out of this private roadway * * * some sort of a mysterious 'in between' highway, which was not a public highway and yet had a 'public character', over which the public acquired an easement by prescription. In doing so they overlook the fact that the accident happened upon the respondent's premises, and not upon the roadway, * * *". Mr. Charles J. Burton, secretary of the defendant corporation, testified that the roadway from New York Avenue to the gravel pit had been in use "Not over five years", and the record discloses no evidence indicating that this roadway had ever been used for any purpose other than that of going to and from the defendant's place of business, with the exception that the Osborn Company, the owner of the land, also made use of it.

[2] For the purpose of showing the alleged "public character" of the roadway, plaintiff's attorney made the following

offer of proof: "If permitted to testify, it is my understanding that Mr. Raymond Coye would testify, * * * that as long as twenty years ago this road from North Avenue to New York Avenue was open to the public, and that he traveled over it at least as recently as five years ago." To sustain the contention that this evidence should have been admitted, appellants have quoted a portion of the syllabus from People v. Power, 38 Cal.App. 181, 175 P. 803, stating that "* * * roads may become public highways without any formal or express dedication, by long uninterrupted use and general acquiescence, prescription, or implied dedication, which may be presumed from long and continued adverse use." It is to be noted, however, that the witness' proffered testimony that the roadway in question "was open to the public", was a mere conclusion of law, and the further statement that the witness "traveled over it at least as recently as five years ago", would not establish the public character of the roadway, nor would it prove any "long continued use and general acquiescence, prescription, or implied dedication, which may be presumed from long and continued adverse use", within the meaning of the case just cited. There was therefore no error committed in the exclusion of the offered testimony.

[3, 4] The appellant maintains that the respondent "was clearly guilty of a violation of the requirements of Section 24400 of the Health and Safety Code, St.1939, p. 966, which reads as follows, "Every person owning or having charge of land on which is located any *abandoned* mining shaft, pit, or other *abandoned* excavation *dangerous to passers-by or live stock* who fails to cover or fence it securely, and keep it so protected, is guilty of a misdemeanor." (Italics added.) It is sufficient answer to this contention to point out that under the evidence as shown by the record, the respondent's property was far from "abandoned". According to the testimony of Mr. Burton, secretary of the respondent corporation, the "plant" had been closed for some six months before the accident but the business of selling rock, sand and gravel was being carried on and an office maintained at the gravel pit. It is also to be noted that Robert Flick was in no sense a "passer-by" entitled to the protection afforded by the quoted section of the Health and Safety Code;—he had entered upon a private road and traveled the distance of a quarter of a mile before the accident occurred. Appellants, seeking to bring themselves within the case of Langazo v. San Joaquin Light & Power Corporation, 32 Cal.App.2d 678, 90 P.2d 825, assert that because of such alleged violation the respondent should have been held liable despite the fact that the minor appellant was a trespasser. In that case plaintiff's son was electrocuted when he came in contact with a sagging telephone wire attached to the poles of defendant's power line, and there was evidence that defendant had failed to maintain the line as required by orders of the Railroad Commission, violations of such orders being considered negligence as a matter of law. It is at once seen that the Langazo case is in no way comparable to the present situation and is therefore not authority for appellant's argument.

[5] The Langazo case just cited, is also urged as authority for the point that "The trial court erred in excluding consideration of the Quarry Safety Rules" issued by the Industrial Accident Commission, Rule 610, subdivision A, which provides, "The sides of stairs, trestles, dangerous plank-walks, gangways, and platforms in and around the quarries shall be provided with hand and guard railing to prevent persons from falling over the sides." Again it is only necessary to point out that the Quarry Safety Rules quoted, can have no application to the facts of this case, the rules of the Industrial Accident Commission being intended to govern working conditions for employees, and appellants not being within the class intended to be benefitted. The Langazo case does not, as claimed by appellants, "involve the precise point raised" but is, as heretofore pointed out, entirely dissimilar, and there was no error in the exclusion of the offered evidence.

[6] It is next contended that "Even though the roadway here involved is considered to be a private road, the defendant, nevertheless, owed a duty to the public which was violated by its maintenance of the unguarded pit." In respect thereto, the court is cited to the case of Hanson v. Spokane Valley Land & Water Co., 1910, 58 Wash. 6, 107 P. 863, 865, in which the following statement occurs, quoted from Wharton's Law of Negligence, "Nor am I justified in making excavations either on

the path which I have permitted other persons to traverse, *or so near a public road that travelers, in the ordinary aberration or casualties of travel,* may stray or be driven over the line and be injured by falling into the excavation." (As italicized by appellants.) Such quotation, however, contains only a portion of the rule, and the part not quoted by appellants is that which is directly applicable to the present situation, namely, "But beyond this my liability to trespassers, *voluntary or involuntary,* does not go. I may make what excavations I choose on my own land, without fencing them in, provided they are not on a line over which I permit travelers to pass, or so near a public road that in them a traveler may unwittingly fall." (Italics added.) Furthermore, the Hanson case involved a situation where the defendant knew that persons were making use of his roadway, whereas, in the case at bar the record discloses no evidence as to knowledge of user by persons other than customers and employees of respondent company and the owner of the real estate. The gravel pit in question was not near a public road but was removed a distance of about one-quarter of a mile from New York Avenue. The cited case is not applicable to the present situation, and appellants' contention in this regard is without merit.

[7] It is argued by appellants that the "Plaintiff, Robert Flick, had the status of an invitee", this argument being founded on the proposition that "An invitation may be implied" from the appearances in the particular case. On the other hand, the respondent claims that the boy's status was that of a trespasser, and that such status was not affected by the fact that the trespass was unintentional. It is not disputed that an invitation may be implied under certain circumstances, but appellants' argument that there was any such implication in the present case is not persuasive. The testimony of the plaintiff, Robert Flick, is illuminative on this point:

"Q. By Mr. Hunt: The sole purpose of your going down to this side road was to get home, wasn't it? A. Yes.

"Q. You didn't have any business with the Ducey-Attwood Company then, did you? A. No."

There was, therefore, nothing in the nature of a "business invitation" upon which appellants could rely. Nor is any other circumstance pointed out which would give rise to a reasonable implication of invitation to enter upon the respondent's premises. The language used in Kirkpatrick v. Damianakes, 15 Cal.App.2d 446, 449, 59 P.2d 556, 557, is applicable to the case at bar, "There can be no doubt about plaintiff's status under the undisputed evidence. She entered upon the property of another without right and without any express or implied invitation or permission. * * * She was driving for her own purposes and her own convenience, and was given no express or implied assurance or safety from anyone when entering upon said private alley. She was therefore a trespasser. 45 C.J. 740. The mere fact that she entered the private alley by mistake did not alter her status. As is said in a note in 41 A.L.R., at page 1430, 'It seems to be the well-settled rule that one who, through mistake, enters on private premises, occupies the status of trespasser. * * *' It is therefore clear that the only duty of the owner or tenant of the property was to abstain from willfully or wantonly injuring plaintiff. Giannini v. Campodonico, 176 Cal. 548, 169 P. 80." Likewise in the instant case, Robert Flick and his companions entered the respondent's premises for purposes of their own, to-wit, to get home, and the fact that the boys turned into this private road by mistake, does not excuse the trespass nor change the rules which govern liability to a trespasser. Thus, it can only be said that this appellant trespassed upon the premises, unknown to the respondent.

[8] Appellants' statement that "The gravel pit constituted a trap and it was, therefore, a liability to plaintiff, Robert Flick, even though his status was that of a trespasser", is without substantial merit. In support of this contention appellants refer to the case of Blaylock v. Jensen, 44 Cal.App.2d 850, 113 P.2d 256, holding that a landowner may be liable where a child becomes mired in an oil sump located about 20 or 30 feet from the paved highway; and Boyce v. San Diego High School District, 215 Cal. 293, 10 P.2d 62, where plaintiff, while inspecting an air corridor at defendant's request, fell into a pit which was not protected by a guard rail. A reading of these cases fails to disclose any point of similarity in reference to the manner in which appellant's accident occurred, and they constitute no authority for

holding that the respondent's gravel pit was in any sense, a trap.

[9] The final point for consideration urged by the appellants is that there is no evidence to support the trial court's finding that Robert Flick was guilty of contributory negligence. In connection with such finding and in refutation of appellants' statement that the evidence failed to show anything which would constitute notice to the boys of the presence of an unguarded pit, the court found in Paragraph IV of the Findings of Fact, "that it is not true that the operator of said automobile in which plaintiff Robert Flick was riding, or the plaintiff Robert Flick, was not given any warning of danger or peril or any notice that said road or passageway was private property; it is true that said structure described in paragraph II hereof themselves gave plaintiff notice that he was on private property". Paragraph II of the findings states: "it is also true that in the immediate vicinity within a fifty to seventy-five foot radius there were rock crushers, elevators, sand and rock piles and other structures usually found in connection with gravel pits, all in plain and unobstructed view of plaintiff and giving him abundant warning of the character of the premises and putting him upon notice to proceed with care and circumspection." Ample evidence is found in the record to support this and all of the findings, and to indicate that Robert Flick and the other boys were guilty of negligence which contributed to, if it did not entirely cause, the accident in question. Any other judgment than that rendered would have been directly opposed to the evidence and contrary to law. Likewise, any decision other than an affirmance of that judgment would establish a precedent requiring every owner of property and every lessee thereof, to fence the land and barricade any depression or dangerous instrumentality thereon, against the remote possibility that some person, by mistake or otherwise, might wander from a public highway however distant, and receive injury on the defendant's premises. Appellants have cited no case which suggests such a doctrine, and such is not the law.

No error appearing in the record, the judgment is affirmed.

YORK, P. J., and DRAPEAU, Justice pro tem., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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70 Cal.App.2d 120

DE ROULET v. MITCHEL et al.

Civ. 14817.

District Court of Appeal, Second District, Division 2, California.

July 10, 1945.

1. Partition ⟹77(2)

One of two tenants in common was entitled as matter of right to interlocutory judgment in partition by sale of property, regardless of contrary wishes of cotenant or of belief of cotenant or trial court that immediate sale would cause an economic detriment. Code Civ.Proc. §§ 752, 763.

2. Partition ⟹14

Under statutes if cotenant seeks partition he is entitled thereto, either in kind or by sale. Code Civ.Proc. §§ 752–801, 752, 763.

3. Partition ⟹14

A cotenant is entitled to partition as a matter of absolute right without assignment of any reason for his demand.

4. Partition ⟹26

The only indispensable requirement to award of partition to cotenant is that a clear title be shown, and partition may not be denied because it will result in financial loss to cotenant.

5. Appeal and error ⟹882(3)

Where defendant in partition action between cotenants alleged that sound business policy required that premises not be sold, but plaintiff did not present evidence on issue of economic advantage until trial court had indicated intention to deny partition on economic grounds, plaintiff was not estopped from urging on appeal error in considering issue of economic advantage.

6. Appeal and error ⟹883

A litigant should submit to rulings with reference to proof of issues, and after he has done so he may thereafter on appeal demonstrate error of ruling to which he has made timely objection.

7. Partition ⟹77(3)

The court may partition by sale if parties would suffer loss by partition in kind, but if they will not thereby suffer loss, the partition must be in kind. Code Civ.Proc. § 763.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Partition action by Marie Louise De Roulet against Adelaide P. Mitchel and others. From a judgment of dismissal, the plaintiff appeals.

Judgment reversed, with directions.

Williamson, Hoge & Judson, of Los Angeles, for appellant.

Kenyon F. Lee, of Los Angeles, for respondent.

MOORE, Presiding Justice.

From a judgment of dismissal of her action for partition plaintiff appeals.

The Facts

Appellant and respondent are sisters. As tenants in common they own a parcel of land situate at the intersection of 12th and Figueroa streets in the city of Los Angeles, in a district devoted primarily to the automotive trade. The improvement of the realty consists of a four-story reinforced concrete building designed and used for automobile display, sales, and service. Each party alleged that she had an estate of inheritance in the property to the extent of an undivided one-half interest in the fee as her sole and separate estate. After alleging such tenancy in common, the separate interests of the lessees and of the lien holders (on defendant's interest), the complaint alleged that "by reason of the nature and location of said property and the nature of the improvements located thereon a physical partition thereof cannot be made without great prejudice to the owners and all persons interested therein," and demanded that the property be sold and the proceeds thereof be divided between the parties according to their rights. Following her general denial the defendant alleged that under the current lease rentals paid on the property from September 1, 1943, to August 31, 1946, were and are $1,400 per month and that for the two succeeding years the rentals will be $1,500 per month, and "that by reason of said favorable terms of said lease to plaintiff and this defendant sound financial judgment and sound business policy require that said premises not be sold. That there is no necessity for the sale thereof. That the interests of said owners of said property will not be promoted by a sale thereof."

At the trial it was stipulated that a partition in kind could not be made without great prejudice to the owners and that any partition of the property should be by order of sale at public auction. Following the trial of the issues raised by the answer the court found that the parties are in disagreement as to the advisibility of selling the property; that the interests of both parties will not be promoted by a sale at this time; that the reasonable market value of the property is $160,000 and that it will increase in the future; and that the property should not be sold at this time. Upon such findings the court ordered that the action be dismissed without prejudice as to respondent.

The Question for Decision

[1] The sole question for decision is whether in an action for partition of real property one of two tenants in common is entitled as a matter of right to an interlocutory judgment of partition by sale of the property and division of proceeds regardless of the contrary wishes of his cotenant or of the latter's belief as to the economic disadvantage of such sale or of the conclusion of the trial court that an immediate sale would cause an economic detriment to both cotenants.

The Decision is Contrary to Law

[2] It is significant that the Civil Code contains no declaration of the rights of cotenants to partition or to resist a partition. The only statutory rules directly applicable to the subject of partition are found in the Code of Civil Procedure, Chapter 4, Part II, Title 10, Secs. 752–801. By section 752 it was evidently intended that any cotenant is entitled to a partition upon a showing of the facts there enumerated. But inasmuch as section 763 was designed for such a situation as is here presented we quote that portion of it directly applicable, towit:

"Section 763. (Question of sale or partition.) If it appears by the evidence, whether alleged in the complaint or not, that the property or any part of it is so situated that partition cannot be made without great prejudice to the owners, or where property is subject to a life estate and the remainder is a contingent remainder, the court may and in the latter case must order the sale thereof; otherwise, upon the requisite proofs being made it must order a partition according to the respective rights of the parties as ascertained by the court, and appoint three referees therefor, and must designate the portion to remain undivided for the owners whose interests remain unknown, or are not ascertained; * * *."

Reading this provision in the light of the preceding sections of Chapter 4, the legislative intent becomes clear in three respects, namely, (1) that the court is vested with discretion in adjudging a partition by sale; (2) that if the property is subject to a life estate with contingent remainder the court must order partition by sale; (3) that otherwise upon requisite proofs the court must order a partition in kind. In other words, partition by one of the two methods is imperative. Under two situations the court is required to order a sale: (a) if in its discretion it determines that under the facts presented a sale should be made or (b) if the "property is subject to a life estate and the remainder is [contingent]." That the legislature intended, in any event, that a partition must be made "upon the requisite proofs" appears beyond dispute as the origin and history of the action is unfolded and the decisions of the appellate courts are understood. While the Civil Code is silent upon the subject, the origin and history of the practice reveals the rule at common law to be to award the partition demanded by a cotenant.

[3, 4] That a joint tenant or a tenant in common possesses the absolute right to have his interests severed from that of his cotenants is the conclusion of all text writers whose works have come under our inspection. Referring to the subject historically, Mr. Freeman points out that in England, as early as 1272 A. D., when heirs by inheritance could come to no agreement among themselves concerning the division of their property a proceeding might be instituted to compel a partition. The use of the action was extended by chancery in the sixteenth century by the exercise of its equitable jurisdiction. Subsequently a statute was enacted requiring all tenants in common to be "coacted and compelled" to make partition between them of the lands they held in joint ownership. The rule was further liberalized in the nineteenth century to authorize a sale when it is more advantageous. Freeman's Co-tenancy and Partition, 2d Ed., §§ 420–424, 433, 539; 5 Pomeroy's Jurisprudence, 2d Ed., §§ 2130, 2144. It is, moreover, the accepted doctrine of the more recent authors upon the subject as well as of the appellate courts of this state that a cotenant is entitled to partition as a matter of absolute right; that he need not ter of absoluate right; that he need not assign any reason for his demand; that it is sufficient if he demands a severance; and that when grounds for a sale are duly established it may be demanded as of right. To grant it is not a mere matter of grace. The only indispensable requirement to its award is that a clear title be shown, and in no event is a partition to be denied because it will result in financial loss to the cotenants. 20 R.C.L. 724, § 8; 47 C.J. 288, § 48; 40 Am.Jur. 72, § 83; 20 Cal.Jur. 614, § 28; DeUprey v. DeUprey, 27 Cal. 329, 87 Am.Dec. 81; Rich v. Smith, 26 Cal.App. 775, 148 P. 545; Vollmer v. Wheeler, 42 Cal.App. 1, 183 P. 264; Harper v. Superior Court, 140 Cal.App. 5, 34 P.2d 1063; Jameson v. Hayward, 106 Cal. 682, 39 P. 1078, 46 Am.St.Rep. 268. See also Justice Sloss' dissent in Gonzalez v. Gonzalez, 174 Cal. 588, 605, 163 P. 993.

The courts of the State of Washington in interpreting its statutes, which are substantially the same as our own, have likewise held the right of partition by a tenant in common to be absolute and not dependent upon the economic advantages to be gained or lost by the parties. Hamilton v. Johnson, 137 Wash. 92, 241 P. 672; Huston v. Swanstrom, 168 Wash. 627, 13 P.2d 17. The Supreme Court of Illinois has also held that tenants in common whose titles are clear have an absolute right to a partition notwithstanding inconveniences to other tenants or to a sale and division of the proceeds, and that this equitable remedy has become a matter of right and not of mere grace. Hill v. Reno, 112 Ill. 154, 54 Am.Rep. 222.

The Supreme Court of Connecticut was confronted with a set of facts similar to those at bar. In spite of evidence that the real estate market was rising and in a few years a partition sale could be made to greater advantage than at the time in question, the right to a partition by sale was held absolute and could not be denied or deferred by reason of a favorable lease or expectation of a rising market. Johnson v. Olmstead, 49 Conn. 509.

Appellant did not Acquiesce in Erroneous Ruling

[5] Respondent contends that if the court below erred in considering economic advantages to the cotenants, then appel-

lant acquiesced in and invited such error and is estopped from urging such error on appeal. To this contention there are two answers: First, the court's conduct in considering that phase of the case was suggested by the special defense alleged in the answer; second, respondent introduced her evidence on May 11, 1944, without mention of her affirmative allegation that "sound financial judgment and sound business policy require that said premises be not sold." In testifying in her own behalf Mrs. Mitchel stated that she did not desire the property sold but preferred to keep it as a sound investment. It was not until after the court indicated its intention to find in favor of the affirmative defense that the present market and economic conditions must be considered that appellant moved for a continuance to May 19, 1944. On the latter day she presented evidence to show that a delay in selling the property would not be of advantage to the sisters. The court accepted the proof of respondent, made findings accordingly and ordered a dismissal of the action. Thus the issue of economic advantage was raised by respondent.

[6] But because appellant contended at the trial that such issue was immaterial to a decision of the case she was not thereby inhibited from meeting the proof introduced by her adversary. Neither is she estopped from urging the error on appeal. It is the duty of any litigant in the course of trial to submit to the rulings with reference to the proof of the issues, and after he has done so he may thereafter on appeal demonstrate the error of the ruling to which he made timely objection. Fernandez v. Western Fuse & Explosives Co., 34 Cal.App. 420, 167 P. 900; Middlecamp v. Zumwalt, 100 Cal.App. 715, 280 P. 1003. In the Zumwalt case although no objection was made to parol evidence received to show that the written contract had been modified, it was held that as a matter of substantive law a written agreement may not be modified by an executory oral agreement. Even though no objection had been made to the parol proof, it was insufficient as a matter of substantive law to change the terms of the writing. It follows that appellant is not estopped to urge the error below.

[7] In support of her contention that the court was vested with discretion to deny a partition respondent cites Williams v. Wells Fargo Bank & Union Trust Co., 17 Cal.2d 104, 109 P.2d 649 and Id., 56 Cal.App.2d 645, 133 P.2d 73. The case heard in the Supreme Court was an application for a writ of supersedeas to stay all proceedings until the decision by the District Court of Appeal. The Supreme Court merely observed that where property of cotenants cannot be divided without prejudice and one of them is entitled to a partition the court may order the property sold and the proceeds divided. This is exactly what the statute says the court may do. It may partition by sale if the parties would suffer loss by partition in kind. But if they will not thereby suffer loss the partition must be made in kind, and that is what the District Court of Appeal decided in the Williams case.

The judgment is reversed and the court below is directed to enter judgment ordering a sale of the property and a division of the proceeds.

W. J. WOOD, and McCOMB, JJ., concur.

PACIFIC GREYHOUND LINES et al. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.*

Civ. 12918.

District Court of Appeal, First District, Division 1, California.

July 19, 1945.

Rehearing Denied Aug. 18, 1945.

Hearing Granted Sept. 13, 1945.

1. Dismissal and nonsuit ⚷60(6)

Estoppel resulting from conduct is not ground for avoiding dismissal of action not brought to trial within five years. Code Civ.Proc. § 583.

2. Courts ⚷90(7), 91(1)

In an intermediate appellate court, views of courts of equal jurisdiction are generally persuasive, but decisions of Supreme Court are binding where the facts are similar.

3. Dismissal and nonsuit ⚷60(3)

Time during which court has no jurisdiction to proceed with trial should be excluded in determining whether action has not been brought to trial within five years as grounds for dismissal. Code Civ.Proc. § 583.

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* Subsequent opinion 168 P.2d 665.

4. Dismissal and nonsuit ⚷73

In determining whether to dismiss action not brought to trial for five years, court could consider that case was taken off trial calendar on defendants' request and that, at all times when possibility of trial was discussed, defendants repeated assertion that it was impossible to go to trial while one defendant was in the army, though such defendant did not invoke Soldiers' and Sailors' Civil Relief Act. Soldiers' and Sailors' Civil Relief Act of 1940, §§ 1 et seq., 201, 50 U.S.C.A.Appendix, §§ 501 et seq., 521, Code Civ.Proc. § 583.

5. Dismissal and nonsuit ⚷73

Whether defendants' actions, taken collectively, constituted a subterfuge and attempt to delay the case, so as to preclude dismissal of action not brought to trial within five years, should be determined solely in trial court's discretion. Code Civ. Proc. § 583.

6. Dismissal and nonsuit ⚷60(3)

The statute authorizing dismissal of action not brought to trial within five years does not sanction a penalty against innocent party for delay when it is impossible, impractical or futile to proceed. Code Civ. Proc. § 583.

7. Appeal and error ⚷973
Dismissal and nonsuit ⚷73

Existence of factual situation constituting an exception to statute requiring dismissal of action not brought to trial within five years must be determined by trial court, and appellate court will not interfere unless there is clear abuse of discretion. Code Civ.Proc. § 583.

8. Mandamus ⚷43

An order on motion to dismiss action not brought to trial within five years is a judicial determination which may not be disturbed in mandamus.

9. Mandamus ⚷43

Mandate to compel dismissal of action may issue only in entire absence of showing of good cause upon hearing of the motion to dismiss.

10. Mandamus ⚷43

Mandate would not issue to compel dismissal of action not brought to trial within five years, where case was taken off trial calendar on defendants' request and defendants asserted that it was impossible to go to trial while one defendant was in the army, though such defendant did not invoke Soldiers' and Sailors' Civil Relief Act. Soldiers' and Sailors' Civil Relief Act of 1940, §§ 1 et seq., 201, 50 U.S.C.A.Appendix, §§ 501 et seq., 521; Code Civ.Proc. § 583.

◆

Petition by Pacific Greyhound Lines and others against the Superior Court of the State of California, in and for the City and County of San Francisco, for writ of mandate to compel dismissal of an action.

Alternative writ discharged and application for peremptory writ denied.

Cooley, Crowley & Supple, of San Francisco, for petitioners.

A. Brooks Berlin, of San Francisco, for Mark B. Lane and Marjorie B. Lane, real parties in interest.

WARD, Justice.

Petitioners request that a writ of mandate issue compelling respondent court to dismiss an action entitled "Mark B. Lane and Marjorie B. Lane, Plaintiffs, versus Earl Bagby, Sr., Earl Bagby, Jr., Pacific Greyhound Lines, a corporation," etc., under the provisions of Code of Civil Procedure, § 583.

The above section provides that an action "shall be dismissed * * * unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have stipulated in writing that the time may be extended."

The action was filed January 29, 1940, and was not brought to trial within five years of that date. On February 21, 1945, defendants moved to dismiss the action. The motion was denied in the superior court on March 20, 1945. On March 27, 1945, plaintiffs moved the court to restore said action to the active trial calendar to be set for trial. Defendants filed certain affidavits in opposition thereto. On the same day the petition herein was filed. On oral argument it was stipulated that the affidavits filed with the motion to set the case for trial should not be considered on the present petition.

The following facts are averred in a counter affidavit to defendants' motion to dismiss:

"* * * that on or about the 20th day of December, 1940, plaintiffs filed a memorandum to set said cause for trial, and thereafter defendants made a demand for jury trial and the matter was thereafter put on the regular jury calendar; that the trial of the above action was set for hearing for March 3, 1941, but due to defendants' failure to deposit jury fees was forced to go off calendar;

"Subsequent thereto, and on or about April 9, 1941, defendants' attorney Leighton Bledsoe informed plaintiffs' counsel, affiant herein that the co-defendant Earl Bagby, Jr. had enlisted in the Armed Services in March of 1941, and attorney Bledsoe further stated that the matter would have to remain off calendar; it was thereupon orally stipulated between counsel for plaintiffs and defendants that said matter would remain off calendar pending the return of Earl Bagby, Jr. to civilian status.

"That from time to time affiant made inquiry as to Earl Bagby, Jr.'s status, and was informed on several occasions by defendants' attorney that said defendant was still in the Service; that affiant is informed and believes that the said Earl Bagby, Jr. is still serving in the Armed Forces of the United States as of this date; that to continue to prosecute the case during the military absence of said defendant Earl Bagby, Jr. was impossible, impractical and a futile gesture; that the presence of Earl Bagby, Jr. is necessary to properly prosecute this action."

There is no denial by defendants either in the trial court or on appeal that it was orally stipulated that the case should remain "off calendar" pending the return of Bagby, Jr., and no denial of the fact that defendants' attorney solicited plaintiffs' attorney to stipulate to the continuances.

The rule set forth in section 583 received a strict interpretation in Rosefield Packing Co. v. Superior Court, 4 Cal.2d 120, 47 P.2d 716. In Miller & Lux, Inc., v. Superior Court, 192 Cal. 333, 219 P. 1006, a literal construction was adopted. Therein it was held that there must be a written stipulation and it must be certain and definite. At page 340 of 192 Cal., at page 1008 of 219 P., the court said: "The provision that a written stipulation be entered into was intended to preclude all disputes, with their attendant charges and countercharges of overreaching and unethical conduct, by a requirement that clear and uncontrovertible evidence be presented to the court that the statutory time was deliberately intended to be extended by both parties."

[1-3] The general rule in California is that estoppel resulting from conduct is not a ground for avoiding dismissal under section 583. Christin v. Superior Court, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153; Bank of America v. Moore & Harrah, 54 Cal.App.2d 37, 128 P.2d 623. However, in these cases defendants merely adopted a method of delay contenanced in legal procedure, namely, a motion for a change of venue in the former and a petition in bankruptcy in the latter. In the present case the method pursued was not illegal but, nevertheless, might be called a device or artifice to obtain a continuance by which the delay resorted to by the defendant was used as an attempt to deprive the plaintiff of the right of trial. On the question of estoppel under such circumstances, see Benner v. Industrial Acc. Comm., 26 Cal.2d 346, 159 P.2d 24. In other cases broader exceptions based upon improper conduct and other reasons are found. As an intermediate appellate court the views of courts of equal jurisdiction are generally persuasive, but the decisions of the Supreme Court are binding in cases where the facts are similar. One clear exception is that the time during which the court has no jurisdiction to proceed with the trial shall be excluded, as, for example, the time during which an appeal from a judgment is pending (Kinard v. Jordan, 175 Cal. 13, 164 P. 894), or the time between the dismissal and the reinstatement, where contestants of a will were fraudulently induced to consent to a dismissal of their contest and later had the dismissal vacated. Estate of Morrison, 125 Cal.App. 504, 14 P.2d 102.

An exception was recognized in situations where the court retained jurisdiction to proceed to trial, but proceeding to trial would be impossible, impractical and futile. The court enunciated this modification in Christin v. Superior Court, supra. The court held that the time consumed in taking an appeal from an order granting a change of venue should be excluded even though the lower court did not lose jurisdiction to proceed with the trial. The court said (9 Cal.2d at page 532, 71 P.2d at page 208, 112 A.L.R. 1153): "The purpose of the statute is plain: to prevent avoidable delay for too long a period. It is not designed arbitrarily to close the proceeding at all events in five years, for it permits the parties to extend the period without limitation, by written stipulation."

In Westphal v. Westphal, 61 Cal.App.2d 544, 143 P.2d 405, the court held that it would have been "practically futile" if not "legally impossible" for plaintiffs to go to trial while their co-plaintiffs' appeal was pending, and that the time consumed on this appeal should be excluded from the operation of section 583. In Bayle-Lacoste & Co. v. Superior Court, 46 Cal.App.2d 636, 116 P.2d 458, an action in eminent domain, the court held that a defendant who voluntarily enters an appearance after an elapse of five years, asking for affirmative relief, waives his right to have the action dismissed.

The case that is very much in point is Judson v. Superior Court, 21 Cal.2d 11, 129 P.2d 361. In that case the plaintiffs had made a reasonable but unavailing effort to serve defendants with process throughout the years intervening between the filing of the action and the hearing on the motion to dismiss under the provisions of section 583. It appeared that defendants had secreted themselves within the state or had resided out of the state with intent to evade service. The same contention is made in the present case as in the Judson case—that without written stipulation it was the duty of the court to dismiss. In the Judson case, 21 Cal.2d at page 14, 129 P.2d at page 363, the court said: "Under these circumstances, to require the plaintiffs to take the uncertain path of publication of summons against defendants who, they had been informed, were nonresidents, would reward subterfuge and make dishonesty profitable. The courts have recognized that the statute relating to dismissals although mandatory in form, should not be applied where, although the defendant was not guilty of acts tending to obstruct the administration of justice, it would have been impracticable for the plaintiff to have brought the action to trial. Christin v. Superior Court, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153; Estate of Morrison, 125 Cal.App. 504, 14 P.2d 102; and Kinard v. Jordan, 175 Cal. 13, 164 P. 894. The facts of the present case show much greater justification for an exception to the statutory requirement than those heretofore presented as the basis for an order denying a motion to dismiss." The court further observed that "the rule is not so rigid as to be without exception, and an action should not be dismissed when, as a result of the conduct or action of a defendant, the plaintiff may not proceed to trial with reasonable certainty that a judgment would conclusively determine the rights of the parties." Other cases upholding implied exceptions to the rule are: Burns v. Massachusetts, etc., Ins. Co., 62 Cal.App.2d 962, 146 P.2d 24; Allyne v. Superior Court, 200 Cal. 661, 254 P. 564; City of Los Angeles v. Superior Court, 15 Cal.2d 16, 98 P.2d 207; Martin v. Gibson, 48 Cal.App.2d 449, 119 P.2d 1012; Jackson v. Thompson, 47 Cal.App.2d 405, 118 P.2d 31; Bank of America v. Superior Court, 47 Cal.App.2d 359, 117 P.2d 932; Hibernia Sav. & Loan Soc. v. Lauffer, 41 Cal.App.2d 725, 107 P.2d 494.

[4] The trial court in the present case had a right to consider the fact that the case was taken off the trial calendar on the request of the defendants; that at all times when the possibility of trial was discussed they repeated the assertion that it was impossible to go to trial while Bagby, Jr., was in the army. Defendant Bagby, Jr., however, did not apply for relief under the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C.A.Appendix, § 501 et seq. Plaintiffs claim that defendant Bagby Jr.'s presence was necessary to the presentation of their case.

However, there is no claim that at any time plaintiffs or defendant called the court's attention to the facts and the possibility of the application of section 521 of the Soldiers' and Sailors' Civil Relief Act. This section provides for a stay of proceedings, in which a serviceman is involved, by the court on its own motion or upon the application of the serviceman whenever it appears that his rights may be prejudiced by the continuance of the proceedings during the period of his military service. If a motion under the provisions of the Soldiers' and Sailors' Civil Relief Act had been presented there is no way of determining what the action of the trial court would have been, but plaintiffs may have been lulled into a sense of security by the actions of defendant in refraining from applying for relief.

[5-7] Whether defendant's actions, taken collectively, constituted a "subterfuge" (Judson v. Superior Court, supra) and attempt to delay the case, and subsequently to invoke the provisions of section 583, are questions to be determined solely in the discretion of the trial court. The

section does not sanction a penalty against the innocent party for delay when it is impossible, impractical or futile to proceed. Christin v. Superior Court, supra; Carmichael v. Superior Court, 55 Cal.App.2d 406, 130 P.2d 725. Whether a factual situation exists which the Supreme Court has determined to be an exception to the mandatory language of the statute must be determined by the trial court. Unless there is a clear abuse of discretion appellate courts will not interfere. Hibernia Sav. & Loan Soc. v. Lauffer, supra; Cohn v. Rosenberg, 62 Cal.App.2d 140, 144 P.2d 399; Inderbitzen v. Lane Hospital, 17 Cal. App.2d 103, 61 P.2d 514; Allyne v. Superior Court, supra; City of Los Angeles v. Superior Court, supra. In Lake v. Superior Court, 39 Cal.App.2d 247, 249, 102 P.2d 1107, discussing section 583 the court said: "Thus the decision upon this application for a writ must rest upon the solid ground that when the trial court has acted within its jurisdiction upon a mixed question of law and fact its order, whether right or wrong, cannot be controlled by mandamus. Bank of America v. Superior Court, 22 Cal.App.2d 450, 452, 71 P.2d 296, 297."

[8, 9] All of the exceptions which have been judicially recognized must be passed upon by the trial court. The order thereon "constitutes a judicial determination which may not be disturbed by the reviewing courts in a mandamus proceeding instituted for such purpose. Ewell v. Superior Court, 69 Cal.App. 629, 232 P. 153. In other words, as said by the Supreme Court in the case of Charles L. Donohoe Co. v. Superior Court, 202 Cal. 15, 258 P. 1094, 1095: 'It is only when there is an entire absence of any showing constituting good cause presented in the superior court upon the hearing of the motion to dismiss that a writ of mandate to compel the dismissal of the action may properly issue. (Citing authorities.)'" Bank of America, etc., v. Superior Court, 22 Cal.App.2d 450, 453, 71 P.2d 296, 297.

[10] The alternative writ issued herein is discharged and the application for a peremptory writ is denied upon the authority of Judson v. Superior Court, supra, and other cases cited herein.

PETERS, P. J., and KNIGHT, J., concur.

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70 Cal.App.2d 245

CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION v. GUERNEWOOD PARK RESORT & TAVERN et al.

Civ. 7141.

District Court of Appeal, Third District, California.
July 20, 1945.

1. Appeal and error ⟹973

Where motion for dismissal for want of prosecution was filed and heard more than two years, but less than five years, after action was filed, order denying motion would not be disturbed except upon a showing of a clear abuse of discretion. Code Civ.Proc. § 583.

2. Dismissal and nonsuit ⟹60(6)

Where record disclosed that death of one defendant and attorney and entry of counsel into armed services as result of war, in addition to delay of respective parties and their counsel, contributed to failure to try action to collect unemployment insurance contributions, trial court did not abuse its discretion in refusing to dismiss action for want of prosecution over period of nearly five years after filing thereof. Code Civ.Proc. § 583; Gen.Laws 1937, Act 8780d, §§ 37, 38, 44.

3. Appeal and error ⟹973

Whether action was diligently prosecuted is for trial court to determine, and its determination is limited only in that exercise of such discretion cannot be abused. Code Civ.Proc. § 583.

◆

Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

Action by the California Employment Stabilization Commission, successor to the California Employment Commission, formerly the Unemployment Reserves Commission, against Guernewood Park Resort & Tavern and others to collect unemployment insurance contributions and interest thereon, wherein the defendants filed a motion to dismiss for lack of prosecution. Judgment for the plaintiff, and the defendants appeal.

Judgment affirmed.

Clarendon W. Anderson and R. M. Barrett, both of Santa Rosa, and John B. Ehlen, of San Francisco, for appellants.

Robt. W. Kenny, Atty. Gen., and Ralph R. Planteen, Clarence A. Linn, and Doris H. Maier, Deputy Attys. Gen., for respondent.

PEEK, Justice.

Under the provisions of sections 37, 38 and 44 of the California Unemployment Insurance Act, Chapter 352, p. 1226, Statutes of 1935, as amended, Gen.Laws 1937, Act 8780d, the plaintiff and respondent sought to collect unemployment insurance contributions and interest thereon from defendants and appellants for the period from January 1, 1937 to and including June 30, 1939. On February 8, 1944, subject to defendants' motion to dismiss for lack of prosecution, the case was heard on its merits and thereafter the court by its order denied said motion and gave judgment in favor of plaintiff. No attack is made upon the judgment. The sole question presented to this court is whether or not the trial court abused its discretion in denying appellants' motion to dismiss for lack of prosecution.

A history of the proceedings as shown by the clerk's transcript and the testimony of the only witness, the attorney for respondent, may be chronologically summarized as follows:

February 9, 1939, complaint filed.

February 27, 1939, letters received by respondent from attorney Steinmetz, counsel for appellants, requesting extensions of time to plead.

March 9, 1939, similar letters received by respondent from attorney Steinmetz.

No date, court's order granting appellants' request extending time to March 20th in which to plead.

No date, court's order granting appellants' request extending time to March 30th in which to plead.

March 17, 1939, extension granted appellants to April 20, 1939.

April 20, 1939, general demurrer of defendant Koehne filed by attorney Kroyer.

April 20, 1939, general demurrer of defendant Herling filed by attorney Steinmetz.

No date, several letters were thereafter written by attorney Steinmetz requesting that the hearings on the demurrers should be continued.

September 3, 1940, order extending time issued by court at the instance of appellant Koehne granting him to and including September 16, 1940, to plead.

September 16, 1940, general demurrer of defendants Koehne and Herling filed by attorney Kroyer.

November 22, 1940, arguments on demurrers heard and overruled with fifteen days to answer.

December 30, 1940, answer filed by appellant Koehne, represented by attorney Kroyer.

January 10, 1941, memorandum to set filed by plaintiff.

February 3, 1941, trial set upon court's own motion for March 19, 1941.

February 15, 1941, respondent served appellants with notice to produce payroll records.

February 17, 1941, notice with admission of service filed by attorney Kroyer, setting cause for March 19, 1941.

March 1, 1941, attorney Kroyer died.

March 21, 1941, respondent notified of death of attorney Kroyer.

March 26, 1941, notice of death of attorney pursuant to section 286 of the Code of Civil Procedure, given by plaintiff to defendants, and case continued to March 28th, to be reset for trial.

May 9, 1941, respondent filed notice of motion for leave to file amended complaint.

May 12, 1941, amended complaint filed.

June 2, 1941, notice that case was set for June 18, 1941 with affidavits of service by mail filed.

June 2, 1941, attorney Charles J. McGoldrick, by a letter to respondent, informed it that he had been retained as counsel for one of the partners, the other partner having died, and requested that the case be dropped from the trial calendar, to be reset in September.

On or about June 5, 1941, counsel for respondent requested that the court drop the case from the trial calendar, to be reset during the month of September, 1941.

June 6, 1941, stipulation that order setting case for trial for June 18, 1941, be set aside and matter be heard in September, 1941, filed.

June 9, 1941, attorney McGoldrick requested extension of time for appellants to plead to the amended complaint.

June 20, 1941, William W. Godward informed respondent by letter that he was associated with attorney Goldrick, and requested a further extension of time.

July 9, 1941, notice of date of trial on September 8, 1941, served on counsel for appellants.

July 28, 1941, answer to amended complaint filed by William Godward upon stationery of Barrett & McConnell, attorneys at law, Santa Rosa, with whom attorney Godward was associated.

August 29, 1941, stipulation filed that case be set for September 22nd, 23rd, or 24th.

September 6, 1941, respondent, due to absence of its auditor, requested continuance of trial date to October 6, 1941.

No date, respondent requested further continuance to November 5, 1941.

September 26, 1941, case set for trial for November 5, 1941, at request of Godward.

No date, by stipulation and request of counsel for plaintiff the order setting case for trial for November 5, 1941, was thereafter set aside.

Shortly after Pearl Harbor, Godward entered the army services as did several members of the legal staff of respondent.

On October 28, 1941, a claim was filed in the Superior Court of the City and County of San Francisco by respondent against the estate of Charles A. Seiger. Seiger was a partner of appellants herein.

February 23, 1943, respondent received notice of rejection of its claim in estate of Seiger.

November 19, 1943, memorandum to set cause for trial served upon "Barrett & McConnell, attorneys at law, Santa Rosa."

November 20, 1943, Barrett & McConnell wrote plaintiff in part as follows: "We have a copy of your letter of November 19 * * * requesting that this case be set for trial on December 16, 1943 at 10:00 o'clock A.M. The writer expects to try this case but will be unable to try it on the date suggested as he is compelled to be in Los Angeles from December 15th to December 19th. We think any date in January which meets your convenience will be agreeable to us and suggest that you notify the clerk accordingly."

November 20, 1943, notice from Walter H. Nagle, County Clerk, received by respondent notifying it that Barrett & McConnell could not try the case upon the date set, that the judge was engaged in a criminal proceeding on said date, and that he would notify respondent when the matter had been set for trial.

November 30, 1943, plaintiff requests the clerk in writing that the case be set for trial on January 5th, 6th or 12th.

December 1, 1943, notice of setting case for trial on January 12, 1944, received by respondent.

December 28, 1943, respondent advised by letter from Barrett & McConnell:

"* * * We are in receipt of notice of trial in above matter which notice we are designated as attorneys for defendants.

"We have been unable to locate any file in this matter in our office, although the writer has some recollection of having talked to someone regarding the matter two or three years ago. If you can give us the name of the individual who was in charge of the defendants' operations for the year in question we will get in touch with him and see what arrangements can be made to proceed to trial."

January 3, 1944, respondent served notice of taking deposition in Sacramento on January 10, 1944 of Thomas Castles.

January 5, 1944, letter from Barrett & McConnell to plaintiffs as follows:

"* * * We have your letter of January 3rd, and have also received by mail notice of taking of deposition in Sacramento on Monday next, January 10, of one Thomas M. Castles.

"In our letter to you of December 28th, we advised you that we had no record in our office of this action. * * * When we wrote you on November 20 last, in response to your previous letter that we were unable to try the case on December 16, the writer was under the impression that the case was one which had been handled by Mr. McConnell in this office, who has been ill and out of the office since last August.

"* * * Subsequent to the death of Mr. Kroyer, William W. Godward of Santa Rosa was submitted as attorney for the defendants and filed an answer on behalf of defendants to the amended complaint. Mr. Godward has been in the navy for the past year and a half or two years. There has apparently been no substitution of any attorney in his stead. We were advised, on telephoning yesterday to Mr. Koehne, that Mr. Charles McGoldrick, formerly assistant district attorney, had taken up the matter informally with the Department, with a view to effecting a settlement, but that nothing came of these negotiations. Mr. McGoldrick is now in the United States Coast Guard.

"We are giving you the above information so that you may know the situation. We are not attorneys of record and have never been employed in the matter and we do not anticipate being employed at this time. * * * At any rate we are not authorized to appear for the defendants in any capacity and it would appear to us that the matter will have to be continued for trial at a later date."

January 8, 1944, letter from plaintiff to Barrett & McConnell: "* * * Our records indicate this employing unit was a partnership consisting of M. H. Herling and K. H. Koehne as partners."

January 10, 1944, notice by respondent to appellant M. H. Herling to appoint an attorney or to appear in person.

January 17, 1944, notice of trial served on appellants by mail.

January 27, 1944, notice to produce records at trial served upon appellants.

January 31, 1944, return receipt of registered mail received by plaintiff signed by M. H. Herling.

February 2, 1944, Barrett & McConnell advised respondent that they were enclosing a copy of notice of motion to dismiss the action for want of prosecution.

February 8, 1944, motion for continuance and motion to dismiss served upon respondent by C. W. Anderson, attorney for appellant Koehne.

February 8, cause heard.

Section 583 of the Code of Civil Procedure provides in part:

"The court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed for two years after action is filed to bring such action to trial. Any action heretofore or hereafter commenced shall be dismissed by the court * * * on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have stipulated in writing that the time may be extended. * * *"

[1] It is thus apparent that the quoted provisions of said section purport to permit a dismissal in the discretion of the court at any time after two years and require a dismissal at any time after five years except where the parties have stipulated otherwise. The periods of two and five years run from the time of the commencement of the action rather than from the time of the filing of the answer as the section previously provided. Hibernia Sav. & Loan Soc. v. Lauffer, 41 Cal.App.2d 725, 107 P.2d 494. In the present case the motion for dismissal was filed and heard on the day of trial, just one day short of the five year period, and therefore admittedly within the period in which the court in the exercise of its discretion had the power to grant or deny appellants' motion to dismiss the action. Inasmuch as said motion fell within the discretionary period, the order of the court denying the same will not be disturbed "except upon a showing of a clear abuse of discretion." Hibernia Sav. & Loan Soc. v. Lauffer, supra, 41 Cal. App.2d at page 729, 107 P.2d at page 496.

[2] A cursory reading of the previously mentioned chronological history of the case is sufficient to show, as the trial court stated, that not only did the respective parties and their counsel contribute to the delay but that death and war also directly intervened. After summarizing the situation thus presented, the trial court in its order denying appellants' motion stated: "Under the circumstances as disclosed by the evidence the court is of the opinion that in the exercise of a sound discretion defendants' motions to dismiss ought not to be granted. This opinion is entertained despite the obvious legislative intent reflected by the code section cited to eliminate the too frequent legal delays by expressly stating limits of discretionary and mandatory dismissals in addition to the inherent powers of the courts themselves to obviate delays." However, the court further observed that neither the statute nor other technical rules of procedure should be held to be so inexorable as to require that a court should lose sight of the fundamental purpose of judicial administration nor close its eyes to the natural consequences, the hardships and the universal dislocation resulting from a world at war. By such observations based (as the record and the order distinctly show) upon a careful examination of each contributing factor, it is evident that the action of the court was neither arbitrary nor wilful but that its discretion was exercised as it should be,

liberally in conformity with the spirit of the law, in a manner to subserve and not to impede or defeat the ends of substantial justice.

In light of such circumstances to argue as do appellants that said order of the court was an abuse of its discretion is to "say that the law allows no latitude for the exercise of discretionary power [and] is to deny that the power is discretionary." Clavey v. Lord, 87 Cal. 413, 25 P. 493, 495.

[3] As stated in their motion to dismiss, the ground upon which appellants relied was the alleged inexcusable delay on the part of respondent in bringing the case to trial and was made upon the "records, pleadings, papers and files" in said action, which we have previously summarized. In view of the record so presented and the facts and circumstances therein set forth we cannot say that the denial of appellants' motion was an abuse of discretion. Whether or not the action was diligently prosecuted was for the trial court to determine, Jackson v. De Benedetti, 39 Cal.App.2d 574, 103 P.2d 990; Ferris v. Wood, 144 Cal. 426, 77 P. 1037, and its determination thereof is limited only in that the exercise of such discretion cannot be abused. Clavey v. Lord, supra.

This court, in the case of Gray v. Times-Mirror Co., 11 Cal.App. 155, 104 P. 481, quoting with approval from the case of Bernard v. Parmelee, 6 Cal.App. 537, 92 P. 658, wherein, upon application of the defendants, the action was dismissed upon the ground that the same had not been prosecuted with reasonable diligence, and the only question therein presented for determination was the same as in the present case, stated at page 546 of 6 Cal.App., at page 662 of 92 P.:

"Each case must, as we have seen from all the authorities, rest upon its own peculiar circumstances, or, as it is expressed in First Nat. Bank v. Nason, 115 Cal. 626, 47 P. 595, 'each particular case presents its own peculiar features, and no iron-clad rule can justly be devised applicable alike to all.'"

Our examination of the record in light of the circumstances shown therein has disclosed nothing which would justify this court in saying that the trial court abused its discretion in denying appellants' motion to dismiss the action.

For the foregoing reasons the judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

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70 Cal.App.2d 238

GERSTEIN v. SMIRL.

Civ. 14799.

District Court of Appeal, Second District, Division 1, California.

July 20, 1945.

1. Costs 🔑32(5)

Where both plaintiff and cross-complainant recover money judgments, a defendant to whom net result is favorable is entitled to recover all his costs. Code Civ.Proc. § 1032.

2. Costs 🔑32(1)

A plaintiff may recover costs if net result of judgment is favorable to him unless such judgment, in its net amount, could have been rendered by municipal or inferior court within the same county. Code Civ.Proc. § 1032.

3. Costs 🔑32(5)

A defendant could recover costs although denied relief on cross-complaint, where verdict also denied plaintiff any relief and hence plaintiff's action was defeated. Code Civ. Proc. §§ 438, 439, 442, 1032.

◆

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa and Jess E. Stephens, Judges.

Action by Sam Gerstein against Helen V. Smirl for damages sustained in automobile accident, wherein defendant filed a cross-complaint. From a judgment denying relief to both parties, plaintiff appeals.

Affirmed.

Mitchell & Gold and Seymour Gold, all of Los Angeles, for appellant.

Parker & Stanbury and Harry D. Parker, all of Los Angeles, for respondent.

WHITE, Justice.

Plaintiff instituted this action to recover damages allegedly sustained by him in an automobile accident as the result of defendant's negligence. By her answer defendant denied any negligence upon her part, alleged contributory negligence on the part of plaintiff, and by cross-complaint sought to recover damages allegedly suffered by her in the same accident. Upon trial of the action, the jury returned a verdict denying relief to both parties under their respective pleadings. Defendant filed a memorandum of costs and disbursements, and judgment was entered upon the verdict that plaintiff recover nothing from defendant, and that "said cross-complainant, Helen V. Smirl, recover from said cross-defendant, Sam Gerstein, nothing, together with costs and disbursements incurred in this action amounting to the sum of $147.-80".

Thereafter, appellant moved to retax costs and to strike out defendant's cost bill on the ground (among others not raised on appeal) "that in said action a cross-complaint was filed by Helen V. Smirl against Sam Gerstein * * * and * * * that both the complaint and cross-complaint were tried at one and the same time by the same evidence, by the same jury and with the same witnesses and that it cannot be determined to which portion of the action the costs are attributable inasmuch as the costs were attributable to both the complaint and the cross-complaint." Plaintiff has appealed from the judgment and from the order denying said motion.

The sole question presented by this appeal is whether a defendant who is awarded nothing on his cross-complaint is entitled to recover costs of suit from an unsuccessful plaintiff.

"The right to recover costs is entirely statutory and 'the measure of the statute is the measure of the right.'" In re Estate of Johnson, 198 Cal. 469, 471, 245 P. 1089; Moss v. Underwriters' Report, Inc., 12 Cal.2d 266, 274, 83 P.2d 503, 507. "In the superior court * * * costs are allowed of course * * * to the defendant upon a judgment in his favor" in "an action for the recovery of money or damages." C.C.P. § 1032. If defendant's answer had been her only pleading, then unquestionably the judgment that plaintiff take nothing would have been a judgment in favor of defendant, entitling her to costs as a matter of right. But appellant urges that, when defendant filed her cross-complaint, she ceased to be a "defendant" entitled to her costs as a matter of right in the event of plaintiff's failure to recover judgment against her, and she then became a "cross-complainant" entitled to recover no costs if "the judgment for the defendant on the cross-complaint does not exceed that of plaintiff on the complaint." We know of no California case determinative of this precise question. However, from time to time, in actions where counterclaims and cross-complaints have been filed, various questions concerning costs have been decided.

[1, 2] It is well settled that, where both plaintiff and cross-complainant recover money judgments, a defendant to whom the "net result of the judgment" is favorable is entitled to recover all his costs. Shelley v. Hart, 112 Cal.App. 231, 243, 297 P. 82; Dobbins v. Horsfall, 58 Cal.App. 2d 23, 27, 136 P.2d 35. If the "net result" of a judgment is favorable to plaintiff, unless it (in its net amount) is one which "could have been rendered by a municipal or inferior court within the same county," plaintiff's costs are "allowed of course." C.C.P. § 1032; Quitzow v. Perrin, 120 Cal. 255, 52 P. 632; Hansen v. Covell, 218 Cal. 622, 632, 24 P.2d 772, 89 A.L.R. 670.

The action here in question was initiated by plaintiff against defendant to recover damages. By their verdict the jury found that both plaintiff and defendant were at fault, or that neither was to blame. In any event, the finding of the jury was that plaintiff had no cause to bring suit against the defendant. Had defendant been let alone she might never have appealed to the courts for redress. However, when plaintiff chose to commence legal action, defendant was required to set up her counterclaims for any damages allegedly sustained by her arising out of the transaction set forth in plaintiff's complaint or be foreclosed from thereafter maintaining an action against the plaintiff therefor. Secs. 438, 439, 442, C.C.P.; Gorman v. Superior Court, 23 Cal.App.2d 173, 72 P.2d 774.

[3] As we read Sec. 1032, it is intended thereby that, if plaintiff in an action fails to make out his case, the defendant is entitled to judgment and must be regarded as the prevailing party. In other words, a party who defeats an action by a

counterclaim is as much entitled to his costs as is a party who defeats it by any other means. In an action such as the instant one for damages, the "net result" of a judgment requiring defendant to pay nothing to the plaintiff is favorable to the former. Although defendant did not recover on her cross-complaint, she was the prevailing party in the court below because plaintiff was denied recovery against her. The statute (Sec. 1032(b), C.C.P.) provides that "costs are allowed of course * * * to the defendant upon a judgment in his favor." It does not lie within the province of the court to engraft upon the statute a provision that, although a defendant has defeated plaintiff's claim, he shall nevertheless be deprived of his costs because he sets up a counterclaim in conformity with the aforesaid sections of the Code of Civil Procedure rather than waive his right to proceed against plaintiff upon a cause of action which grows out of the transaction that gave rise to plaintiff's complaint. The trial court therefore properly denied plaintiff's motion to strike out defendant's cost bill.

The judgment and order appealed from are affirmed.

YORK, P. J., and DORAN, J., concur.

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70 Cal.App.2d 128

PEOPLE v. KINGSBURY.

Cr. 3885.

District Court of Appeal, Second District, Division 2, California.

July 10, 1945.

1. False pretenses 🔑49(1)

Evidence authorized conviction of grand theft in obtaining of money from victim by offering to sell interest in land on false representation that an oil company intended to build a pipe line across such land.

2. Criminal law 🔑1169(2)

The admission of incompetent testimony was not prejudicial to defendant where defendant permitted the same testimony to be given without objection.

3. Criminal law 🔑1119(4)

Where defendant failed to direct court's attention to any misconduct of district attorney and an examination of record indicated that both trial judge and district attorney were meticulously careful to protect interest of defendant to the end of his having a fair and impartial trial, assignment of error that district attorney was guilty of misconduct could not be sustained.

4. Criminal law 🔑913(1)

A motion for a new trial may be granted only upon one of grounds stated in Penal Code, so that, where defendant failed to urge any of the grounds mentioned, court properly denied motion for new trial. Pen.Code, § 1181.

5. Criminal law 🔑1202(4)

When a defendant is charged in an information or indictment with having suffered a previous conviction and at time of his arraignment denies such charge, the issue thus joined must be tried by jury which tries issue upon his plea of not guilty to offense charged in information or indictment. Pen.Code, § 1025.

6. Criminal law 🔑1202(3)

Where information charged defendant with grand theft and also with having been on three previous occasions convicted of felony and defendant denied the conviction when arraigned, proof relative to such prior convictions was properly presented at defendant's trial. Pen.Code, § 1025.

7. Criminal law 🔑1127

Where defendant failed to direct attention of District Court of Appeal to alleged order made after judgment affecting his substantial rights, court could not discuss defendant's appeal from such order.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Lloyd A. Kingsbury was convicted of grand theft, and he appeals.

Affirmed.

Gordon M. Gale, of Bell, for appellant.

Robert W. Kenny, of San Francisco, and L. G. Campbell, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment of guilty on four counts of grand theft, after trial before a jury, defendant appeals. The jury also found that on three previous occasions defendant had been convicted of felonies.

There is likewise an appeal from an order denying defendant's motion for a new trial and "from an order made after judgment affecting the substantial right of" defendant.

The evidence being viewed in the light most favorable to the People (respondent), the essential facts are:

About June 12, 1943, defendant called on Mr. Lunsman stating that he was a representative of the Standard Oil Company and that it was going to construct a pipe line to certain lands in Monterey county. Defendant offered to sell Mr. Lunsman a one-ninth interest in the land to be crossed for the sum of $500. This offer Mr. Lunsman accepted and paid the agreed price to defendant.

On or about June 16, 1943, defendant offered Mr. Lunsman a one-third interest in the land if he would pay an additional $1000. This Mr. Lunsman did. On June 18, 1943, defendant offered Mr. Lunsman a one-half interest in the land if he would pay an additional $750. This offer was likewise accepted and Mr. Dunsman gave defendant his check for $750.

On June 25, 1943, defendant represented to Mr. Lunsman that he had an additional piece of land across which an oil company was going to place a pipe line and that he would sell a one-half interest in this land to Mr. Lunsman for $375. Mr. Lunsman accepted this offer and paid defendant $375.

Defendant was not an employee or a representative of the Standard Oil Company. Neither did the company at any time intend to build a pipe line across the lands described by defendant, nor did defendant at any time convey to Mr. Lunsman any interest in the lands described by defendant.

Defendant urges reversal of the judgment on five propositions which will be stated and answered hereunder seriatim:

First: *There is not any substantial evidence to sustain the verdict of the jury.*

[1] This proposition is without merit. We have examined the record and are of the opinion that there is substantial evidence, considered in connection with such inferences as the jury may have reasonably drawn therefrom to sustain the findings of fact upon which the verdicts of guilty were necessarily predicated. There is direct testimony of witnesses to each of the facts set forth above. Further discussion of the evidence would serve no useful purpose.

Second: *The court committed prejudicial error in permitting the introduction of evidence over defendant's objection.*

[2] This proposition is untenable. During the course of the trial Dr. Gordon was permitted to testify that defendant in September, 1943 had made similar representations to him relative to land located in Texas, and had endeavored to sell to the witness land located in such state. It may be conceded that such testimony was objectionable and should not have been received in evidence. However, the evidence was not prejudicial to defendant for the reason the same evidence was given by Dr. Gordon without objection from defendant.

Third: *The district attorney was guilty of misconduct.*

[3] This proposition is also untenable. Defendant has failed to direct our attention to any misconduct of the district attorney. In fact examination of the record discloses that both the trial judge and the district attorney were meticulously careful to protect the interests of the defendant to the end of his having a fair and impartial trial.

Fourth: *The trial court committed prejudicial error in refusing to grant defendant's motion for a new trial.*

[4] This proposition is likewise untenable and is governed by the established law in California that a motion for a new trial in a criminal case may be granted only upon one of the grounds stated in section 1181 of the Penal Code. In the present case none of the grounds mentioned in such section is urged by defendant as the basis for granting his motion for a new trial.

Fifth: *The trial court committed prejudicial error in receiving evidence of defendant's prior conviction.*

[5] This proposition is devoid of merit. The law is established in California that when a defendant is charged in an information or indictment with having suffered a previous conviction, if he denies at the

time of his arraignment that he has suffered such previous conviction the issue thus joined must be tried by the jury which tries the issue upon his plea of not guilty to the offense charged in the information or indictment. (Section 1025, Penal Code.)

[6] In the instant case defendant was charged in the information with having been on three previous occasions convicted of felonies. When arraigned he denied the convictions. It was therefore the duty of the district attorney to present competent evidence relative to the prior convictions and the duty of the trial judge to receive such evidence.

Our examination of the record convinces us that defendant had a fair and impartial trial and that his constitutional rights were fully safeguarded.

[7] Defendant has failed to direct our attention to the alleged "order made after judgment affecting" his substantial rights, therefore we are not in a position to discuss the appeal from such order.

For the foregoing reasons the judgment and orders are and each is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

PEOPLE v. WILLIAMS.*

Cr. 2318.

District Court of Appeal, First District,
Division 1, California.
July 7, 1945.

Rehearing Denied July 21, 1945.

Hearing Granted Aug. 2, 1945.

1. Burglary 🔑41(1, 7)

In prosecution for burglary of butcher shop, conflicting evidence on issues involved, including sufficiency of identification of alleged stolen turkeys, was for jury.

2. Criminal law 🔑1169(1)

Where evidence did not overwhelmingly establish accused's guilt of burglary of butcher shop and first jury to hear evidence disagreed as to guilt, materiality of any error in introduction of evidence was of relatively more importance than in case where evidence was overwhelmingly in favor of prosecution.

3. Indictment and information 🔑175

Where information charged that defendant burglarized butcher shop at 3299 Sixteenth Street, evidence that building was located at 3297 was not a material variance.

4. Indictment and information 🔑166, 171

Every essential element of crime charged must be alleged and proved, and proof must correspond with allegations in information.

5. Criminal law 🔑1167(1)
Indictment and information 🔑171

The test of "materiality" of variance between information and proof to require reversal is that it must be of such a substantive character as to have misled accused in preparing his defense or of such nature that defendant may be placed in second jeopardy for same offense.

See Words and Phrases, Permanent Edition, for all other definitions of "Material Variance".

6. Criminal law 🔑295

On a plea of jeopardy, extrinsic evidence is admissible on the trial to identify crime of which defendant has been convicted.

7. Indictment and information 🔑86(2)

Information in burglary prosecution need not set forth exact address of burglarized building so long as building is described with sufficient particularity to show that it falls within classification set forth in statute.

8. Indictment and information 🔑86(2)

An information in burglary prosecution need go no further in particularizing place burglarized than to allege county in which crime was committed.

9. Witnesses 🔑337(5)

In burglary prosecution accused could properly be asked on cross-examination for purposes of impeachment whether he had ever been convicted of a felony. Code Civ.Proc. § 2051.

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* Subsequent opinion 163 P.2d 692.

10. Witnesses 🔑337(6)

Where accused in burglary prosecution on cross-examination denied that he had ever pleaded guilty to a felony, it was error to admit in evidence record of accused's previous commitment to Preston School of Industry, on a plea of guilty to burglary in the second degree, punishable either as a felony or misdemeanor, since evidence of such plea did not establish nature of the crime. Code Civ.Proc. § 2051; Pen.Code, §§ 17, 461, subd. 2.

11 Witnesses 🔑337(5)

A plea of guilty followed by detention in a reformatory does not make person so detained a "convicted felon" within Code provision that witness may be impeached by showing that he had been convicted of a felony in view of Penal Code section providing that, when sentence is other than death or imprisonment in state prison, offense must be deemed a misdemeanor for all purposes after judgment. Code Civ. Proc. § 2051; Pen.Code, § 17.

See Words and Phrases, Permanent Edition, for all other definitions of "Convicted Felon".

12. Witnesses 🔑351

The prosecuting attorney, by asking defendant, testifying in his own behalf, one improper question and getting a negative reply, cannot lay foundation for another improper question for purposes of impeachment. Code Civ.Proc. § 2051.

13. Criminal law 🔑633(1)

Accused persons are constitutionally entitled to have their guilt or innocence determined according to law and to have their substantial rights protected.

14. Criminal law 🔑1186(4)

Where evidence was legally sufficient to sustain conviction of defendant for burglary of butcher shop and theft of turkeys therefrom, but was not overwhelming, and one jury had already disagreed on issue of guilt, error in admitting record of accused's previous commitment to Preston School of Industry for second degree burglary was prejudicial as probably being a determining factor in jury's deliberation and verdict of guilty. Code Civ.Proc. § 2051; Pen.Code, §§ 17, 461, subd. 2; Const. art. 6, § 4½.

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Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Vernon Williams was convicted of burglary in the second degree, and he appeals.

Reversed and remanded for new trial.

Vernon Williams, in pro. per.

Robert W. Kenny, Atty. Gen., and Ralph W. Scott, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Defendant was found guilty by a jury of burglary in the second degree. He appeals, in propria persona, from the judgment of conviction and from the order denying his motion for a new trial. In addition to contending that the evidence is insufficient as a matter of law, he urges that there is a fatal variance between the information and the proof as to the exact location of the butcher shop he is charged with burglarizing, and that prejudicial error was committed in the rulings on the admissibility of evidence.

This is the second trial of defendant. On the first trial the jury disagreed. The facts as disclosed by the present record are as follows: Giacomi Tassi and William Fey operate a butcher shop on 16th Street, near Delores Street, in San Francisco. Tassi testified that this shop was located at 3297–16th Street. Fey, on the other hand, testified that the shop was located at 3299–16th Street. The information charges a burglarious entry at 3299–16th Street.

On the evening of November 23, 1943, just before Thanksgiving, Tassi and Fey closed their shop and locked the doors about 6 p.m. At that time they had an uncertain number of turkeys in their shop. These belonged to various customers who had brought them to the shop to be cleaned. Neither partner was sure of the exact number of turkeys in their possession, their estimates ranging from a dozen to eighteen or twenty. Neither partner was sure that all of the turkeys were tagged or marked. When the partners arrived to open shop on the morning of November 24th they found that the door to an adjoining place of business, and the door to their shop had been forced open and that the large plate glass window on the door to their shop had been smashed. The lock on the door was broken and the floor of the shop was covered with turkeys and papers. Both partners positively testified that four of the turkeys were missing. Just how they knew this when they did not know the number of turkeys they had in the first place is not clear from the evidence.

Officer Loftus of the San Francisco Police Department testified that he was on duty in the Mission District during the early morning hours of November 24th. On 24th Street, near South Van Ness Avenue, some eight blocks from the butcher shop, he noticed a Ford panel delivery truck. In the body of the truck he saw some large bags with turkey legs protruding. This was at about 1:15 a.m. He watched the truck from a nearby doorway, and after a short period observed two men come out of a barber shop and start to enter the truck. One of the men was admittedly the defendant. The other was one De Mato. According to the officer the defendant was just getting behind the wheel of the truck when he arrived and asked the two men for some identification. Defendant produced his draft card. He then asked defendant if he was going to take the truck. The defendant answered that he was not because the truck did not belong to him. When asked why he had climbed into the truck he replied that he had no reason as the truck was not his. The officer decided to arrest the men and took them to a police call box on the corner of 24th and Mission Streets. According to his testimony, while he was telephoning, both men ran away, in different directions. The officer pursued De Mato, chasing him for several blocks and finally shooting at him. He wounded De Mato and after seeing him removed in an ambulance, he returned to the barber shop where he secured a turkey from the proprietor. He put this turkey in the truck with the others. He was not sure how many turkeys were then in the truck. At one of the hearings he had testified there were four or five. Admittedly three turkeys were taken to the police station and ultimately returned to Tassi and Fey. Both Tassi and Fey testified that the three turkeys returned to them by the police had been stolen from their store. Tassi testified he could identify turkeys by just looking at them. He also testified that one of the turkeys had a tag; that that turkey belonged to a lady by the name of White; that the tag was from the California Poultry Company and had the salesman's name—Al—written on it. The tag was introduced into evidence. The other turkeys were untagged. Fey's testimony on the point was somewhat more confusing. He testified that one turkey was tagged with a California Poultry Company tag and that the other two were not tagged. On the first trial he had testified they all had tags but admitted on this trial that this was not so, but implies that the owners' names were on the bags. He also testified that all the turkeys had tags and that he turned these tags over to the police. The other two tags were never produced.

Inspector McCann of the San Francisco Police Department testified that defendant was apprehended in a Market Street theater by him and several officers on December 1, 1943. He testified that he saw the defendant on the stairway leading to the balcony; that when defendant saw McCann he turned and ran; that he chased defendant; that defendant tried to get out of a balcony fire door, but when the door failed to open he was apprehended. He further testified that he questioned defendant in the lobby of the theater and later at the Hall of Justice. The officer's testimony is to the effect that during such questioning defendant denied he could drive a car but that he had a driver's license in his own name which the officer saw and returned to him; that defendant denied that he had stolen the turkeys; that defendant stated that he had met De Mato in a pool room; that De Mato had asked him to borrow the truck; that he decided to drive the truck because it had bad brakes; that he (the officer) did not ask him where he drove the truck; that defendant said De Mato had said he was to pick up some turkeys; that when De Mato denied ownership of the truck so did he; that while being taken to the call box he just ran away. The officer admitted that he never has investigated the ownership of the truck, nor did he try to ascertain whether the Motor Vehicle Department had issued a driver's license to defendant.

Another inspector of the police department, John R. Hunt, also testified as to conversations had with defendant at the Hall of Justice. Contrary to the testimony of McCann he stated that defendant then told the officers the truck belonged to his brother. Otherwise, this officer generally corroborated McCann's story of that conversation. In another conversation had with defendant Hunt testified that defendant told him that he had driven De Mato to 18th and Mission; that there De Mato got out and he stayed in the car; that a little later De Mato returned with four turkeys; that they then drove to 24th Street where De Mato delivered one of the turkeys to the barber. This officer also testified that defendant had a driver's license which was returned to him, but unlike McCann he could not testify whether or not it was in defendant's name. Hunt also testified that he saw three turkeys at the Hall of Justice and one was tagged; that at that time someone had taken the paper bags off and thrown them away. The barber was not produced as a witness.

Defendant took the stand as the sole witness on his own behalf. He produced a letter from the Motor Vehicle Department stating that no license had been issued to him since 1927. He denied stealing the turkeys, or burglarizing the store. He denied many of the statements attributed to him by the officers. He testified that he was coming out of the barber shop on 24th and South Van Ness when he met De Mato; that De Mato asked him for a ride home; that they were just getting into the truck when Officer Loftus yelled at them from across the street; that upon request for identification he showed the officer his draft card; that he told the officer the truck belonged to his brother; that there was no registration in the car; that the officer said he would have to arrest them; that on the way to the call box De Mato and the officer engaged in an argument; that the officer slapped De Mato in the face; that De Mato started to run away and the officer started shooting at him; that when De Mato was about a half block away, he, the defendant, ran away too; that he ran away because he was afraid. He also testified that the reason he ran away when he saw McCann at the theater was because McCann had a pistol in his hand (which McCann denied) and he was afraid he would be shot. He described in detail his activities on November 23rd, but produced no corroboration. He testified he purchased two turkeys that day at the California Poultry Company, and that these were the turkeys in the truck when he was arrested.

[1, 2] So far as the sufficiency of the evidence is concerned defendant's main contention is that the prosecution failed to prove that the turkeys in the truck were turkeys stolen from Tassi and Fey. While it must be conceded that there is much confusion in the evidence on this issue, and that there are inconsistencies in the record on this point, and while the evidence on this issue is by no means as clear as might be desired, we think the sufficiency of the identification of the stolen property, and the reconciliation of such inconsistencies was for the jury. However, it should be pointed out that the case is a close one on the facts. The evidence does not overwhelmingly establish the guilt of the defendant. The first jury to hear the evidence, in fact, disagreed as to defendant's guilt. This being so the materiality of any error in the introduction of evidence is thus of relatively more importance than it would be in a case where the evidence was overwhelmingly in favor of the prosecution.

[3-6] As already pointed out, the information charged that defendant burglarized a butcher shop at 3299 Sixteenth Street, San Francisco, while Tassi testified that the shop was located at 3297 Sixteenth Street. Defendant urges that this constitutes a fatal variance between the information and the proof. It should be mentioned that Fey testified that the building was located at 3299 Sixteenth Street. (R.T. 34.) This is a complete answer to the contention. But even if the testimony showed that the building was located at 3297 instead of 3299, the variance would not be fatal. Of course, it is elementary that every essential element of the crime charged must be alleged and proved, and the proof must correspond with the allegations in the information. But in order to constitute a variance sufficient to require a reversal it must constitute a material variance, that is, it must be of such a substantive character as to have misled the accused in preparing his defense, or it must be of such a nature that the defendant may be placed in second jeopardy for the same offense. See many cases collected 2 Wharton's Criminal Evidence, 11th Ed., p. 1799, § 1028; People v. Larrabee, 113 Cal.App. 745, 299 P. 85; People v. Foster, 117 Cal.App. 439, 4 P.2d 173; People v. Harrington, 92 Cal.App. 245, 267 P. 942; People v. Terrill, 132 Cal. 497, 64 P. 894; People v. Evanoff, 45 Cal.App. 108, 187 P. 54; People v. LaMarr, 20 Cal. 2d 705, 128 P.2d 345; People v. Guerrero, 22 Cal.2d 183, 137 P.2d 21. Here, of course, defendant was in no way prejudiced in preparing his defense by the alleged variance. Nor can he successfully contend that he may be placed in jeopardy again for the same offense. The rule is

well settled that, on a plea of jeopardy, extrinsic evidence is admissible on the trial to identify the crime of which a defendant has been convicted. United States v. Remington, 2 Cir., 64 F.2d 386; Dunbar v. United States, 156 U.S. 185, 15 S.Ct. 325, 39 L.Ed. 390.

[7, 8] It was not essential that the exact address of the building should have been set forth in the information as long as the building was described with sufficient particularly to show that it falls within the classification set forth in the statute, and as long as the defendant was apprised of the particular crime against which he had to defend. It is not essential that the information should go further in particularizing the place than to allege the county in which the crime is committed. People v. Redman, 39 Cal.App. 566, 179 P. 725; People v. Webber, 133 Cal. 623, 66 P. 38; People v. Geiger, 116 Cal. 440, 48 P. 389; see 4 Cal.Jur. p. 728, § 14. The Geiger case is directly in point. There the information charged a burglary in feloniously entering "a building at St. Helena, in the county of Napa." The proof was that the building was situated a mile and a half from St. Helena. The variance was held not to be material.

[9, 10] The next contention of defendant is that error was committed in admitting into evidence a record of defendant's previous commitment to the Preston School of Industry. As already indicated, defendant was the sole defense witness. On cross-examination he was asked if he had ever been convicted of a felony. He replied that he had not. He was then asked if he had ever pleaded guilty to a felony. The vigorous objections of his counsel having been overruled, he answered that he had not. He was then asked if he had ever pleaded guilty to a burglary. He answered that he had not. Thereafter, over objection, there was introduced into evidence a certain record of the Municipal Court of San Francisco. It showed that on May 16, 1941, defendant pleaded guilty to a burglary, that the degree of the crime was fixed as second degree, that he was then certified to the Superior Court, and that thereafter he was committed to the Preston School of Industry.

The introduction of this record was error of a most serious, and, we think, prejudicial nature. Section 2051 of the Code of Civil Procedure provides that a witness may not be impeached "by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony." The first question as to whether he had been convicted of a felony was proper. The second, as to whether he had pled guilty to a felony, was not, because, under the circumstances here existing, evidence of pleading guilty does not establish the nature of the crime as defined in § 17 of the Penal Code. That section provides that: "A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor. When a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the state prison." Under § 461, sub. 2, of the Penal Code, the punishment for burglary in the second degree is fixed at not to exceed one year in the county jail, or not to exceed fifteen years in the state prison.

[11] It is clear that detention at the Preston School of Industry is something other than imprisonment in the state prison. It is also quite obvious that under § 17, above quoted, a plea of guilty followed by detention in a reformatory does not make the person involved a convicted felon within the meaning of § 2051 of the Code of Civil Procedure. Under § 17, since defendant was not imprisoned in the state prison, the offense must be "deemed a misdemeanor for all purposes after a judgment." This seems so clear that further discussion would be superfluous were it not for the somewhat confusing state of the authorities on this subject. In People v. Hoffman, 199 Cal. 155, 248 P. 504, it was held that it was error to introduce into evidence the record of the juvenile court which showed that the defendant had pleaded guilty in that court to grand larceny. In People v. Adams, 76 Cal.App. 178, 244 P. 106, it was held to be error, which with other errors warranted a reversal, where proof was admitted that defendant had been sent to a reform school. These cases were discussed and distinguished in People v. Maloney, 92 Cal.App. 371, 268 P. 472, where the prosecution introduced evidence that the defendant had pleaded guilty to a felony charge and had there-

after been committed to the Preston School of Industry. This was held not to be error, and, if erroneous, not to have been prejudicial. However, that case dealt with a provision of the Vehicle Code which provided that violation of the section constituted a felony. Considerable reliance was placed on this statutory designation. All three of the above cases were discussed in People v. Goodwin, 105 Cal.App. 122, 286 P. 1087, where the trial court admitted evidence that the defendant had been convicted of grand larceny and then required to serve a term at the Preston School of Industry. The court quoted from the Maloney case at length and with apparent approval. The actual decision of the court, however, was that, even if erroneous, the error was not prejudicial inasmuch as the evidence conclusively established guilt. In People v. Dykes, 107 Cal.App. 107, 290 P. 102, where the factual situation was identical with that in the instant case, the court held that the error, if error it was, was not prejudicial. The Maloney case, supra, was distinguished and probably disapproved in People v. Trimble, 18 Cal.App.2d 350, 63 P.2d 1173. The defendant in that case had a prior conviction of a violation of § 146 of the California Vehicle Act, St.1931, p. 2133—the same section involved in the Maloney case. That section expressly provided that a person committing the acts prohibited "shall be deemed guilty of a felony." After conviction the defendant was sentenced to pay a fine. The question involved was whether such a conviction made him a two-time loser. In holding it did not, the appellate court stated, 18 Cal. App.2d at page 351, 63 P.2d at page 1174: "The characterization given a penalized act by the Legislature is immaterial in determining whether or not it is a misdemeanor or a felony, the sole test being the nature and extent of the punishment imposed. People v. Sacramento Butchers' Ass'n, 12 Cal.App. 471, 489, 107 P. 712. If the punishment imposed is other than death or imprisonment in the state prison, the penalized act is for all purposes thereafter deemed a misdemeanor. Section 17, Penal Code." See, also, People v. Rowland, 19 Cal.App.2d 540, 65 P.2d 1333; People v. Lando, 92 Cal.App. 405, 268 P. 439; for a general discussion of the proper interpretation of § 17 of the Penal Code see People v. Oreck, 69 Cal.App.2d 317, 158 P.2d 940.

[12] The respondent argues that the introduction of the record was proper for impeachment purposes inasmuch as the defendant had testified that he had not pled guilty to a felony. The obvious answer to this contention is that the question as to whether the defendant had pled guilty to a felony was improper and should not have been asked. Section 2051 of the Code of Civil Procedure specifically prohibits impeachment "by evidence of particular wrongful acts," with the sole exception that it may be shown that the witness has been "convicted of a felony." By asking one improper question and getting a negative reply the prosecuting attorney cannot lay the foundation for another improper question. This defendant had not been convicted of a felony. The asking of the challenged questions and the introduction of the record were clearly error.

[13, 14] Was the error prejudicial? This is sometimes a quite difficult point to determine. It is not a complete answer to point out that the evidence is sufficient to support the judgment. Accused persons are constitutionally entitled to have their guilt or innocence determined according to law, and to have their substantial rights protected. See many cases collected and commented on in People v. Adams, 76 Cal.App. 178, at pages 186 and 187, 244 P. 106. In the instant case, although the evidence is legally sufficient, it is by no means overwhelming. The identification of the turkeys was quite uncertain. There are unexplained lapses in the state's case. Why was the barber to whom one of the stolen turkeys was supposed to have been delivered not produced or his absence explained? What became of the tags that Fey testified had been delivered to the police? Who owned the truck? Did defendant have a driver's license? These, and other matters, were not sufficiently explained by the prosecution's case. The defendant was the sole witness on his own behalf. One jury had already disagreed on his guilt or innocence. This jury brought in a verdict of second degree burglary. Anything that materially affected defendant's credibility might very well have been the determining factor in the jury's deliberation. How can we say, under such circumstances, that the erroneous introduction of the record showing that defendant had pleaded guilty to burglary and been sent to reform school might not have been the element that tipped the scales against him? Art. VI, § 4½, cannot be used to excuse all errors committed by the prosecuting officials. Under the

circumstances here we are of the opinion that the error was prejudicial.

The judgment and order appealed from are reversed, and the cause remanded for a new trial.

WARD, J., and DOOLING, Justice pro tem., concur.

70 Cal.App.2d 150

GONSALVES v. ASSOCIACAO PROTECTORA UNIAO MADEIRENSE DO ESTADO DA CALIFORNIA et al.

Civ. 12863.

District Court of Appeal, First District, Division 2, California.

July 12, 1945.

Hearing Denied Aug. 30, 1945.

1. Appeal and error 🔑1079

Where no argument was made in support of contention, but there was a mere statement of suspicious circumstances which formed basis for further conjectures that appellant had not been given a fair trial by lodge, the point would be considered abandoned.

2. Mandamus 🔑187(4)

One expelled from lodge could not attack for first time on appeal from judgment denying petition for writ of mandate commanding restoration, jurisdiction of board of directors, particularly where any doubt of jurisdiction might have been cured by an amendment in case of timely objection.

3. Beneficial associations 🔑10(2)
Mandamus 🔑168(2)

Where constitution and by-laws of a lodge provided for expulsion in case of defamation of an officer, and it was proved that a member had referred to a director as "king of criminals" and a "beast" in a letter, the writing was libelous per se, and the burden was on the member to show that such communication was privileged. Civ. Code, §§ 45, 47.

4. Libel and slander 🔑5

Malice is not inferred from the communication, but may be inferred from all the facts and circumstances of the particular transaction. Civ.Code, § 48.

5. Mandamus 🔑187(9)

Where appellant had been expelled from lodge for libeling an officer thereof and did not plead or prove any claim of privilege in action asking for a writ of mandamus to restore membership which was denied, on appeal it would be assumed that if a finding had been required it would have been adverse to appellant. Civ.Code, §§ 45, 47, 48.

6. Mandamus 🔑7, 187(9)

A writ of mandate is a writ of discretion and not of right, and on appeal from judgment denying the writ it must be assumed that trial court properly exercised its discretion.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Antonio Pedro Gonsalves against Associacao Protectora Uniao Madeirense Do Estado Da California and Manuel S. Lucas, Louis Gomes Faria, etc., and others, for a writ of mandate commanding the defendants to restore the plaintiff to membership in the defendant lodge. From a judgment for defendants, the plaintiff appeals.

Judgment affirmed.

Thomas G. Michaels and J. Elwood Andresen, both of Oakland, for appellant.

E. H. Christian, Myron Harris, R. J. Darter, and John Jewett Earle, all of Oakland, for respondents.

NOURSE, Presiding Justice.

Plaintiff sued for a writ of mandate to command the defendants to restore him to membership in defendant lodge with the benefits and privileges to which a member is entitled. The defendants by answer pleaded that the plaintiff was expelled from membership in the lodge as a result of a trial upon charges of misconduct duly filed and heard in accordance with the constitution and by-laws of the lodge. The trial court found that the proceedings before the lodge were in due form and denied the petition.

[1] In support of his appeal from the judgment the plaintiff raises three points: That the board of directors did not have jurisdiction to try and expel him, that the letter which was the basis of the charges

against him was privileged, and that he was not accorded a fair trial. No argument is made in support of the third point. A statement of suspicious circumstances is recited on which the appellant lays his conjectures that he was treated unfairly and nothing more. We may assume from the manner of presentation that this ground has been abandoned.

The question of jurisdiction rests in the interpretation of the constitution and by-laws of the order. These were printed and circulated in the Portuguese language and each party tendered its own translation. Expert testimony was taken and the trial court found that the constitution and by-laws conferred upon the board of directors these functions:

"It is the duty of the Board of Directors which consists of seven members to decide any complaint of one member against another member and after considering all the attenuating and aggravating circumstances to apply the corresponding penalties."

Appellant states that in his translation of the constitution and by-laws there is a section reading: "Any complaint by a member of one Council against a member or officer of another Council, shall be forwarded at once to the Subordinate Council of which the accused is a member."

In the same translation there is a section defining the powers of the board of directors and reading, in part: "To consider only a complaint when the same is presented as follows: * * * Reason why complaint was not considered by the Subordinate Council."

In a translation left with this court upon stipulation of the parties during the oral argument we find in section 1 of Article XIV, Chapt. III, this provision: "Complaints may be filed with any Subordinate Council, the Supreme Board of Directors, * * * against any violation of the provisions of the Constitution or By-Laws * * *." And in the same volume (Chapt. II, Art. IV, Sec. 8, sub. 22) the board of directors is authorized: "To decide any complaint from a member against an officer or Subordinate Council; from member against member of any Subordinate Council * * *."

From the foregoing it appears that complaints against an offending member may be filed and heard before the Subordinate Council, the Supreme Board of Directors or the Supreme Council, and the jurisdiction of each is apparently concurrent and co-extensive. The respondents elected to try appellant before the Supreme Board of Directors. Art. IV, sec. 8, sub. 23 of Chapt. II authorizes the board of directors "To consider only a complaint when the same is presented as follows: g—Reason why complaint was not considered by the Subordinate Council." If this means that the complaint must show on its face the reason why it was not considered by the Subordinate Council it would be a matter in which the complaint might be amended if timely objection were raised. It does not appear that such objection was made at any time. The petition does not plead any facts which would put the question at issue and we are unable to find any matter in the record which would indicate that the question was raised in the trial court. The petitioner testified that when he was called for trial before the board of directors the only objection which he made was "the letter was not belongs to the lodge, should not be read in the lodge because it was belongs somewhere else, the laws, not in the lodge." A witness for appellant who had acted as his attorney before the board of directors testified that he objected to the trial on the ground that the letter presented a personal controversy between appellant and Mr. Freitas and not a matter of which the lodge should take cognizance. He also testified: "I told them they had not right to start the case from the Board, they should start it from the council to which he belonged * * *."

[2] These objections are not the same as what is now raised for the first time on this appeal. The board of directors did have the power to entertain the complaint if the reasons why it was not heard by the Subordinate Council were shown. If objection had been made to the form of the complaint an appropriate amendment might have been made. If the question had been raised in the trial court that the reasons for not hearing it in the Subordinate Council had not been shown before the directors heard it evidence of that fact might have been produced. But, as we read the record, the appellant appeared before the directors and submitted to trial without protest to the form of the complaint, and without protest to the jurisdiction of the board other than the protest heretofore noted which was unjustified by any interpretation of the regulations of the lodge. From the order of expulsion the appellant took an appeal to

the regional convention of the lodge. He was there fully heard and was represented by counsel. The convention approved the order of the board of directors and it does not appear that the appellant there raised any question as to the form of the complaint, or as to the jurisdiction of the board of directors. He is now foreclosed from asserting that his expulsion was not effected in accordance with the constitution and by-laws of the order.

The same confusion over the translation of the constitution and by-laws complicates the final ground urged by appellant. The action taken against him was based upon a letter which he sent to a fellow member residing in the East wherein he attacked officers of his lodge, referring to a director as "King of criminals" and a "beast." He admits the charge but contends that his act was not covered by the constitution and by-laws, and also that the communication was privileged. Section 27 of Article IX, Chapt. III, of the by-laws, in defining the duties of members, reads: "Not to conspire against, or to defame * * * any officer. * * * Any member who does this, and if it is so proven, will be expelled from the Association." Section 1(e), Art. XIII, relating to loss of rights and privileges, provides for expulsion of "Any member who conspires against, or slanders any officer of the Association." In both cases the word "difamar" is used in the Portuguese print of the by-laws. In one section it was translated as "defames", in another as "slanders." Witnesses were called and testimony taken that there was no word in the Portuguese language corresponding to the English word "slander" as used in the legal sense as distinguishing the oral defamation from the written "libel"; that the word "difamar" as used in the Portuguese means either oral or written defamation. The trial court so found, and that should end the controversy.

[3-6] The communication was not privileged—at least the appellant failed to prove that it was. The issue was not raised in the pleadings and no finding was made by the trial court. The writing was libelous per se under section 45 of the Civil Code. Thus the burden was on appellant to show that it was privileged under Civil Code, § 47. If the paper was issued without malice it was incumbent upon appellant to prove that defense. 16 Cal.Jur. p. 101. Though malice is not inferred "from the communication" (Civil Code, § 48) it nevertheless may be inferred from all the facts and circumstances of the particular transaction. From the fact that appellant admitted issuing the letter and did not plead nor prove any claim of privilege we may assume that if a finding had been required it would have been adverse to appellant. Alternatively we should say that, since the writ of mandate is a writ of discretion and not a writ of right (Ertman v. Municipal Court, 68 Cal.App.2d 143, 155 P.2d 908), we must assume that the trial court, having before it all the circumstances under which the letter was written, and the proceedings for expulsion under the rules of the lodge, properly exercised its discretion in denying the petition for a writ of mandate.

The judgment is affirmed.

STURTEVANT, J., and DOOLING, Justice pro tem., concur.

JOHNSTON v. DE LA GUERRA PROPERTIES, Inc., et al.*

Civ. 14901.

District Court of Appeal, Second District, Division 2, California.

July 12, 1945.

Rehearing Denied July 27, 1945.

Hearing Granted Aug. 30, 1945.

1. Appeal and error 🔑927(3)

On appeal from judgment predicated upon granting of motion for a nonsuit, evidence was to be considered in light most favorable to plaintiff.

2. Negligence 🔑54

Where property owner and operator of restaurant in one of buildings located on property had nothing to do with erection of wall by oil company on company's adjacent property, property owner and restaurant operator were not liable for injuries sustained by plaintiff who fell from wall onto walkway bordering building.

3. Negligence 🔑32(1)

An invitee may not recover damages from an invitor for negligence in not using reasonable care for protection and safety of invitee where injuries do not occur upon portion of premises owned by invitor, but upon another's property adjacent thereto over which invitor has no control.

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* Subsequent opinion 170 P.2d 5.

4. Negligence ⟹44

An existing lawful structure does not become unlawful when abutting landowner creates a dangerous condition by altering character of his property.

◆

Appeal from Superior Court, Santa Barbara County; Atwell Westwick, Judge.

Action by Laura B. Johnston against De La Guerra Properties, Inc., and another, to recover damages for personal injuries. From a judgment in favor of the defendants, the plaintiff appeals.

Judgment affirmed.

W. P. Butcher, of Santa Barbara, for appellant.

Spray, Davis & Gould, of Los Angeles, for respondent corporation.

Norris Montgomery, of Santa Barbara, for respondent Smith.

McCOMB, Justice.

From a judgment in favor of defendants predicated upon the granting of defendants' motion for a nonsuit in an action to recover damages for personal injuries, plaintiff appeals.

[1] The evidence being viewed in the light most favorable to plaintiff (appellant), as it must be considered on appeal from a judgment predicated upon the granting of a motion for a nonsuit (In re Estate of Flood, 217 Cal. 763, 768, 21 P.2d 579), the essential facts are:

Defendant De La Guerra Properties, Inc., was the owner of a parcel of property situated on the southwesterly corner of Anacapa and De La Guerra streets in the city of Santa Barbara. Defendant Smith operated a restaurant in one of the buildings located on this property, known as the El Paseo, under a tenancy with his co-defendant.

The northerly property line of the De La Guerra property joined the southerly property line of a service station and a parking lot owned by the Union Oil Company. The De La Guerra building on its northerly side was approximately ten feet south of the property line. Between the northerly face of the building and the property line was a cement walk approximately ten feet wide. This walk was constructed in 1928, or 1929, and abutted the entire length of the north face of the building and at the easterly end joined the public sidewalk on Anacapa Street. The westerly end of the sidewalk terminated at the back of El Paseo. The walkway was used as a service entrance to the various establishments in the building. There were three doors to the building opening onto the walkway.

On Anacapa Street westerly to the end of the walkway there was a one foot rise in grade. The oil station property adjoining the defendants' property was at approximately the same elevation as defendants' property at Anacapa Street, but increased in elevation in a westerly direction to where the level at the westerly end was approximately two feet higher than the walkway extending along the northerly edge of defendants' property.

From the time the walkway was built until about 1936, defendant De La Guerra's patrons had used the property, later acquired by the Union Oil Company, as a parking lot at which time they had graded the property, landscaped it, and sloped it to the walkway on the northerly side of the building. The Union Oil Company purchased the parkway about 1936 and thereafter neither defendant had anything to do with the service station, the parkway, nor the maintenance thereof. At the time the Union Oil Company took over the service station they constructed a concrete wall close to the southerly edge of their property running the entire length of defendants' walkway. This wall rose from approximately six inches above the walkway at the easterly end to two feet at the westerly end. The wall was entirely on the Union Oil Company's property and was planned and erected entirely by said company. Immediately north of the wall was an area ten feet wide which was dirt and landscaped with shrubbery. Bordering this, to the north, was a concrete curb approximately seven inches high separating the landscaped dirt portion from the asphalt pavement of the oil station property. Upon the asphalt pavement there were white lines painted on the surface of the black pavement extending from the seven-inch curb outward diagonally to indicate parking spaces for automobiles parking against the curb.

The concrete wall on the oil station property and the curb to the north thereof were broken by a ramp running from the asphalt parking lot down to the walkway of defendants. This ramp was about in the middle of the south property line of the Union Oil Company's property and was protected on both sides by a concrete wall. The ramp was about three feet wide and sloped downward to the walkway at a grade of about two feet. Directly across the walkway from the ramp was a door leading into the defendants' property, and over which was a sign indicating the El Paseo restaurant. The ramp was entirely on the Union Oil Company's property and was designed and constructed by said company.

At about 8 p.m., November 7, 1943, plaintiff was driven by her husband to the oil station property where they parked their car. Plaintiff alighted from the car. The night was dark though she could see the glass of the doorway leading to the El Paseo restaurant. She could see where she was walking, but thought there was a low step from the station property to the walkway.[1] She took about six steps in the darkness, picking her way as she walked along. She put her left foot on the top of the concrete wall, stepped down with her right foot and fell onto the walkway adjacent to defendants' property. As a result of the fall she received personal injuries.

Defendants' motion for a nonsuit was granted on the ground, among others, that the evidence showed without conflict that the accident happened on property owned and controlled by the Union Oil Company and not by defendants or either of them.

[2] This is the sole question necessary for us to determine:

Did the foregoing evidence disclose that plaintiff did not have a cause of action against defendants or either of them?

This question must be answered in the affirmative and is governed by these pertinent rules of law:

[3] 1) The law is established in California that an invitee is not entitled to recover damages from an invitor for alleged negligence of the latter in not using reasonable care for the protection and safety of its invitee, where the injuries do not occur upon the portion of the premises owned by the invitor but occur on property adjacent thereto owned by another, over which property the invitor does not have any right or control. (Gabriel v. Bank of Italy, 204 Cal. 244, 245, 246, 267 P. 544, 58 A.L.R. 1039; Davis v. West Shore Company, 55 Cal.App.2d 220, 224, 130 P.2d 459.)

[4] 2) It is the law that a structure already existing and not otherwise unlawful does not become unlawful when the abutting landowner creates a dangerous condition by altering the character of his property. Galiano v. Pacific Gas & Elec. Co., 20 Cal.App.2d 534, 542 et seq. 67 P.2d 388; Kleinberg v. Schween, 134 App.Div. 493, 119 N.Y.S. 239; Gordon v. Schween, Sup., 117 N.Y.S. 191.

From the foregoing evidence it is clear that in the instant case both of the above stated rules are applicable and relieve defendants from responsibility to plaintiff for these reasons:

First: The accident did not occur upon the property of defendants or either of them; and

Second: The cause of the accident was a wall erected by the Union Oil Company seven or eight years after the sidewalk belonging to defendants had been erected and any dangerous condition that existed was created by the abutting landowner and not by defendants.

Van Wye v. Robbins, 48 Cal.App.2d 660, 120 P.2d 507, relied on by plaintiff is not applicable in the instant case for the reason that in the Van Wye case there was an agreement by the defendant and the owner of the adjacent service station whereby the customers of the defendant were permitted to park their cars free upon the service station premises. In the present case there was not any agreement between defendants or either of them and the Union Oil Company whereby customers of defendant could park their cars upon the property of the Union Oil Company.

In view of our conclusions, it is unnecessary to discuss other questions argued by counsel.

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[1] The plaintiff had been to the restaurant on one previous occasion at which time she parked near Anacapa Street in the parkway, then walked toward Anacapa Street and stepped down to the walkway by stepping over a curb about six or seven inches high.

For the foregoing reasons the motion for a nonsuit was properly granted and the judgment entered thereon is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

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69 Cal.App.2d Supp. 819

PEOPLE v. BEGGS et al.

Cr. A—2092.

Appellate Department, Superior Court, Los Angeles County, California.

June 25, 1945.

1. Food 🔑20(1)

Complaints charging that defendants sold mislabeled and misbranded food in that they sold onions under labels representing the contents of containers in which onions were packed to be greater in quantity and weight than they in truth were, stated a public offense. St.1943, pp. 2633, 2635, §§ 26490, 26510.

2. Food 🔑21

Evidence that sacks of onions weighing less than 50 pounds were sold under the label "Texas Onions 50 lbs. net weight" authorized convictions of selling mislabeled food. St.1943, pp. 2633, 2635, §§ 26490, 26510.

3. Food 🔑15

Neither knowledge or an intent to defraud are elements of offense of sale of misbranded or mislabeled food. St.1943, pp. 2633, 2635, §§ 26490, 26510.

4. Food 🔑20(5)

In prosecution for sale of misbranded or mislabeled food arising out of sale of onions in sacks weighing less than 50 pounds under a label declaring a net weight of 50 pounds, the use of the words "wilfully and unlawfully" in the complaints did not require proof of knowledge or intent. St.1943, pp. 2633, 2635, §§ 26490, 26510.

5. Stipulations 🔑14(1)

Where a stipulation in prosecution for sale of mislabeled or misbranded food recited that all facts stipulated occurred in the city of Los Angeles, court would not consider contentions based on principles governing interstate commerce.

6. Indictment and information 🔑59

Where complaint charged that defendant sold onions represented by defendant to be of a greater weight than their true net weight, thereby charging an offense under Business and Professions Code, § 12024, the fact that it was recited in complaint that act was a violation of section 12023 was of no legal consequence. St.1939, p. 447, §§ 12023, 12024.

7. Food 🔑15

In prosecution for selling a commodity in less quantity than defendant represented it to be, representation of quantity is an essential element of the offense. St.1939, p. 447, § 12024.

8. Food 🔑15

The fact that sacks containing onions bore labels indicating a net weight of 50 pounds although sacks actually contained less than 50 pounds of onions, unless such tag was seen by buyer, could not form the basis of conviction of sale of a commodity in less quantity than defendant represented it to be. St.1939, p. 447, § 12024.

9. Food 🔑21

Evidence was insufficient to authorize conviction of selling onions in less quantity than represented. St.1939, p. 447, § 12024.

10. Criminal law 🔑202(1)

Where defendants were convicted of selling mislabeled onions on the basis of labels indicating that sacks of onions contained 50 pounds net weight when, in fact, sacks contained a lesser weight, on retrial of charge of sale of onions in less quantity than represented, in absence of evidence of representations of weight other than by means of label on sack, additional sentences would not be proper, since, in such event, first count would be completely included within proof under second count and double punishment is not authorized. St.1939, p. 447, § 12024; St.1943, pp. 2633, 2635, §§ 26490, 26510.

◆

Appeal from Municipal Court of City of Los Angeles; Robert Clifton, Judge.

W. J. Beggs and others were convicted of selling mislabeled and misbranded food and certain of the defendants were convicted under a second count of selling certain food under representation that it was a weight greater than true net weight, and they appeal.

Convictions under first count affirmed, and convictions under second count reversed and remanded for new trials.

Redmond & Redmond, of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., Donald M. Redwine, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for respondent.

BISHOP, Judge.

[1] In three separate complaints three groups of defendants were charged, in count 1, with wilfully and unlawfully selling "an article of food, to wit: onions, which was then and there mislabeled and misbranded, in that its label represented the contents of the container in which it was packed to be greater in quantity and weight than they in truth and in fact were." These allegations state a public offense under section 26510 of the Health and Safety Code, Stats.1943, p. 2635, which provides: "The * * * selling * * * of any article of food which is * * * misbranded is prohibited," for section 26490 of the same Code, St.1943, p. 2633, declares: "A food shall be deemed to be misbranded: (1) If its labeling is false or misleading in any particular."

The evidence warranted the trial court in reaching these conclusions: The onions involved in these cases were grown in Texas and were shipped to Los Angeles in sacks bearing labels which read: "Texas Onions 50 lbs. net weight." The shippers had been directed to fill the sacks so that they contained more than fifty pounds of onions, but in fact most of the sacks never had contained as much as fifty pounds of onions. None of the defendants weighed the sacks of onions which they sold until after the sales were made and the sealer of weights and measures had intervened. The defendant Cornett sold sacks of onions labelled as though containing fifty pounds each, but which failed to do so, to the Los Angeles Potato Distributors, Inc., a corporation, which, in turn, acting through defendants Harry Alouzet and Felix Marina, sold them to Haddad Bros. Produce Company. Defendant Cornett also sold some of these misbranded sacks to Beggs Bros. Produce Company, a business operated by defendants W. J. and Nat Beggs, on whose behalf and with whose knowledge defendant Jones resold the sacks to Balsano Produce Company.

[2-4] The conclusions just set forth support the convictions of the several defendants on the first count. Neither knowledge nor an intent to defraud is made a condition of the statute, with the result that the act of selling misbranded goods constitutes the offense, though done, as it doubtless was in the case before us, both in happy ignorance of the fact that the legend on the sacks was incorrect and without any intention of defrauding anyone. This conclusion is supported by cases analogous to ours, decided in this state, People v. Hartman, 1900, 130 Cal. 487, 490, 62 P. 823; People v. Pera, 1918, 36 Cal.App. 292, 304, 171 P. 1091; People v. Bickerstaff, 1920, 46 Cal.App. 764, 770, 190 P. 656; People v. Sweeney, 1944, 66 Cal.App.2d 855, 153 P. 2d 371, and by cases on all fours, decided elsewhere, Commonwealth v. Sacks, 1913, 214 Mass. 72, 100 N.E. 1019, 45 L.R.A., N.S., 1, Ann.Cas.1914B, 1076; Smith v. State, 1931, 223 Ala. 346, 136 So. 270, 271; Woodard v. State, 1941, 30 Ala.App. 144, 2 So.2d 330, 332; State v. Weisberg, 1943, 74 Ohio App. 91, 55 N.E.2d 870, 872; Great Atlantic & Pacific Tea Co. v. District of Columbia, 1937, 67 App.D.C. 30, 89 F.2d 502, 505; but see Newark v. East Side Coal Co., 1909, 77 N.J.L. 732, 73 A. 484. The employment of the words "wilfully and unlawfully" in the complaints did not require proof of knowledge or intent not required by the statute. People v. Settles, 1938, 29 Cal.App.Supp.2d 781, 784, 78 P.2d 274.

[5] Other contentions were made by the defendants respecting their conviction on this first charge, but we find them untenable. Some of the contentions are based on principles governing interstate commerce. As it was agreed that "All these facts stipulated in the stipulation occurred in the city of Los Angeles", we are not confronted with an interstate question, for, in spite of rumors to the contrary, the boundaries of the city do not extend beyond state lines.

[6-8] The second count of each complaint charged that the defendants sold onions "represented by [the defendants] to be of a weight of fifty (50) pounds, which was * * * a weight greater than the true net weight thereof." The words

chosen for this second count come partly from section 12023 of the Business and Professions Code, St.1939, p. 447,[1] and partly from the succeeding section which reads: "12024. Every person, who by himself, or through or for another, sells any commodity in less quantity than he represents it to be is guilty of a misdemeanor." The count charges the defendants with having done an act which is made a misdemeanor by the section just quoted, although not pleaded in the words of the section, and the fact that it is recited in the complaint that the act is a violation of section 12023 is of no legal consequence. People v. Arthur, 1934, 1 Cal.App.Supp.2d, 768, 771, 32 P.2d 1002, 1003, and cases cited. An essential element of the public offense charged is that the defendants "represented" the quantity of the onions, by reference to their weight. It seems obvious to us that a merchant could not properly be held to have violated section 12024 by selling food to a customer to whom he made no mention of the weight, or quantity, in any manner; there must be a representation to the buyer of a greater quantity than in truth is sold, or section 12024 is not violated. A statement made but not heard by the buyer, consequently, would not "represent" a higher quantity than the true quantity, nor would a legend on a sack, never seen by the buyer, constitute a representation.

[9, 10] In the case at bar there was no evidence that any of the buyers had ever seen the sacks upon which the purported net weight of the contents was given, nor was there any evidence that the weight had been represented in any other fashion. The conviction of the defendants in the two cases where convictions were had under the second count, must therefore be reversed. We are remanding the two cases for new trials, as to count 2, because of the possibility that evidence may be adduced of representations of the weight of the onions other than by means of the label on the sacks. If the only evidence of representation as to the weight of onions is that the labels on the sacks were seen by the purchasers, then additional sentences will not be proper, for, in such event, count 1 will be completely included within the proof of acts under count 2 and double punishment is not authorized. See People v. Buchanan, 1929, 106 Cal.App.Supp. 765, 767 et seq., 288 P. 50; People v. Twedt, 1934, 1 Cal.2d 392, 398, 35 P.2d 324; People v. Craig, 1941, 17 Cal.2d 453, 110 P.2d 403; People v. Krupa, 1944, 64 Cal.App. 2d 592, 149 P.2d 416.

The judgments of conviction and orders denying new trial, with reference to the first count in each case, are affirmed. The judgments of conviction based on the second count in cases numbered 24650 and 24652 in the trial court are reversed and the cases remanded for new trials.

SHAW, P. J., and KINCAID, J., concur.

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[1] Section 12023, Business and Professions Code: "Every person who by himself or his employee or agent, or as the employee or agent of another, sells any commodity, at, by, or according to gross weight or measure, or at, by, as, of, or according to any weight, measure or count which is greater than the true net weight, measure or count thereof, or which is less than the standard net weight, standard net measure or standard net count, including tolerances, as such standards and tolerances are established pursuant to the provisions of this division is guilty of a misdemeanor."

26 Cal.2d 736

PEOPLE v. ONE 1937 LINCOLN ZEPHYR SEDAN, ENGINE NO. H–38308, EMERG. PERMIT NO. OF 5181, et al.

L. A. 19132.

Supreme Court of California.
July 10, 1945.

1. Intoxicating liquors ⚷246

Where driver of taxicab violated Alcoholic Beverage Act while operating taxicab by unlawfully selling whisky and owner of taxicab business who was also registered owner of taxicab did not participate in wrongful act, forfeiture of taxicab was not authorized, since owner was exempted as common carrier from forfeiture provision of the act. Gen. Laws 1937, Act 3796, § 3; Gen. Laws Supp. 1941, Act 3796, §§ 51g, 52(i).

2. Forfeitures ⚷1

The law does not favor forfeitures, and a statute which authorizes it should be strictly construed in favor of owner.

3. Statutes ⚷72

Construction of Alcoholic Beverage Act provision as exempting innocent common carriers from forfeiture of vehicles wrongfully used by employees in violation of act does not contravene constitutional provision requiring that all laws shall have a uniform operation. Gen. Laws Supp. 1941, Act 3796, §§ 51g, 52(i); Const. art. 1, § 11.

◆

In Bank.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Proceeding by the People for forfeiture of one 1937 Lincoln Zephyr Sedan Taxicab, Engine No. H–38308, Emerg. Permit No. of 5181, on ground that driver thereof while operating the taxicab violated the liquor law, wherein Samuel Clauser intervened as registered taxicab owner. From a judgment dismissing the proceeding and releasing taxicab to owner, the People appeal.

Affirmed.

Robert W. Kenny, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for appellant.

O. E. Mark, of San Diego, for respondent.

GIBSON, Chief Justice.

This proceeding was brought under section 52 of the Alcoholic Beverage Control Act, Stats. 1935, p. 1123, and amendments thereto, Deering's Gen. Laws 1937, 1941 Supp., p. 2006, Act 3796, to forfeit to the State a taxicab on the ground that the driver thereof violated sections 3 and 51g of the act by possessing, transporting and selling alcoholic beverages without a license.

There is no dispute as to the material facts. The evidence discloses that while operating the taxicab the driver sold two bottles of whiskey to a sailor who was riding in the vehicle. The driver was arrested, pleaded guilty, and was fined. The taxicab was impounded and notice of seizure and intended forfeiture was served as required by section 52(b) of the act. The registered owner who operated the taxicab company answered and prayed for the release of the vehicle. The trial court found that the owner was not present when the violation occurred, had no personal connection therewith and had instructed his drivers not to sell or transport intoxicating liquor in the taxicabs. The State has appealed from the ensuing judgment dismissing the forfeiture proceeding and releasing the vehicle to the owner.

Section 3 of the act provides in part that "Any person violating any provision of this section shall be guilty of a misdemeanor."

Section 51g provides: "It shall be unlawful for any person to use any automobile or other vehicle to conceal, convey, carry, or transport any alcoholic beverages * * * with the design to evade the excise taxes or license fees imposed by this act; * * *. Any automobile or other vehicle used to conceal, convey, carry or transport alcoholic beverages, * * * in violation of this section shall be forfeited to the State of California."

Under similar forfeiture provisions it has been held that when the owner of an automobile consents to its lawful use by another who illegally operates it to transport or sell narcotics or alcoholic beverages, the owner may not defeat a forfeiture on the ground that he had no knowledge of the violation of the statute. People v. One 1941 Ford Truck, Cal.Sup., 159 P.2d 641; People v. One 1933 Plymouth Auto, 13 Cal.2d 565, 90 P.2d 799; Van Oster v. Kansas, 272 U. S. 465, 47 S.Ct. 133, 71 L.Ed. 354, 40 A.L.R. 1044. However, section 52(i) of the act here involved specifically exempts common carriers and the determinative question is as to the meaning and effect of this exemption.

[1] It is the theory of the State that inasmuch as the taxicab was used in violating the statute, the unlawful act precludes application of the exemption in favor of common carriers. In other words, the State contends that the exemption of common carriers is restricted to those cases where the vehicle is used for legitimate purposes. This argument fails to distinguish between the common carrier and the vehicle operated by the carrier. In the present case the owner of the taxicab business who is also the registered owner of the vehicle is the common carrier. The vehicle is merely the instrumentality through which he, as common carrier, was discharging his functions.

[2] The statute does not purport to limit the exemption in favor of common carriers to acts committed in the vehicles by members of the public, although this is in effect the claim made by the State. If the Legislature had intended to render a vehicle used by a common carrier liable to confiscation if it was being used by the driver to conceal, transport and sell liquor contrary to law, and without the knowledge of the carrier, it would have been a simple matter to have worded the exemption provision accordingly. Moreover, the law does not favor forfeitures and the statute should be strictly construed in favor of the owner. People v. One 1941 Buick 8, 63 Cal.App.2d 661, 665, 147 P.2d 401; Santos v. Dondero, 11 Cal.App.2d 720, 54 P.2d 764; 37 C.J.S., Forfeitures, p. 8, § 4, subsec. b.

We express no opinion as to the effect of the exemption in cases where the common carrier participates in the wrongful acts.

[3] Our construction of section 52(i) of the act, exempting innocent common carriers from forfeiture of vehicles wrongfully used by employees in violation of the statute, does not contravene the provision of section 11 of article I of the state Constitution that all laws shall have a uniform operation, for there are reasonable grounds for exempting common carriers from this particular penalty under circumstances such as here exist. The character, duties and responsibilities of common carriers furnish ample justification for placing them in a separate classification.

The judgment dismissing the forfeiture proceeding and releasing the vehicle to the owner is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

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26 Cal.2d 873

PEOPLE, Respondent, v. ONE 1940 BUICK SEDAN, SERIAL NO. 13823180, ENGINE NO. 54016743, 1941 LICENSE NO. 10L569, Defendant; David D. Frohman, Appellant.

L. A. 19127.

Supreme Court of California.

July 10, 1945.

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding for forfeiture of taxicab for violation of liquor law. Judgment for plaintiff reversed with directions.

Charles A. Son, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

PER CURIAM.

The material facts and contentions of this case are substantially the same as those involved and considered in the case of People v. One 1937 Lincoln, Cal.Sup., 160 P.2d 769. What we there said is determinative of this appeal.

The judgment is reversed with directions to the trial court to enter judgment releasing the vehicle to the owner.

26 Cal.2d 872

PEOPLE, Appellant, v. ONE 1942 DODGE SEDAN, SERIAL NO. 30594333, ENGINE NO. D-22-19364, LICENSE NO. CK-0835 and 5B8756, Defendant; William Williford, Respondent.

L. A. 19124.

Supreme Court of California.

July 10, 1945.

In Bank.

Appeal from Superior Court, Santa Barbara County; Ernest D. Wagner, Judge.

Proceeding for forfeiture of taxicab for violation of liquor law. Judgment, releasing vehicle to owner, affirmed.

Robert W. Kenny, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for appellant.

Wm. G. Junge, of Los Angeles, for respondent.

PER CURIAM.

The material facts and contentions of this case are substantially the same as those involved and considered in the case of People v. One 1937 Lincoln, Cal.Sup., 160 P.2d 769. What we there said is determinative of this appeal.

The Judgment releasing the vehicle to the owner is affirmed.

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26 Cal.2d 871

PEOPLE, Respondent, v. ONE 1942 STUDEBAKER COMMANDER SEDAN, SERIAL NO. 4228493, ENGINE NO. H177842, TEMP. PERMIT NO. CF. 4842, Defendant; Wilmington Cab Company, Appellant.

L. A. 18945.

Supreme Court of California.

July 10, 1945.

In Bank.

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Proceeding for forfeiture of taxicab for violation of liquor law. Judgment for plaintiff reversed with directions.

John G. Clock and Wm. H. Brayton, both of Long Beach, for appellant.

Robert W. Kenny, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

PER CURIAM.

The material facts and contentions of this case are substantially the same as those involved and considered in the case of People v. One 1937 Lincoln, Cal.Sup., 160 P.2d 769. What we there said is determinative of this appeal.

The judgment is reversed with directions to the trial court to enter judgment releasing the vehicle to the owner.

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26 Cal.2d 873

PEOPLE, Appellant, v. ONE 1941 PACKARD TAXI SEDAN, ENGINE NO. TD25465C, LICENSE NO. BE/PC V9931, SERIAL NO. T14822079, Defendant; Tanner Motor Livery, Inc. (a Corporation), Respondent.

SAME v. ONE 1941 CHEVROLET TAXI SEDAN, SERIAL NO. 6AG12-8887, ENGINE NO. AA273472, LICENSE NO. BE/PC X 7028, Defendant; San Diego Yellow Cabs, Inc. (a Corporation), Respondent.

SAME v. ONE 1942 CHEVROLET SEDAN TAXI, ENGINE NO. BA-331108, LICENSE NO. BEXPCX-1674, SERIAL NO. 6BG-016687, Defendant; San Diego Yellow Cabs, Inc. (a Corporation), Respondent.

L. A. 19133–19135.

Supreme Court of California.

July 10, 1945.

In Bank.

Appeals from Superior Court, San Diego County; Charles C. Haines, Judge.

Proceedings for forfeiture of taxicabs for violations of liquor law. Judgments dismissing proceedings and releasing vehicles to owners, affirmed.

Robert W. Kenny, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for appellant.

Clifford K. Fitzgerald, of San Diego, for respondents.

PER CURIAM.

The material facts and contentions of these cases are substantially the same as those involved and considered in the case of People v. One 1937 Lincoln, Cal.Sup., 160 P.2d 769. What we there said is determinative of these appeals.

The judgments dismissing the forfeiture proceedings and releasing the vehicles to the owners are affirmed.

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26 Cal.2d 871

PEOPLE, Respondent, v. ONE 1942 PLYMOUTH SEDAN, SERIAL NO. 3299896, ENGINE NO. P14-4572B, LICENSE NO. BE-PC-XX9397, Defendant; Virgil H. Rogers et al., Appellants.

L. A. 19122.

Supreme Court of California.

July 10, 1945.

In Bank.

Appeal from a judgment of the Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Proceeding for forfeiture of taxicab for violation of liquor law. Judgment for plaintiff reversed with directions.

John J. McMahon and Arthur C. Verge, both of Los Angeles, for appellants.

Robert W. Kenny, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

PER CURIAM.

The material facts and contentions of this case are substantially the same as those involved and considered in the case of People v. One 1937 Lincoln, Cal.Sup., 160 P.2d 769. What we there said is determinative of this appeal.

The judgment is reversed with directions to the trial court to enter judgment releasing the vehicle to the owner.

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26 Cal.2d 621

MOORE v. WOOD et al.

L. A. 18845.

Supreme Court of California.

June 29, 1945.

1. Appeal and error ⇨878(1)

The judicial interpretation of an agreement binds parties to extent that they do not attack the determination by appeal from the judgment construing the provisions in controversy.

2. Contracts ⇨170(1)

The practical interpretation of a contract by the parties constitutes cogent evidence of intent.

3. Appeal and error ⇨878(1)

Where plaintiff did not appeal from judgment declaring rights of parties under written agreement for development and operation of gold mine and defendants did not challenge portion of it which required plaintiff to bear all maintenance expenses incurred during such times as he was "unable to work" the mine "by reason of strikes, lockouts, governmental regulations or any other cause beyond (his) * * * control", plaintiff was bound by the judgment, so as to be responsible for expenses incident to care of mining property during time that effective working of property was delayed by governmental regulations beyond his control, even though agreement did not expressly provide for payment of maintenance expenses.

4. Appeal and error ⇨1008(3)

Where record included no evidence offered or received for purpose of showing intention of parties as to their agreement, construction of the contract by trial court presented a question of law which Supreme Court could determine on appeal.

5. Mines and minerals ⇨101

Where written agreement between defendants, as owners of gold mining property, and plaintiff for development and operation of the property made plaintiff responsible for the expenses incident to care of property during time that effective working of property was delayed by governmental regulations beyond plaintiff's control, order of War Production Board suspending gold mining was a "governmental regulation" within meaning of contract, so that plaintiff was required to bear entire expense of taking care of property during Federal ban against gold mining.

See Words and Phrases, Permanent Edition, for all other definitions of "Governmental Regulation".

6. Contracts ⟹143

The meaning of a written instrument is not to be determined by isolating one term used by party and defining it without reference to language of the contract, but, on the contrary, the agreement must be construed as a whole. Civ.Code, § 1641.

7. Mines and minerals ⟹101

Order of War Production Board suspending gold mining for an indefinite period was a "governmental regulation" within meaning of written contract for development and operation of mining property which made plaintiff responsible for expenses incident to care of property during time that effective working of property was delayed by governmental regulations beyond plaintiff's control, as against contention that prohibition of an act was something different from a regulation concerning it.

8. Mines and minerals ⟹101

Where written agreement between defendants, as owners of gold mining property, and plaintiff for development and operation made plaintiff responsible for expenses incident to care of property during time that effective working of property was delayed by governmental regulations beyond plaintiff's control, plaintiff under doctrine of impossibility could not charge defendants with any part of maintenance expenses during time property could not be operated because of order of War Production Board suspending gold mining.

CARTER and SCHAUER, JJ., dissenting.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Granville Moore against Thomas A. Wood and another for declaratory relief as to right of the parties under an agreement. From a portion of the judgment, the defendants appeal.

Reversed with directions.

Prior opinion 152 P.2d 1014.

Thomas A. Wood, in pro. per., and Michael F. Shannon, both of Los Angeles, for appellants.

Cruickshank, Brooke, Dunlap & Ross and Robert H. Dunlap, all of Pasadena, for respondent.

EDMONDS, Justice.

By a contract made in 1942, Granville Moore obtained certain rights in connection with the exploration and development of a gold mining property. Less than a year later, the federal government ordered the suspension of all operations of that kind. Later Moore commenced the present action for declaratory relief, asserting that a dispute had arisen concerning the construction of the terms of the contract relating to the responsibility for the cost of maintaining the property during the time the order is in effect. Thomas A. Wood and Ann Wood, the owners of a part interest and lessees of the remaining interest in the mine, have appealed from a portion of the judgment requiring them to pay 49 per cent of the maintenance expenses, and the question for decision concerns the scope and effect of the contract between the parties.

The agreement in controversy provides that as Moore "desires an option to acquire a 51% interest" in the mining property, he shall, not later than February 16, 1942, take possession "and commence the mining operation in the mine located upon said real property known as the Governor Mine, and will thereafter continuously operate said property and develop the same, expending thereon such moneys as may be necessary properly to develop said mine, estimated at $25,000.00 and will place said mine on production within a period of twelve months from the date hereof, provided that delays are not incurred by reason of strikes, lockouts, governmental regulations or any other causes beyond the control of [Moore], and in the event that [Moore] should be delayed in placing said mine on production within said period of twelve months by reason of such cause or causes, then said twelve months' period shall be extended to cover such period of time as [Moore] shall be unable to work said mine. 2. [Moore] will carry on said work in a miner-like fashion and pay for all labor, insurance premiums, power and utility bills, all materials purchased, supplies used, and all other expenses of such work so as to develop the greatest possible tonnage of ore consistent with good work and proper development, working not less than ninety man shifts per month. * * *

4. * * * all [net] profits made shall be divided 49% to the [Woods] and 51% to [Moore], such division to be made through the instrumentality of the corporation next specified, if created. 5. The [Woods] will, at any time that [Moore] elects, convey title to * * * a corporation to be formed under the laws of the State of California * * * having a Board of five directors and with a capital stock structure * * * which * * * shall be issued as follows: 49% thereof to the [Woods] or their nominees and 51% thereof to [Moore] or his nominee. The determination to create a corporation * * * shall rest with [Moore]. * * *"

The evidence shows, without conflict, that upon the execution of the contract on February 16, 1942, Moore took possession of the mine and during the next five months expended $22,300 in developing it. He also paid the Woods $5,000 as required by the agreement. The mine has been greatly improved by Moore, but he has not realized any return from it.

Prior to July 16, 1942, the material priority regulations issued by the War Production Board were modified to prevent the further procurement of materials essential to mining operations and since that date it has been impossible to operate the property. Moreover, before that date, the continuance of mining operations was prevented by the induction into the armed forces of certain of Moore's irreplaceable and essential employees. Finally, on October 8, 1942, the War Production Board issued an order prohibiting the further conduct of gold mining operations. The land which is the subject of the contract in controversy is valuable only as a gold mining property and the circumstances which have prevented Moore's operation of the property since July 16, 1942, are causes beyond his control.

From the time of the discontinuance of the mining operations to January 10, 1943, when the trial of this suit commenced, Moore expended approximately $2,300 for the protection of the properties against theft, injury, or destruction during the suspension of operations; $1,033.65 of this amount was paid after October 8, 1942, when all gold mining operations were prohibited. The "shutdown" or "standby" expenses will continue at the rate of about $300 per month. In July, 1942, Moore gave the Woods notice that he elected to have the title to the land conveyed to a corporation to be formed in accordance with the provisions of the contract. The Woods refused to comply with his demand.

Upon this evidence, the trial court found that Moore "agreed to place the Governor Mine on production within a period of twelve months from and after February 16, 1942, provided that delays were not incurred by reason of strikes, lockouts, governmental regulations or any other causes beyond the control of" Moore; that he is "excused from placing said mine on production so long as the existing order of the War Productions Board * * * prohibiting the conduct of gold mining operations is in effect"; also, that he "is excused from placing said mine on production until the expiration of 130 days" after the removal of such restriction.

By additional findings, the trial court declared that Moore's obligation to place the mine on production is a personal covenant, and the cost of same "is to be borne by [Moore] at his sole expense irrespective of the date of formation of the corporation. * * * The true meaning of the words 'on production' is to create net value, and the Governor Mine * * * will be on production only when it is yielding a net return." Moore has performed all covenants of the contract entitling him to the formation of a corporation, and the Woods are obligated to join in the execution of Articles of Incorporation. All expenses incidental to the operation of the mine prior to October 8, 1942, are to be borne by Moore, and those subsequent to that date and until the removal of the governmental prohibition of gold mining, shall be paid by the corporation to be formed.

Upon repeal of the War Production Board order, the cost of operating the mine will become the personal obligation of Moore, until such time as the mine is placed on production; from that time on, the operating expenses shall be borne by the corporation. But if the mine is not put on production at Moore's cost and expense within 130 days from the date of revocation of the governmental prohibition, the Woods will become entitled to terminate Moore's right to an interest in the property.

By the judgment the Woods are ordered to immediately join with Moore in the formation of a corporation, and to transfer their interest in the mining properties to the corporation. Moore is required to pay the expenses necessary to place the mine on production within 130 days after the termination of the War Production Board order prohibiting gold mining operations, and thereafter the cost of operations is to be paid by the corporation.

The appeal of Wood and his wife is from those portions of the judgment by which the corporation is ordered to "bear the expense of maintaining said property, to-wit: the expense of insurance, services of watchmen, power bills, taxes, utility charges and other expenses of safely keeping the personal property aforesaid and preventing damage to and theft from the Governor Mine * * * so long as there shall be in effect that certain order of the War Production Board in effect October, 8, 1942, or any other valid order by a government agency having jurisdiction in the premises prohibiting the conduct of gold mining operations"; also specified in the notice of appeal is the provision of the judgment wherein it is ordered that unless the Woods "pay to Granville Moore 49% of the sum of $1,033.65 in cash, and 49% of the amounts expended by him in safely keeping said property since January 10, 1943, [Moore] shall cause the corporation to set up on its books of account a liability to said Granville Moore the sum of $1,033.65 plus such sums of money as said Granville Moore has expended since January 10, 1943, for the purpose of safely keeping said Governor Mine."

Only insofar as the findings include a construction of the contract in controversy do the appellants challenge the sufficiency of the evidence to sustain them. But in asserting that they are not obligated for any part of the shutdown expenditures, the appellants say that "the questions of law involved here are simple and have only to do with the general principles governing the construction of contracts." Properly construing the contract from its four corners and as a whole, they contend, it clearly appears that Moore's obligation under the agreement to pay all expenses necessary to place the mine on production includes the payment of any expenditures incurred during shutdown periods. Also, they assert, the parties had in mind operational suspensions of the very nature here involved, for the contract provides that the one-year period in which the mine had to be put on production at Moore's expense was to be extended to cover any delays occasioned by reason of "strikes, lockouts, governmental regulations or any other causes beyond the control of" Moore. In the event any such delays are incurred, the appellants add, the contract does not provide for the suspension of Moore's obligations during such time. Summing up their attack on the judgment, the Woods complain that under these circumstances, the trial court has written into their agreement obligations, additional to those assumed by them, as follows: "First, a paragraph placing the burden of the expense of maintaining the property during the period of Government interference upon the corporation that was to be formed; second, a paragraph placing the expense subsequent to October, 1942, and prior to January 10, 1943, on the parties to the contract."

In support of the judgment in his favor Moore contends that, in construing the agreement between the parties, the trial court correctly interpreted the contract term "governmental regulations" as not including an entire prohibition. In this connection, he asserts "by the great weight of authority the words 'regulate' and 'regulation' do not include the concept of 'prohibit' or 'prohibition'." Accordingly, as the War Production Board order was a prohibition not within the contemplation of the parties when they contracted, from the effective date of such governmental prohibition the parties incurred duties and liabilities "closely analogous" to those existing between tenants in common, whereby he is entitled to a proportionate contribution from the Woods for standby expenses paid by him. And, assuming for the purposes of argument that the meaning of the contract is doubtful, the trial court's construction must be adhered to even though as an original proposition another interpretation is equally tenable. In conclusion, Moore asserts that to interpret the contract as placing upon him the entire burden of the shutdown costs during the existence of the governmental prohibition would result in the unjust enrichment of the appellants.

As argued by the parties on this appeal, therefore, the determinative question is whether, in anticipating delays occasioned by "governmental regulations" and during which times Moore might be "unable to work" the mine, the parties at the time they contracted contemplated a shutdown caused by a governmental prohibition of gold mining.

Implicit in the judgment of the trial court is the determination that the contract obligates Moore to pay all maintenance expenses incurred during periods of delay in which he is unable to work the mine by reason of "governmental regulations" beyond his control. The orders of the War Production Board made prior to October were regulations of that kind; and he must, therefore, pay all of the cost of maintaining the property up to the date when gold mining was prohibited. Also, as the regulations in effect between July and October were within the contemplation of the parties when they contracted, Moore may not rely upon the doctrine of impossibility of performance to excuse his delay in placing the mine upon production by the date fixed in the contract. On the other hand, the order suspending gold mining operations was not a "governmental regulation" within the contemplation of the parties; Moore is not obligated, therefore, to pay shutdown expenditures incurred subsequent to October 8, 1942. The suspension of gold mining operations created a condition beyond Moore's control, and constitutes a delay caused by operation of law, excusing performance by him.

[1-3] As Moore has not appealed from the judgment and the Woods do not challenge the portion of it which requires him to bear all maintenance expenses incurred during such times as he is "unable to work" the mine "by reason of strikes, lockouts, governmental regulations or any other causes beyond [his] * * * control," it follows that the obligations of the litigants must be determined in accordance with that construction of their contract. Certainly the judicial interpretation of an agreement binds the parties to the extent that they do not attack the determination by appeal from the judgment construing the provisions in controversy. The practical interpretation of a contract by the parties constitutes cogent evidence of intent (Roy v. Salisbury, 21 Cal.2d 176, 184, 130 P.2d 706; Tanner v. Title Ins. & Trust Co., 20 Cal.2d 814, 823, 129 P.2d 383; Commercial Discount Co. v. Cowen, 18 Cal.2d 610, 116 P.2d 599); and the doctrine of res judicata applies to those portions of a judgment which have become final.

Accordingly, although the parties did not expressly provide for the payment of maintenance expenses, by the determination of the trial court, which has now become final, Moore is responsible for the expenses incident to the care of the property during the time that the effective working of the property is delayed by "governmental regulations" beyond his control. Moore argues that there is a difference between the regulations of the War Production Board in effect prior to October 8th and the order suspending gold mining which was promulgated on that date. But although the earlier restrictions worked more indirectly, they effectively stopped the development of the mine; indeed, the findings of the trial court are that on July 19th, Moore closed down the mine due to causes beyond his control.

[4, 5] The challenged portion of the judgment, construing the contract as not imposing upon him the sole liability for maintenance expenses during the pendency of the October 8th order, is not conclusive upon this appeal as Moore contends. The record includes no evidence offered or received for the purpose of showing the intention of the parties as to their agreement. The construction of the contract by the trial court, therefore, presents a question of law which this court must determine. In re Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825; Moffatt v. Tight, 44 Cal.App.2d 643, 648, 112 P.2d 910; Mitchel v. Brown, 43 Cal.App.2d 217, 222, 110 P.2d 456; Texas Co. v. Todd, 19 Cal.App.2d 174, 185, 64 P.2d 1180. Considering the contract from that standpoint, as there is no contention that the order of October 8th was promulgated for the purpose of permanently prohibiting gold mining, according to the part of the judgment which has now become final, it is a "governmental regulation" within the meaning of that term as used by the parties.

[6, 7] Moore attempts to distinguish the regulations in effect prior to October 8th and the order which the War Production Board issued on that date by arguing that the prohibition of an act is something quite different from a regulation concerning it. In this connection, he reasons that as a legislative delegation of power does not include the right to prohibit the doing of the act which is the subject of the enactment, he is not obligated to pay all maintenance expenses during the time mining operations are suspended by the federal order. But the rule by which delegation of legislative power is to be measured is of little aid in determining the intention of the parties under the circumstances shown by the record now before the court. To apply it here would require a construction of the term

"governmental regulation" without reference to its context which clearly shows the purpose for which it was used. The meaning of a written instrument is not to be determined by isolating one term used by the parties and defining it without reference to other language of the contract. Skookum Oil Co. v. Thomas, 162 Cal. 539, 547, 123 P. 363; Culley v. Cochran, 17 Cal. App.2d 498, 502, 62 P.2d 168. On the contrary, for the purpose of ascertaining the intention of the parties, their agreement must be construed as a whole, so that when read together all of its provisions may be given effect. Civ.Code, § 1641; Universal Sales Corp. v. California, etc., Mfg. Co., 20 Cal.2d 751, 760, 128 P.2d 665; Ghirardelli v. Peninsula Properties Co., 16 Cal.2d 494, 496, 107 P.2d 41. As so read, no sound basis exists for making any differentiation between a "governmental regulation" which prevented Moore from obtaining materials without which the mine could not be worked and a "governmental regulation" which suspends mining operations for an indefinite period.

[8] Finally, the doctrine of impossibility does not give Moore the right to charge the Woods with any part of the maintenance expenses. By their agreement, the parties contemplated that there might be a period or periods of time during which Moore could not, for reasons beyond his control, continue mining operations. If and when such a condition arises, the contract reads, the time within which the mine shall be placed on production is to be extended. But the right to such an extension does not relieve him from the obligation to pay maintenance expenses. Moore admits that, under the terms of his contract, he must develop the mine "at his sole risk and expense," and there is no merit to his contention that the Woods will be unjustly enriched in the event he is required to pay the cost of maintaining the property during the time he is unable to work it.

Those portions of the judgment appealed from are reversed, with directions to the trial court to substitute therefor a determination that by the terms of the contract of the parties dated February 16, 1942, Granville Moore is liable for all maintenance and safekeeping of the property known as the Governor Mine during the time that the order of the War Production Board suspending gold mining operations has been, and continues to be, in effect, or there is in effect any other order by a governmental agency having jurisdiction in the premises suspending such operations.

GIBSON, C. J., and SHENK, TRAYNOR, and SPENCE, JJ., concurred.

CARTER, Justice (dissenting).

I dissent. I cannot agree with the result reached in this case. Moore entered into an agreement with the Woods in which he agreed to develop a gold mine within twelve months. The Woods were lessees of the mine. Moore was also to pay $5,000. The agreement estimated the necessary development expenditures to be $25,000. At any time at Moore's request a corporation was to be formed to take over the mine in which he was to have a 51 per cent interest and the Woods, the balance. Moore entered into possession of the property, paid the $5,000, and diligently prosecuted development work, expending $22,300. Although the mine had not reached a "production basis" further operations by Moore were prevented by conditions beyond the control of either him or the Woods. The sole issue presented is whether the expenses of safeguarding the property during the period that development was prevented should be borne by Moore, the Woods or by both in proportion to their interests. The solution of that question depends upon the interpretation of the contract and the application of equitable principles.

First, the contract properly interpreted is wholly silent on the foregoing issue. It provides that Moore shall "continuously operate said property and develop the same, expending thereon such moneys as may be necessary properly to develop said mine, * * * and will place said mine on production within a period of twelve (12) months from the date hereof. * * *" The foregoing clause is qualified by the immediately following proviso "that delays are not incurred by reason of * * *, governmental regulations or any other causes beyond the control of the party of the second part, and in the event that the said party of the second part should be delayed in placing the said mine on production within said period of twelve months by reason of any such cause or causes, *then said twelve months' period shall be extended to cover such period of time as said party of the second part shall be unable to* *work said mine." Hence, Moore's time was extended* by the terms of the agreement. The only other clause in the agreement dealing with Moore's obligation to make payments or assume duties with respect to the mine is the paragraph immediately following the above-quoted excerpts. It provides that Moore "will carry on *said work* in a miner-like fashion and pay for all labor, insurance premiums, power and utility bills, all materials purchased, supplies used, and all other expenses of *such work* so as *to develop* the greatest possible tonnage of ore consistent with good work and proper development, working not less than ninety (90) man shifts per month." The words "said work" and "such work" can refer only to *development and operational work.* That is the only type of work referred to in the foregoing part of the agreement and must be that to which reference is made in the last-quoted paragraph. Certainly work of that character aimed toward putting the mine on production does not include expenses for preservation of the property when because of unforeseen events *the development and operation of the mine is prevented.* The very work which Moore assumed the obligation to perform was prevented. How then may it be said that he was doing such work in merely preserving the property. Therefore, we have a situation in which neither Moore nor the Woods have assumed by the contract the obligation for the maintenance expenses while the mine cannot be operated.

Second, principles of equity, restitution and unjust enrichment require that the expenses be borne by the Woods and Moore in proportion to the interests they are to have in the partnership or corporation which is to operate the property. The following factors are of importance. The possessory right to the mine and the minerals and some of the equipment used in its development belong to the Woods. It is their property which must be preserved during the interval that work is prevented. Moore has paid $5,000 and expended $22,300 in the development of the mine. He has performed all of the terms of the agreement to be by him performed. Through no fault of his he is faced with the problem of being unable to proceed with the development work, and the necessity of preserving the mine and equipment in order that he will not lose the efforts and outlays already expended. Both he and the Woods have an interest in having that property preserved in order that it may be placed finally on a production basis to their mutual benefit. By analogy the following rule should apply. "Where two persons are tenants in common or joint tenants and one of them has taken reasonably necessary action for the preservation of the subject matter or of their common interests, he is entitled to indemnity or contribution, enforced by means of a lien upon the interest of the other (a) if he made a request to the other to join in such preservation, or (b) without such request, if action was immediately necessary and the other was not available." Rest., Restitution, § 105. See, also, Rest., Restitution, § 117. Also Moore and the Woods may be considered as joint adventurers. The Woods furnished the mining property. Moore was to develop it paying the expenses thereof. A corporation or partnership was to be formed to operate the mine. The interests in the produce from the mine were expressly apportioned, and when it became a producing mine the profits and losses were to be divided. A joint adventure has been defined as "a joint association of persons in a common enterprise for profit, but falling short of a partnership. * * *

"To illustrate: a joint adventure exists where a furrier agrees with a merchant to devote his labor and skill in manufacturing fur garments, the other to furnish the capital, sell the goods and pay the furrier a proportion of the net profits and a salary for his services; in such case the furrier has not the usual power of a partner to bind the firm. So also it has been held that there is a joint adventure where one agrees to devote his services to securing fruit to be marketed by the other on an equal division of the profits and losses; where two persons agree to make a purchase of grain and to share the profits and losses; where several persons associate themselves together to promote a race for profit; where two persons agree to operate an apartment house on shares for a limited time; and where several persons purchase an interest in a mine and operate it, not for ultimate profit, but as a means of paying the balance of the purchase price." 14 Cal. Jur. 760.

The trial court determined that the expense of safeguarding the property during the period of enforced suspension of operations should be borne by Moore and Woods in proportion to their respective interests in the property. In my opinion this is an equitable division, and the judgment should be affirmed.

SCHAUER, J., concurred.

26 Cal.2d 764

KNIGHT et al. v. CITY OF LOS ANGELES.
L. A. 19304.

Supreme Court of California.
July 30, 1945.

1. Municipal corporations 🔑741(2)

Substantial compliance with claim provisions, whether in a statute or charter, is all that is required. Gen.Laws 1943, Acts 5149, 5619.

2. Municipal corporations 🔑741(2)

The purpose of the statute imposing liability upon municipal corporations for injury to property by reason of defective and dangerous condition of the corporation's works or property is important in determining whether there has been substantial compliance with the claim provisions thereof. Gen.Laws 1943, Acts 5149, 5619.

3. Municipal corporations 🔑845(1)

A claim against city for damages of a continuing character caused to date of claim which was filed on May 5, 1941, and which stated that such damage was caused by city's neglect to properly install and maintain drainage facilities; that as result thereof claimants' property was undermined and settled; that conditions were known to city which failed to remedy them, and that on or about February and March, 1941, the defendant's officers and employees negligently caused additional obstructions which impounded the water and further undermined the property completely ruining and destroying the value thereof and the house and improvements located thereon, substantially complied with claim statute. Gen.Laws 1943, Acts 5149, 5619.

4. Municipal corporations 🔑741(2)

The rule of substantial compliance with claim statute prevents the requirement of the impossible or absurd. Gen.Laws 1943, Acts 5149, 5619.

5. Municipal corporations 🔑741(1)

The time within which claim must be filed under claim statute starts when the accident has occurred. Gen.Laws 1943, Acts 5149, 5619.

6. Municipal corporations 🔑741(2)

The claims statute must be given a reasonable interpretation and it could not be supposed that the Legislature intended to require the impossible or idle act of specifying all the days of the month involved in a continuous injury. Gen.Laws 1943, Acts 5149, 5619.

7. Municipal corporations 🔑742(4)

Where claim against city specified that on or about and during the months of February and March, 1941, the negligence of the city's officers and agents resulted in complete destruction of value of property and claimants' complaint alleged that property was completely destroyed on February 28, 1941, there was no fatal variance between claim and the complaint. Gen.Laws 1943, Acts 5149, 5619.

8. Municipal corporations 🔑741(1)

Where claim against city was for damages of a continuing character "caused to this date" and claim was verified as required by statute, date of verification could be taken as the date of the claim which was not otherwise dated. Gen.Laws 1943, Acts 5149, 5619.

9. Contracts 🔑146

The time at which an instrument becomes operative, or has the legal effect for which it is made, is its date.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by William Knight and another against City of Los Angeles for damages to property due to negligence of defendant in installing and maintaining drainage facilities in street upon which plaintiffs' property abuts. From an order granting plaintiffs' motion for new trial, the defendant appeals.

Order affirmed.

Prior opinion, 154 P.2d 459.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Victor P. Spero and Louis A. Babior, Deputy City Attys., all of Los Angeles, for appellant.

E. H. Delorey, of Los Angeles, for respondents.

CARTER, Justice.

Plaintiffs' action for damages to their property is based on the claimed negligence of defendant in installing and maintaining drainage facilities on Primera Avenue, a street in defendant city of Los Angeles upon which plaintiffs' property abuts, resulting in the seepage of water into and an overflow on plaintiffs' land, destroying the improvements thereon. Plaintiffs, predicating their complaint upon article I, section 14, of the Constitution of California and the public liability statute imposing liability upon municipal corporations for injury to property by reason of the defective and dangerous condition of the corporation's works or property, Stats. 1923, p. 675; Deering's Gen.Laws 1943, Act 5619, filed a claim on May 5, 1941, with the appropriate municipal officer pursuant to the claim statute requiring a claim to be filed "within ninety days after such accident has occurred" Stats. 1931, p. 2475, § 1; Deering's Gen.Laws 1943, Act 5149, or the provision of the Los Angeles Charter requiring the presentation of claims as a condition precedent to actions thereon within six months after "the occurrence from which the damage arose." (Los Angeles Charter, §§ 362, 363, 376.)

Pursuant to stipulation the issue as to the legal sufficiency of the claim was tried alone, resulting in a judgment for defendant. Plaintiffs' motion for a new trial was granted and from that order defendant appeals. There is a dispute as to whether plaintiffs' action is founded upon the public liability statute (supra) or the eminent domain provision of the Constitution, Cal. Const., art. I, § 14, and whether the charter provision or claim statute applies. In view of the result we reach we may assume plaintiffs are proceeding under the public liability statute and that the claim statute controls.

The claim statute requires that the claim must state "the date and place of the accident and the extent of the injuries or damages received." Stats.1931, p. 2475, § 1. Defendant contends the claim is fatally defective for lack of the date of the accident.

The claim recites the damages "caused to this date" which are of a "continuous and continuing character"; that the damage arises and arose out of the neglect of defendant to properly install and in maintaining drainage facilities; that as a result plaintiffs' property was undermined and settled; that the conditions were known to defendant but it failed to remedy them; that "on or about and during the months of February and March, 1941, the officers and employees of said City of Los Angeles, then and there being conversant with the conditions existing in and along Primera Street in front of claimant's property, instead of remedying same, did then and there and at said time negligently, carelessly and in violation of known engineering rules cause additional obstructions to be placed in the flow of water so that the same was impounded in front of claimant's property with no outlet other than through and under ground upon which claimant's house is located, resulting in a complete undermining and moving of the supports thereunder and a dropping down and falling away of the previous surface of said property, completely ruining and destroying the value of said property and the house and improvements located thereon."

[1] In ascertaining the validity of the instant claim we must be guided by the rule that substantial compliance with claim provisions, whether in a statute or charter, is all that is required. Dillard v. County of Kern, 23 Cal.2d 271, 144 P.2d 365, 150 A.L.R. 1048; Hall v. City of Los Angeles, 19 Cal.2d 198, 120 P.2d 13; Hennessy v. County of San Bernardino, 47 Cal.App.2d 183, 117 P.2d 745; Ridge v. Boulder Creek, etc., School Dist., 60 Cal.App.2d 453, 140 P.2d 990; Kelso v. Board of Education, 42 Cal.App.2d 415, 109 P.2d 29; Sandstoe v. Atchison, T. & S. F. Ry. Co., 28 Cal.App.2d 215, 82 P.2d 216; Uttley v. City of Santa Ana, 136 Cal.App. 23, 28 P.2d 377; Milovich v. City of Los Angeles, 42 Cal.App.2d 364, 108 P.2d 960; Silva v. County of Fresno, 63 Cal.App.2d 253, 146 P.2d 520.

[2–5] In determining whether or not there has been substantial compliance the purpose of the claim statute is important. Two purposes have been suggested, namely, to provide the city with information in order that it may settle claims of merit without litigation, Natural Soda Products Co. v. City of Los Angeles, 23 Cal.2d 193, 143 P.2d 12, and where there is continuing damage to give the city an opportunity to provide against the continuance of the injury. Natural Soda Products Co. v. City of Los Angeles, supra, dissent. Tested by either of these purposes there has been substantial compliance with the claim statute in this case when we consider the factors involved. The damage is claimed to have been a continuing one. Hence, there would be no exact time or day of the month that it could be said that the accident occurred. It was a progressive process. The aims of giving the city an opportunity to settle the claim and preventing further injury would not be jeopardized. The span of time, February and March of a certain year, as well as up to the date of the claim was given. Nothing would have been gained by the superfluous listing of each and every day during that time such as February 1st, 2d, 3d, etc. The rule of substantial compliance prevents the requirement of the impossible or absurd. Closely allied are the questions of the point of commencement of the period within which the claim must be filed and the requirement that the date be specified. The period starts when the accident has occurred, and the statute provides that the date of the accident must be given. Thus, in Natural Soda Products Co. v. City of Los Angeles, 23 Cal.2d 193, 203, 143 P.2d 12, 18, where the issue of when the period for filing the claim commenced, it was held that where there was a continuing injury, the starting point was the completion thereof, the court stating:

"That purpose is best served if the entire sequence of events giving rise to the injury is regarded as the 'occurrence from which the damage arose,' for damages can be assessed accurately only when the sequence is completed and the total injury taken into account. * * *

"Defendant contends that the case of Powers Farms v. Consolidated Irrigation District, 19 Cal.2d 123, 119 P.2d 717, requires a different construction of the charter provision. That case, however, involved a different statute, and since no claim had been filed the court was concerned with determining, not the time within which a claim had to be filed, but whether the presentation of any claim was required. To hold that plaintiff was required to present a claim for the entire damage to its property by September 6th, six months after the initial flooding established the inevitability of damages, would require an unreasonable construction of the language of the charter provision, for the last flooding contributed to the injury as well as the first, and it would therefore be inaccurate to say that the first flooding was 'the occurrence from which the damage arose.'" It would lead to strange results if the date when the accident "occurred" fixed a different time for the commencement of the period than the date of the accident, which must be stated in the claim. They have reference to the same event. Hence, the reasoning in the Natural Soda case is persuasive.

Even if we pursue the reasoning that where the injury is continuing, the claimant may recover only for that occurring within the limited period prior to the presentation of the claim or that the time commences its course when the damage becomes apparent and discoverable (see cases collected 116 A.L.R. 975), we are led to no different result. The injury is still continuous and each day is one of occurrence.

There is a sufficient specification in the claim of the duration of the injury. It cannot be said to be without a starting point. The months of February and March and the year are specified. Insofar as the termination of the injury is concerned, defendant is not in a position to complain. If the last date of the injury is to be taken as the date of occurrence we have the end of March or the date of the claim. If the injury extends beyond these periods, plaintiffs are the sufferers. Defendant has been notified in time for it to rectify the condition and investigate the claim. The holding in Powers Farms v. Consolidated Irr. Dist., 19 Cal.2d 123, 119 P.2d 717, is not in conflict with these views. As stated in Natural Soda Prod. Co. v. City of Los Angeles, supra, in regard to the holding in that case, "since *no claim* had been filed the court was concerned with determining, *not* the time within which a claim had to be filed, but whether the presentation of any claim was required." (Italics added.) Likewise, the instant case is concerned with the sufficiency of the specification of time and not with a failure to present any claim. A similar situation existed, that is, that no claim was filed, or not in time, or with the wrong official, or was not verified in the following cases. Norton v. City of Pomona, 5 Cal.2d 54, 53 P.2d 952; Douglass v. City of Los Angeles, 5 Cal.2d 123, 53 P.2d 353; Helbach v. City of Long Beach, 50 Cal.App.2d 242, 123 P.2d 62; Kline v. San Francisco United School

Dist., 40 Cal.App.2d 174, 104 P.2d 661, 105 P.2d 362; Young v. County of Ventura, 39 Cal.App.2d 732, 104 P.2d 102; Kahrs v. County of Los Angeles, 28 Cal.App.2d 46, 82 P.2d 29; Yonker v. City of San Gabriel, 23 Cal.App.2d 556, 73 P.2d 623; Cooper v. County of Butte, 17 Cal.App.2d 43, 61 P.2d 516; Spencer v. City of Calipatria, 9 Cal.App.2d 267, 49 P.2d 320. Other cases where some item required to be stated in the claim was wholly omitted or the claim was insufficient in other particulars are likewise not in point. They proceed upon the theory that substantial compliance cannot be based upon an entire absence of one factor, a condition which does not exist in the case at bar. See Hall v. City of Los Angeles, supra; White-Satra v. City of Los Angeles, 14 Cal.App.2d 688, 58 P.2d 933.

[6] Defendant argues that the portion of the claim heretofore quoted as specifying February and March as the time of the accident refers to time of cause rather than result, and that the time of the accident means the time of the result, not the cause. We do not so interpret that portion of the claim. It is apparent that not only the causes, obstruction of the drainage facilities, occurred at that time, but that those causes resulted in the damage to the property. Reasonably construed the resulting damages also occurred within the stated period.

Defendant relies upon authorities dealing with cases in which the accident occurred on a specific date, and reference to the date of such accident meant the particular day of the month and the year on which the accident occurred, citing in this connection Kahrs v. County of Los Angeles, supra; Cole v. Board of Supervisors, 27 Cal.App. 528, 150 P. 784; Shipman v. Forbes, 97 Cal. 572, 32 P. 599, and In re Estate of Price, 14 Cal.App. 462, 112 P. 482. In all of those cases the occurrence, event, or accident were of a nature that the day of the month could be stated inasmuch as the accident was one event rather than a continuing course of occurrences. It is not to be supposed that the Legislature intended to require the impossible or the idle act of specifying all the days of the months involved in the continuous injury. The legislation must be given a reasonable interpretation and where we have a continuing injury the claim here involved constitutes substantial compliance. Where the injury is continuing it would be plainly arbitrary to insist that the claimant specify one day of the injury, thus limiting himself to that day's injury alone, which in all probability could not be separated from the other days in determining the amount of damage. In Kahrs v. County of Los Angeles, supra, the issue involved a claim stating the time to be on and after a stated date. It was said to lack substantial compliance. If the injury there was continuous we cannot agree with the holding in that case for the reasons heretofore stated. Moreover, in the Kahrs case the court repudiated the underlying purpose that is practically without exception assigned to claim statutes, stating at page 49 of 28 Cal.App.2d, at page 31 of 82 P.2d:

"With regard to appellants' contention that the phraseology of the claim, to-wit, 'on and after October 17, 1934', was sufficiently definite to include February 7, 1935, it is argued 'that the object of requiring claims to be filed is to give timely notice to the county, and thus enable it to make investigation and, if possible, take action to arrest the progress of the injury, and thereby minimize the chances of any further damages'. The argument is untenable. If such were the purpose of the claim, why wait the ninety-day period when the requirement of immediate notice would best serve such a purpose? Although it is unnecessary to account for the reasons that persuaded the legislature to fix the ninety-day limitation period, it is altogether likely that a consideration for the public welfare was influential. Timely notice of a claim under such circumstances affords an opportunity for investigation as to the merits thereof, which the progress of time might render futile."

[7] It is urged that because plaintiffs allege in their complaint that their property was completely destroyed on February 28, 1941, there is a fatal variance between the times fixed in the claim and the complaint. The time specified in the claim embraces the date of February 28, 1941, and hence it is very doubtful that there would be a fatal variance. In any event we do not know what may transpire in the future course of the litigation. Plaintiffs may obtain leave to amend their complaint either before the introduction of evidence as to the time of the injury or thereafter to conform to the proof.

[8] Finally, defendant asserts that the reference to the continuance of the injury "to this date" in the forepart of the claim is insufficient because the claim is not dated and that the date of the verification cannot be used. Manifestly, "to this date," means to the date of the claim. It is reasonable that the date of the verification may be the date to which reference is made, for the verification is necessary and is the time that the claim became a completed document. Defendant relies upon Kelso v. Board of Education, 42 Cal. App.2d 415, 109 P.2d 29, and Shipman v. Forbes, 97 Cal. 572, 32 P. 599. In the Kelso case the court was concerned with an apparent conflict between the verification and the claim as to the identity of the claimant. No such situation exists in the instant case. In the Shipman case it was required that a warrant must be dated by the superintendent of streets, the issuing officer, and the warrant countersigned by the auditor. The superintendent failed to date the warrant and it was held that the date of countersigning could not supply the defect. The court stated: "The function of the auditor, however, being merely that of approval, and limited to countersigning the warrant, is not called into exercise until after the warrant has been completed. Whatever is essential to the issuance and validity of the warrant must be done before it reaches the auditor, and no act of his can supply any defect or cure any irregularity in the prior proceedings. The position of the date, September 7, 1888, after the counter-signing by the auditor, shows that it was a part of his act, and not a part of the warrant itself." However, in the instant case there is a specific reference to "this date" which could only mean one thing, the date of the claim, and the date thereof as an effective document to be used as a claim would be the date of the verification.

[9] As stated in Cotton v. Watson, 134 Cal. 422, 424, 66 P. 490: "The time at which an instrument becomes operative, or has the legal effect for which it is made, is its date." Moreover, in the Shipman case the court was concerned with tax proceedings and for that reason did not consider the rule of substantial compliance.

The order granting a new trial is affirmed.

GIBSON, C. J., and TRAYNOR and SCHAUER, JJ., concurred.

SHENK, Justice.

I concur in the result. As I understand the opinion, it decides only that the claim was in substantial compliance with the law requiring the filing of claims and does not decide when the time for filing such a claim commences to run nor indicate the period during which damages may be recoverable.

EDMONDS and SPENCE, JJ., concurred.

26 Cal.2d 705

PELLETT v. SONOTONE CORPORATION et al.

L. A. 19233.

Supreme Court of California.

June 29, 1945.

1. Appeal and error 🔑1099(7)

Where the evidence at the first trial had been held sufficient to support a judgment for plaintiff, unless it is shown that some essential fact or facts which were proved at the first trial were not proved on the second trial, or were conclusively disproved, the law of the case applies in determining the sufficiency of the evidence.

2. Trial 🔑171

The power of the trial court to direct a verdict is subject to the same limitations as its power to grant a nonsuit.

3. Release 🔑29(1), 37

A release of one joint tort-feasor is a release of all, but a mere covenant not to sue one joint tort-feasor does not release the other.

4. Release 🔑7

The distinction between a "release" and a "covenant not to sue" is entirely artificial, in that as between the parties the final result is the same in both cases, namely, that there is no further recovery from the defendant who makes the settlement, and the difference in the effect as to third parties is based on the fact that in one case there is an immediate release, whereas in the other there is merely an agreement not to prosecute a suit.

See Words and Phrases, Permanent Edition, for all other definitions of "Covenant Not to Sue" and "Release".

5. Release ⚷1, 38, 46

A "release" is the abandonment, relinquishment, or giving up of a right or claim to the person against whom it might have been demanded or enforced, and its effect is to extinguish the cause of action; hence it may be pleaded as a defense to the action.

6. Release ⚷7

A "covenant not to sue" is not a present abandonment or relinquishment of the right or claim, but merely an agreement not to enforce an existing cause of action.

7. Release ⚷7

A "covenant not to sue" does not have the effect of extinguishing the cause of action and while, in the case of a sole tort-feasor, the covenant may be pleaded as a bar to the action in order to avoid circuity of action, a covenant not to sue one of several joint tort-feasors may not be so pleaded by the covenantee, who must seek his remedy in an action for breach of the covenant.

8. Release ⚷7

Where plaintiff agreed with one of defendant joint tort-feasors that, if judgment was entered against such defendant, plaintiff would not levy execution against such defendant's property or make any demand upon him to pay the judgment, and such defendant covenanted that he would defend the action and would not file the agreement except in the event plaintiff commenced any proceedings in violation of the covenant, the agreement could not be pleaded by such defendant as a defense to the action and hence lacked one of the essential elements of a release.

9. Release ⚷1

The theory on which a release is held to bar a recovery is that plaintiff has accepted payment in satisfaction or in compromise of his right of action, and has released and abandoned his right of action in consideration of the payment received.

10. Release ⚷37

Where plaintiff in action against several tort-feasors agreed with one of the defendants that, if judgment was entered against such defendant, plaintiff would not levy execution against such defendant's property or make any demand upon him to pay the judgment, and there was no agreement that the payments by such defendant of $5 within 60 days and $10 in event judgment was entered for plaintiff was to constitute a satisfaction or compromise of the right of action, the agreement could not be construed as a release, so as to release other joint tort-feasors.

11. Release ⚷7

In the case of covenants not to sue, it is not essential that covenantor make an express agreement to indemnify the covenantee and hold him harmless in case of any violation of the covenant, and the covenantee may waive the express undertaking to indemnify and rely solely upon his remedy of damages for breach of the covenant.

12. Witnesses ⚷369

Where plaintiff agreed with one of defendant tort-feasors that, if judgment was recovered against such defendant, plaintiff would not levy execution against such defendant's property or make any demand upon him to pay the judgment, and such defendant agreed to defend the suit and not to file the covenant in the action, except only in defense if plaintiff commenced any proceeding in violation thereof, the testimony of such defendant could be weighed in light of the knowledge that he was not a witness adverse to plaintiff.

TRAYNOR and EDMONDS, JJ. dissenting.

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In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Charles S. Pellett against the Sonotone Corporation and others for damages resulting from alleged negligence of defendants in failing to remove from plaintiff's ear all plaster paris used in making a cast of the ear. From a judgment for defendants based upon a directed verdict, plaintiff appeals.

Reversed.

Prior opinion, Cal.App., 151 P.2d 912.

Joseph D. Taylor and Russell F. Hager, both of Los Angeles, for appellant.

Leonard Wilson, of Los Angeles, for respondents.

GIBSON, Chief Justice.

This is a second appeal by plaintiff in an action for damages for personal injuries. On the prior appeal (Pellett v. Sonotone Corp., 55 Cal.App.2d 158, 130 P.2d 181) a judgment of nonsuit was reversed. On the second trial the court directed a verdict in favor of defendants, and plaintiff has appealed from the ensuing judgment.

Plaintiff purchased a hearing device from defendant Sonotone Corporation. Part of the device consisted of an individually moulded ear tip which required the making of a plaster cast or impression of plaintiff's ear. Defendant Brown, a salesman and "consultant" for defendant Sonotone, requested defendant Compton, a dentist, to make the cast, and plaintiff and Brown went to Compton's office for that purpose. Compton, assisted by Brown, made the cast. Subsequently plaintiff felt a pain in his ear. He consulted an ear specialist and learned that a foreign substance was present. Some plaster of paris, wax, and cotton were removed, and the pain diminished and then disappeared.

[1, 2] Aside from the agreement hereafter referred to, it appears that the evidence was substantially the same as that introduced at the first trial which resulted in a nonsuit. On appeal that judgment was reversed by the District Court of Appeal which held (55 Cal.App.2d 158, 161, 130 P.2d 181, 182) that: "Assuming for the purpose of this appeal only that the above statement of facts is true, we are of the opinion that the trial jury might reasonably have believed that defendant Compton and defendant Brown were agents of defendant Sonotone Corporation and that defendant Compton and defendant Brown were negligent in not having used an appropriate instrument to examine plaintiff's ear after the plaster cast was made to be certain that none of the plaster or cotton used remained in his ear, and likewise that plaintiff was not dilatory in discovering that some of the plaster and cotton had been negligently left in his ear." No attempt has been made to show that there was any substantial difference in the evidence at the second trial, but even if additional evidence was introduced, any conflict thereby created would be immaterial in determining the sufficiency of the evidence to support a judgment for plaintiff. Unless it is shown that some essential fact or facts which were proved at the first trial were not proved on the second trial, or were *conclusively* disproved, the law of the case applies in determining the sufficiency of the evidence. Berry v. Maywood Mut. W. Co. No. One, 13 Cal.2d 185, 186, 88 P.2d 705; Wells v. Lloyd, 21 Cal.2d 452, 454, 455, 132 P.2d 471. The power of the trial court to direct a verdict is subject to the same limitations as its power to grant a nonsuit (Gindraux v. Maurice Mercantile Co., 4 Cal.2d 206, 208, 47 P.2d 708; Gish v. Los Angeles R. Corp., 13 Cal.2d 570, 572, 573, 90 P.2d 792), and hence, under the law of the case, it must be held that plaintiff had made a sufficient showing and was entitled to have the issues submitted to the jury unless he had released the defendants from liability.

Defendants claim that the directed verdict was justified because they were released by reason of plaintiff's execution of a document reading as follows:

"Whereas, Charles S. Pellett, through his attorney, has become satisfied that the defendant, G. L. Compton, in the performance of any acts or of his negligent failure to do anything which should have been done, was subject to the direction and control and supervision of John E. Brown and the Sonotone Corporation, and that any negligence on the part of said Dr. G. L. Compton, was not due to any culpability of the said G. L. Compton, and,

"Whereas, Charles S. Pellett is also satisfied that a great portion of the property of G. L. Compton is exempt from execution and that the levy of an execution upon any property of G. L. Compton will work a hardship upon him, and

"Whereas, in any event, Charles S. Pellett has been advised by his counsel that the covenant hereinafter made will in no wise prejudice his case or prevent recovery and collection from the defendant Sonotone Corporation, and the defendant, John E. Brown;

"Now, therefore, Charles S. Pellett hereby agrees and covenants with G. L. Compton as follows:

"Said G. L. Compton, as a consideration for the covenant hereby made by Charles S. Pellett, does hereby agree to pay to the said Charles S. Pellett the sum of $10.00 in the event a judgment is entered in favor of Charles S. Pellett and defendant in said action, and said G. L. Compton agrees to pay to said Charles S. Pellett the sum of $5.00 on or before 60 days from date hereof in any event and regardless of what judgment may be entered in the above entitled action.

"In consideration of the promises herein contained on the part of G. L. Compton, Charles S. Pellett covenants and agrees with said G. L. Compton that in the event a judgment is entered against said G. L. Compton, in the above entitled action, that he will not levy execution issued upon said judgment against any property of said G. L. Compton and that he will make no demand upon G. L. Compton to pay said judgment or any portion thereof.

"Said G. L. Compton, as further consideration for the covenant herein contained agrees not to file this covenant and agreement in the above entitled action, except in the event any proceedings are commenced by Charles A. Pellett contrary to and in violation of this covenant.

"Said G. L. Compton further agrees that he will defend said action by his attorney in the interests of justice and will not withdraw his attorney from said action until a verdict of the jury has been rendered or until the court has by directed verdict or non-suit terminated the trial of said action.

"In Witness Whereof the parties hereto have signed this covenant this day of June, 1941.

"Charles S. Pellett
"Plaintiff
"G. L. Compton,
"Said Defendant."

Defendants contend that this document constituted a release of defendant Compton and consequently a discharge of the others. Plaintiff contends that the document was not intended to be and is not a release, or even a covenant not to sue, but merely an agreement not to levy execution on defendant Compton's property and not to make demand on him for payment of any judgment rendered.

It appears that this document was executed while the first trial was in progress, and plaintiff's explanation is that "Under ordinary circumstances, a dismissal of the case against G. L. Compton would have been filed, but because of the doctor's better knowledge of what had happened in connection with the making of the plaster impression and the adverse interest which, under plaintiff's theory of the case, he had in clearing himself of responsibility by showing that he acted as directed by Sonotone Corporation, it was considered necessary to have his counsel continue throughout the trial, and for that reason the document in question was prepared and executed." The existence of this document was not disclosed until the case was called for the second trial when defendant Compton sought a continuance because his former attorney was in military service. Plaintiff's counsel opposed a continuance stating that the matter had been settled as to him, but refused to give a copy of the agreement to counsel for defendant Sonotone until directed to do so by the trial court. Defendant Sonotone then pleaded the agreement in a supplemental answer.

[3] The rule in this state, applied in many cases, is that a release of one joint tort feasor is a release of all (Bee v. Cooper, 217 Cal. 96, 17 P.2d 740; Bogardus v. O'Dea, 105 Cal.App. 189, 287 P. 149; see, also, cases cited in 20 McK. Dig., p. 615), but that a mere covenant not to sue one joint tort feasor does not release the others. Lewis v. Johnson, 12 Cal.2d 558, 562, 86 P.2d 99; Kincheloe v. Retail Credit Co., Inc., 4 Cal.2d 21, 46 P.2d 971. There is authority in other jurisdictions for a contrary holding, where the one making the release reserves his rights against the others, if he has not received full satisfaction. See, Rest., Torts § 885. This view is illustrated by McKenna v. Austin, 77 U.S. App.D.C. 228, 134 F.2d 659, 148 A.L.R. 1253, which proceeds on the theory that it is a question of fact and intent whether a settlement is made in full satisfaction or merely as the best obtainable compromise; and that a partial satisfaction taken in compromise does not discharge the other wrongdoers. It should be noted, however, that the McKenna case also recognizes the right to contribution among joint tort feasors, which is not permitted in this state.

[4] As pointed out in the McKenna case, the distinction between a release and a covenant not to sue is entirely artificial. As between the parties to the agreement, the final result is the same in both cases, namely, that there is no further recovery from the defendant who makes the settlement, and the difference in the effect as to third parties is based mainly, if not entirely, on the fact that in one case there is an immediate release, whereas in the other there is merely an agreement not to prosecute a suit. The rule regarding

a covenant not to sue was apparently adopted as an exception to the strict release rule because the courts desired to modify the latter rule by indirection.

There does not seem to be any prior decision involving an agreement exactly like that made by the plaintiff herein. Cf. Schramm v. Brooklyn Heights R. Co., 35 App.Div. 334, 54 N.Y.S. 945. On its face, the agreement is not strictly a release or a covenant not to sue, although it partakes somewhat of the nature of both.

[5-8] A release has been defined as the abandonment, relinquishment or giving up of a right or claim to the person against whom it might have been demanded or enforced (Black's Law Dict.; Ballentine's Law Dict.) and its effect is to extinguish the cause of action; hence it may be pleaded as a defense to the action. A covenant not to sue, on the other hand, is not a present abandonment or relinquishment of the right or claim, but merely an agreement not to enforce an existing cause of action. It does not have the effect of extinguishing the cause of action; and while, in the case of a sole tort feasor, the covenant may be pleaded as a bar to the action in order to avoid circuity of action, a covenant not to sue one of several joint tort feasors may not be so pleaded by the covenantee, who must seek his remedy in an action for breach of the covenant. Sunset Scavenger Corp. v. Oddou, 11 Cal.App.2d 92, 96, 53 P.2d 188; Hawber v. Raley, 92 Cal.App. 701, 704, 268 P. 943; Matthey v. Gally, 4 Cal. 62, 64, 60 Am.Dec. 595. In the present case, plaintiff covenanted that, if judgment was entered against defendant Compton, he would not levy execution against Compton's property or make any demand upon him to pay the judgment or any portion thereof. Defendant Compton, on the other hand, covenanted that he would defend the action and would not file the agreement "except in the event any proceedings are commenced by Charles A. Pellett contrary to and in violation of this covenant." Since no execution could issue or demand for payment of the judgment be made until after entry of the judgment, the agreement, according to its terms, could not be pleaded as a defense to the action, and hence it lacks one of the essential elements of a release.

[9, 10] The theory on which a release is held to bar a recovery is that the plaintiff has accepted payment in satisfaction or in compromise of his right of action, and has released and abandoned his right of action in consideration of the payment received. In the present case there is nothing in the agreement, or in the record, to indicate that the payments of $5 within 60 days and $10 in the event judgment was entered in favor of plaintiff were ever made or that they were intended to or did constitute any payment in satisfaction, in whole or in part, or in compromise, of the right of action. There is no provision of the agreement indicating any release or relinquishment of the right of action, and the agreement cannot be construed as a release.

[11] In the case of covenants not to sue, while it is customary for the covenantor to make an express agreement to indemnify the covenantee and hold him harmless in case of any violation of the covenants, it is not essential that there be an express agreement to that effect, and the covenantee may waive the express undertaking to indemnify and rely solely upon his remedy of damages for breach of the covenant. Hence, in the present case, the absence of any provision for indemnification does not compel a holding that the document is a release.

On the other hand, the agreement does not purport to be, nor can it be construed strictly to be, a covenant not to sue, since it does not contemplate a cessation of the existing litigation, but on the contrary provides for continuation of the trial and places on defendant Compton the burden of defending the action until the rendition of a verdict or a nonsuit. However, since the plaintiff did not expressly or by necessary implication abandon or relinquish his claim or right of action, or agree to accept the payments in satisfaction of his claims, and since the agreement according to its terms could not be pleaded by the covenantee as a defense to the action, and since the only agreement by plaintiff was that he would not levy execution on any property of the covenantee or make demand upon him for payment of the judgment or any portion thereof, we are of the opinion that it is closely akin to a covenant not to sue, that its legal effect should be held to be similar, and that it is not such an instrument as will operate to release other joint tort feasors.

[12] We do not, however, approve the provisions of the agreement which required Compton to defend the suit and bound him "not to file this covenant and agreement

in the above entitled action, except in the event any proceedings are commenced by Charles A. Pellett contrary to and in violation of this covenant." While the trial court did not find, and we cannot hold as a matter of law, that there was any fraud or collusion in this case, such an agreement might lead to a fraud upon the court by concealing the position of a party who is an important witness in the action. In the present case, however, the court and the other parties were fully informed of the nature and contents of the agreement prior to the second trial, and the court or jury could weigh the testimony of defendant Compton in the light of the knowledge that, since the agreement provided that a judgment could not be enforced against him, he was not a witness who was adverse to the plaintiff. Moreover, the validity of the agreement, as between the parties thereto, is not at issue herein.

The judgment is reversed.

SHENK, CARTER, SCHAUER, and SPENCE, JJ., concurred.

TRAYNOR, Justice (dissenting).

I dissent. This proceeding involves separate causes of action against several defendants. Code Civ.Proc., §§ 379a to 379c; see Kraft v. Smith, 24 Cal.2d 124, 128, 148 P.2d 23; Peters v. Bigelow, 137 Cal. App. 135, 141, 30 P.2d 450; Prosser, Torts, p. 1101. Plaintiff contends that Compton caused the injury by negligently failing to remove plaster and cotton from plaintiff's ear, and that since he acted as Sonotone's agent, Sonotone, as well as Compton, is liable for Compton's negligence. Plaintiff also contends that Brown and Sonotone are independently liable for his injury, even if Compton is not, on the grounds that Brown failed to supervise Compton properly and advised plaintiff that the pain in his ear was to be expected and was of no consequence, and that Sonotone gave improper instructions to its agents.

In my opinion, plaintiff's agreement with Compton covered only the cause of action based on Compton's own negligence and did not relate to plaintiff's causes of action based on the independent acts of negligence of the other defendants. See Ash v. Mortensen, 24 Cal.2d 654, 658, 659, 150 P.2d 876; Prosser, Joint Torts and Several Liability, 25 Cal.L.Rev. 413, 423-425, 442-443; Prosser, Torts, p. 1107-1111. Plaintiff may therefore pursue any cause of action involved in this action consistent with lack of negligence on the part of Compton. As to the cause of action based on Sonotone's liability for Compton's negligent conduct as Sonotone's agent, I believe that plaintiff is bound by his agreement with Compton that the latter was not at fault. He cannot claim that the agreement is fictitious in order to pursue a cause of action against Sontone based on Compton's culpable conduct as Sonotone's agent.

It is not necessary to determine in this case whether a principal who is secondarily liable for negligent conduct of his agent is released from liability if the plaintiff makes a compromise with the agent wherein the plaintiff for partial satisfaction of his claim for damages releases the agent. When the secondarily liable defendant is a surety, a release of the principal debtor ordinarily discharges the debt for which the surety is secondarily liable and releases the surety. Lamb v. Wahlenmaier, 144 Cal. 91, 95, 77 P. 765, 103 Am.St.Rep. 66; see Holden v. Mensinger, 175 Cal. 300, 304, 165 P. 950; 4 Williston, Contracts (rev. ed.) § 1220. It is also settled that a verdict in favor of an agent in a tort action terminates the liability of the principal, since that liability is based on the agent's alleged fault and is incompatible with a verdict denying blameworthy conduct on the part of the agent. Bradley v. Rosenthal, 154 Cal. 420, 423, 97 P. 875, 129 Am.St.Rep. 171; Fimple v. Southern Pacific Co., 38 Cal.App. 727, 731, 177 P. 871; see Mims v. Bennett, 160 S.C. 39, 158 S.E. 124, 78 A.L.R. 365; 1 Cal.Jur. 845. The agreement in the present case was not a compromise and did not give plaintiff partial or full satisfaction for his damages. In my opinion the five dollars to be paid by Compton upon the execution of the agreement was only a nominal consideration for plaintiff's promise "that in the event a judgment is entered against said G. L. Compton * * * he will not levy execution upon said judgment against any property of said G. L. Compton and * * * will make no demand upon G. L. Compton to pay said judgment or any part thereof."

The real significance of the agreement, which was to be concealed from Sonotone and the court, appears from the circumstances under which it was made. Those circumstances speak for themselves. Any person who introduces foreign substances into the body of another must exercise care in removing them. See Ales v. Ryan, 8

Cal.2d 82, 106, 64 P.2d 409; Engelking v. Carlson, 13 Cal.2d 216, 221, 88 P.2d 695; Armstrong v. Wallace, 8 Cal.App.2d 429, 439, 47 P.2d 740. Plaintiff could therefore assume that he had a promising case with respect to the cause of action based on Compton's negligence and could expect to recover from Sonotone the damages caused by the negligence of its agent Compton. It is apparent that plaintiff was interested in maintaining the outward appearance of a law-suit against Compton in order to get Compton's testimony as a presumably hostile witness to prove Compton's negligence and to make Sonotone responsible for that negligence. Hence the agreement that in substance provided that Compton's testimony would not make him responsible to plaintiff. This scheme made the action against Compton a collusive proceeding. It is clear that plaintiff expected by this agreement to secure favorable testimony from Compton in his action against Sonotone, and that Compton's true performance was to be the giving of favorable testimony. Since the contract could not set forth such an immoral consideration it was predicated on the agreement that Compton was not guilty of culpable conduct. It provided: "Whereas, Charles S. Pellett, through his attorney, has become satisfied that the defendant, G. L. Compton, in the performance of any acts or his negligent failure to do anything which should have been done, was subject to the direction and control and supervision of John E. Brown and the Sonotone Corporation, and that any negligence on the part of said Dr. G. L. Compton, *was not due to any culpability of said G. L. Compton.*" (Italics added.)

Plaintiff should be bound by his agreement that there was no culpability on Compton's part. He should not be allowed to maintain that this agreement was fictitious after contriving to obtain Compton's favorable testimony by promising him immunity from liability. See Civ.Code, § 3517. He cannot agree that Compton is blameless and at the same time make Compton's principal liable on the basis of culpable conduct of Compton. Fraud would be encouraged if it were held that such an agreement has no effect on the principal's liability, which depends solely on the fault of the agent. The public policy underlying the liability of the principal for the agent's torts (Otis Elevator Co. v. First National Bank, 163 Cal. 31, 39, 124 P. 704, 41 L.R.A., N.S., 529; Bank of California v. Western Union Telegraph Co., 52 Cal. 280, 288; see Prosser, Torts, p. 472) has no effect when the plaintiff and the agent conspire to make the principal alone responsible for the agent's fault.

EDMONDS, J., concurred.

S. SIWEL & CO. v. LOS ANGELES COUNTY et al.*

L. A. 18935.

Supreme Court of California.

June 29, 1945.

Rehearing Granted July 26, 1945.

1. Municipal corporations 🔑405
Taxation 🔑1

A "tax" is levied for general public good and without special regard to benefits conferred upon individual or property subject thereto, while a "special assessment" is levied to enforce payment for a benefit equal in value to the amount thereof.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Assessment" and "Tax".

2. Municipal corporations 🔑586

Highway improvement assessments levied by city for payment of bonds could not be legally enforced by county which purchased and canceled bonds. Gen.Laws 1931, Act 3276a; Gen.Laws 1937, Act 3303*l*; St.1933, p. 948; St.1935, p. 342, § 1625.5; St.1937, p. 2401, § 1626; pp. 160, 161, §§ 1626.5–1628.

3. Municipal corporations 🔑526

The relief statutes authorizing counties and cities to pay bonds and cancel taxes and assessments, construed as making highway improvement assessments levied by city for payment of bonds unenforceable on purchase and cancellation of bonds by county, were not invalid for discrimination against property owners who had paid assessments before county acted. Gen.Laws 1931, Act 3276a; Gen.Laws 1937, Act 3303*l*; St.1933, p. 948; St.1935, p. 342, § 1625.5; St.1937, p. 2401, § 1626; pp. 160, 161, §§ 1626.5–1628.

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* Subsequent opinion 167 P.2d 177.

4. Taxation ⚷535, 537

The statutes providing for refund and recovery of taxes erroneously or illegally collected or paid under protest on void assessments must be liberally construed. St.1939, pp. 1370–1373; St.1941, pp. 2112–2116, §§ 5096–5143.

5. Taxation ⚷535

The statute authorizing refund of taxes erroneonsly or illegally collected is not limited to recovery of erroneous or illegal taxes. St.1939, p. 1370; St.1941, p. 2114, § 5096.

6. Municipal corporations ⚷523(1)

Where highway improvement assessments levied by city for payment of bonds were rendered unenforceable by county's purchase and cancellation of bonds, landowner which subsequently paid assessments under protest could recover amount thereof under statute authorizing refund of taxes erroneously or illegally collected. St.1939, p. 1370; St.1941, p. 2114, § 5096.

TRAYNOR, J., dissenting.

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In Bank.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by S. Siwel & Co. against the County of Los Angeles and another to recover special assessments paid under protest. From a judgment for defendants on demurrer, plaintiff appeals.

Reversed with directions.

Prior opinion, 152 P.2d 537.

Murphey & Davis, of Los Angeles, for appellant.

J. H. O'Connor, Co. Counsel, and A. Curtis Smith, Deputy Co. Counsel, both of Los Angeles, and Clyde Woodworth, City Atty., of South Gate, for respondents.

EDMONDS, Justice.

Under protest the S. Siwel Co. paid special assessments levied by the city of South Gate, and brought this action to obtain a refund. Upon the appeal from the judgment of dismissal entered after a general demurrer to the complaint was sustained and leave to amend denied, the questions presented for decision concern the validity of the assessments and the scope of certain sections of the Revenue and Taxation Code.

The facts alleged in the complaint and a proposed amended complaint may be summarized as follows: The appellant is the owner of land in the city of South Gate bordering on Wright Road, a highway of general county use. The highway was improved pursuant to a proceeding had under the Acquisition and Improvement Act of 1925, commonly known as the Mattoon Act, Stats.1925, p. 849, Deering's Gen.Laws 1931, Act 3276a, repealed by Stats.1933, chap. 346, p. 949. In 1929, acquisition and improvement bonds to the amount of $43,400 were issued and sold. Special assessments were levied against lands in the district, of which the appellant's property constituted a large part. Levies for the years 1929–1933, inclusive, were paid by the Siwel company, but assessments of the four subsequent years, 1934–1937, inclusive, were allowed to become delinquent. Only about 9 per cent of such assessments were paid by the property owners and the district was in economic distress.

Prior to June, 1938, bonds in the principal amount of $4,000 and interest had been paid in full, but of the outstanding bonds in the principal sum of $39,400, approximately $16,000 were delinquent in payment of principal and all were delinquent in payment of interest. The country was passing through a period of severe economic depression and the land values in the district shrank to a point where the total assessed valuation of all the taxable property within the district was at times less than the face value of the amounts outstanding on the bonded indebtedness. Taxes and assessments against a large percentage of the property in the district had been delinquent for five years and, unless financial aid was made available, a large percentage of the property would be stricken from the tax rolls.

Appropriate legislation had been enacted for the relief of districts in distress. Stats.1935, p. 1250, chap. 354, Deering's Gen.Laws, Act 3303*l*; Streets & Highways Code, §§ 1625.5–1628, St.1935, p. 342, St. 1937, pp. 160, 161, 2401. In 1938, acting pursuant to these provisions and prior to the levy of any assessment for that year, the county board of supervisors purchased all of the outstanding bonds of the district and canceled them. The appellant thereafter demanded that the assessments for the years 1934–1937 be canceled. The demand was rejected by both the city and the county. The property owner then made payment under protest, and filed a timely claim for refund, followed by commencement of the present suit.

In challenging the ruling of the trial court that these facts do not state a cause of action entitling the Siwel company to a refund of the amounts paid by it to discharge the assessments levied prior to the retirement of the bonds, the appellant takes the position that these assessments were collectible only for the purpose of meeting the obligation on the bonds, and the right to do so ceased to exist when the bonds were paid and canceled. Therefore, the argument continues, unless the amount paid to satisfy the assessments for the years 1934–1937 is refunded, the city will be unjustly enriched. And the appellant asserts that the procedure specified by the Revenue and Taxation Code may be used by a property owner to obtain a refund of assessments paid under the circumstances related in the complaint.

The city and the county contend that the cancellation of the bonds raised no bar to the collection of assessments theretofore levied. Under section 1626 of the Streets and Highways Code, St.1937, p. 2401, the legislative body of the city was given discretionary power to direct the cancellation of any unpaid taxes and assessments, and in the exercise of that discretion decided not to cancel the assessments levied before 1938 against the property of the appellant and other property owners in the assessment district. If assessments levied prior to 1938 are canceled, the respondents assert, the landowners who defaulted in their obligations will obtain a benefit denied to those who paid the assessments placed against their properties.

The city of South Gate has delegated its functions relating to the collection of taxes to the county of Los Angeles. The Acquisition and Improvement Act, supra, provided that upon the making of levies for the payment of principal and interest on bonds issued in accordance with its provisions, the assessments shall be "collected and enforced in the same manner and by the same persons and at the same time and with the same penalties and interest as are other taxes." Section 41. The statute, in effect, adopted the procedure provided by general law for the collection of taxes for general municipal purposes.

The relief legislation enacted in 1935 reposes in city and county legislative bodies a broad and wide discretion in the matter of payment of bonds and the cancellation of taxes and assessments. Section 1626 of the Streets and Highways Code provides that "boards of supervisors in their respective counties may purchase or redeem at a discount, and may at any time in their discretion cancel or retire, bonds of any special assessment district," for payment of which special assessments have been or are to be levied, if the bonds have been used exclusively for the improvement or repair of highways. Payment of any portion of the principal or interest is authorized, or money may be transferred into the interest and sinking fund for the discharge of the bonds.

Act 3303*l* declares that city and county legislative bodies are "hereby fully and completedly authorized and empowered, on the consent of the owners or holders of such bonds or indebtedness, to purchase, adjust, liquidate or cancel such bonds or indebtedness, or any part of them or it * * *," and to "adjust, waive or cancel in whole or in part, any tax or taxes, assessment or assessments, penalty or penalties and interest heretofore levied or taxed against any of the property or properties in such special assessment district which have been taxed or levied for the purpose of meeting the bonds or indebtedness of such special assessment districts."

A further provision of section 1626 is that "Whenever as the result of the * * cancellation * * * of bonds * * * the legislative body which conducted the proceedings for the issuance of such bonds * * * determines that there is sufficient money in the interest and sinking fund or other proper fund to adequately provide for the retirement of payment of the penalties, interest and principal of all outstanding bonds * * * such legislative body may, in its discretion, direct the cancellation or, if its taxes are collected through another legislative body it may in its discretion by resolution order such other legislative body to direct the cancellation of all or any portion of the unpaid taxes and assessments and the penalties thereon and the lien thereof levied or to be levied for the payment of such penalties, principal and interest. * * * Whenever only a portion of such taxes, assessments and liens are canceled, it may be according to any uniform plan which in the discretion of such legislative body is deemed equitable. * * *" Sections 1625.5 and 1627 authorize the purchase of the bonds with money from the general fund of the county, or from certain special funds.

From these provisions it is apparent that the county, instead of purchasing all of the bonds of the district, might have bought less than the total number of those outstanding, and then held, as subsisting obligations, either all or a part of those which it acquired. Under ordinary circumstances, it might be expected, the cancellation of all outstanding assessments would follow the purchase and cancellation of all unpaid bonds, whereas the purchase and cancellation of only a part of the unpaid obligations would be accompanied by a corresponding partial relief from assessment collections according to a uniform plan. The statutes import a correlation between bond cancellations and the nullification of assessments. Had the county left outstanding a sufficient number of the bonds to represent an amount of indebtedness equal to the sum which might be realized from levied assessments, there could be no question concerning its right to enforce the collection from the appellant of the amount paid by it under protest. However, after the purchase and cancellation of all of the bonds, which eliminated all indebtedness toward the payment of which assessments might be applied, did the county have the authority to require any further payment by a property owner in the district?

From the fact that by not canceling all of the bonds the county could have retained the right to enforce the collection of assessments, it might seem that the controversy concerns a mere technicality or error of procedure. But the appellant contends that a fundamental principle of taxation is at stake, a principle which underlies the power of special assessment and is inherent in the law which marks the distinction between general and special taxation. This principle is that whereas a general tax is an equal and uniform charge levied to meet the ordinary expenses of government and for general public purposes, a special assessment may be levied only for the purpose of paying for improvements which directly benefit the land specially assessed; its burden rests upon the locality benefited and when that burden is lifted the power to assess ceases. For that reason, the appellant argues, where the obligation for the payment of which special assessments have been levied is discharged, there is no purpose for the collection of such assessments and no right to enforce them.

[1] The fundamental distinction between general taxation and assessment for a special purpose was announced in this state in the early case of Emery v. San Francisco Gas Co., 1865, 28 Cal. 345, and is universally recognized. See 5 McQuillin on Municipal Corporations, 2d Ed., ch. 38, pp. 699 et seq.; 1 Cooley on Taxation, 4th Ed., § 31, p. 105; 1 Page & Jones, Taxation by Assessment, chaps. 1 and 3; Gray on Limitations on the Taxing Power and Public Indebtedness, pp. 6–7; Hamilton on Law of Special Assessment, chap. III, pp. 148, et seq. "The terms 'tax' and 'assessment,' except in the case of specific taxation," it is said in 24 California Jurisprudence, § 22, p. 38, "both include the idea of some ratio or rule of apportionment. While the two terms are sometimes used synonymously, there is a well-recognized distinction between them. A tax is levied for the general public good, and without special regard to the benefit conferred upon the individual or property subject thereto, while a special assessment is levied to force payment for a benefit equal in value to the amount thereof. The latter is not a tax of all the property within a district for general purposes, founded upon the benefits supposed to be derived from the organization of a government, but is a charge upon specific property for a specific purpose, founded upon the benefits supposed to be derived by the property itself. * * * A special assessment is not in the constitutional sense a tax at all."

Judicial decisions are replete with the emphatic declaration, in varying forms, that the test in all special assessment proceedings is that the amount of the levy should not exceed the particular benefit to the property. "The assessment can be levied only for the actual cost of the improvement 'and the local authorities cannot include in the assessment the expense of any other work than such as is necessary to complete the particular improvement in a reasonable and fair mode.' 2 Elliott on Roads and Streets, 4th Ed., p. 892. Authorities to the same effect could be multiplied without number, and there appears to be none to the contrary." County of San Diego v. Childs, 1932, 217 Cal. 109, 117, 17 P.2d 734, 737.

[2] The Acquisition and Improvement Act, supra, pursuant to which the assessments now challenged by the appellant were levied, provided a method for the construction of street improvements, and for the payment of their cost by the issuance of bonds payable by the levy and collection of special assessments against the real property within the district found to be specially benefited by the improvement. Section 41(7) of the act allowed the levy of special assessments "clearly sufficient to pay the principal and interest of said bonds as the same shall become payable," but it contained no authorization for the levy or collection of a tax for any other purpose. The provision that "Any money remaining in any acquisition and improvement district interest and sinking fund after all of the bonds * * * have been retired shall be transferred to the general fund of the county or municipality * * *" was merely a catch-all for the disposition of surplus money which might "remain" in the fund after payment of the indebtedness because of the impossibility of equalizing tax collections with indebtedness down to the last penny. The act did not authorize, or purport to authorize, any levy or collection of a special assessment after cancellation of the indebtedness. And although the repeal of the statute shall not "be applicable to or affect in any way any bonds heretofore issued or authorized to be issued under said act or any assessment levied or authorized to be levied * * * and all of the provisions of said act are retained in full force and effect until all bonds issued * * * under said act shall be fully paid and discharged", Stats. 1933, p. 948, only while there are outstanding obligations is there any authority or duty to levy or collect assessments; the right to assess was not conferred and does not exist apart from the indebtedness.

[3] The fact that the county's payment of the indebtedness without enforcement of collection of the delinquent 1934–1937 assessments would benefit the 91 per cent of the property owners who did not pay for those years, thus discriminating against the 9 per cent who did pay, is beside the point. All owners in the district are benefited by the lifting of the assessments for years subsequent to 1937. The purpose of the relief statutes is to remove economic distress from the district and to get the properties back on the tax rolls. The application of such statutes by the legislative bodies in the exercise of a broad discretion does not necessarily operate with equality as to all property owners; in fact, the contribution of general county funds for payment of the improvement is at the expense of the general taxpayers. A discrimination in some direction is inevitable and not unlawful. City of Dunsmuir v. Porter, 7 Cal.2d 269, 60 P.2d 836; County of San Diego v. Hammond, 6 Cal.2d 709, 719–727, 59 P.2d 478, 105 A.L.R. 1155.

[4, 5] Sections 5096–5107 of the Revenue and Taxation Code, St.1939, pp. 1370–1372, St.1941, pp. 2114–2116, a recodification of section 3804 of the Political Code, provide for a refund of "taxes * * * erroneously or illegally collected." The word "taxes" concededly includes an assessment for public improvements (§ 4801, St.1939, p. 1361). Sections 5136–5143, St. 1939, pp. 1372, 1373, St.1941, pp. 2112, 2113, a recodification of section 3819 of the Political Code, provide for the recovery of taxes paid under protest on a "void" assessment. Such statutes are to be liberally construed, Brenner v. Los Angeles, 160 Cal. 72, 78, 116 P. 397; Stewart Law & Collection Co. v. Alameda County, 142 Cal. 660, 662, 76 P. 481; Pacific Coast Co. v. Wells, 134 Cal. 471, 474, 66 P. 657, and no sound reason is advanced for distinguishing, under circumstances such as are here shown, between illegality or error arising in the levy and illegality or error arising from subsequent events.

Section 5096 is not limited to the recovery of erroneous or illegal taxes but authorizes the refund of taxes "erroneously or illegally collected." Evans v. County of San Joaquin, 67 Cal.App.2d 452, 455, 154 P.2d 468. The use of the word "collected" rather than the term "levied" or "assessed" is most significant. Compare section 4986, St.1941, p. 2641, authorizing a cancellation of taxes "levied or charged * * * erroneously or illegally."

[6] There is no reason to relegate a taxpayer in the situation of the appellant to a proceeding in mandamus to compel cancellation of the assessment, or to enjoin a tax sale, or to other possible remedy. Where the subsequent event which makes the levy unenforceable and its collection "erroneous" and "illegal," would in the event of prior occurrence have rendered the assessment void ab initio, the

remedy afforded by sections 5096 et seq. is available to him. Had there been no indebtedness in existence at the time of the levies here in controversy, the assessments would have been void ab initio. They could not have been levied for an improvement already completed and paid for. The later cancellation of the bonds which rendered these levies unenforceable and the collection of the assessments illegal and erroneous entitled the appellant to avail itself of the refund procedure. City of Santa Monica v. Los Angeles County, 1911, 15 Cal.App. 710, 115 P. 945, and Grimes v. County of Merced, 1928, 96 Cal.App. 76, 273 P. 839, are not at variance with this determination. They are distinguishable upon the facts and do not decide the points here presented.

The judgment is reversed with directions to the trial court to overrule the general demurrer to the complaint and to proceed in accordance with the views here expressed.

GIBSON, C. J., and SHENK, CARTER, SCHAUER, and SPENCE, JJ., concur.

TRAYNOR, Justice (dissenting).

I dissent.

The assessments in question were levied by defendant city under the Acquisition and Improvement Act of 1925, Stats.1925, p. 849, Deering's Gen.Laws, 1931, Act 3276a. This act was repealed in 1933, Stats.1933, p. 948, with a saving clause that the repeal did not affect any bonds theretofore issued or any assessments theretofore levied. Section 41 of the act provides that assessments shall be "collected and enforced in the same manner and by the same persons and at the same time and with the same penalties and interest as are other taxes for state and county purposes * * * and all laws applicable to the levy, collection and enforcement of taxes for state and county purposes * * * are hereby made applicable to said special assessment taxes." The assessments paid by plaintiff were validly levied and placed upon the tax rolls. They could have been cancelled under the legislation enacted in 1935 for the relief of special assessment districts (Deering's Gen.Laws, Act 3303*l*, Stats.1935, p. 1250; Streets & Highways Code, §§ 1625, 1626, 1627, 1628, as amended by Stats.1935, pp. 2178, 2199, Stats.1937, p. 160) had the legislative bodies concerned determined that the relief of the district required such cancellation. They determined, however, that the assessments should not be cancelled. The statutes governing such assessments therefore compel their collection unless those statutes violate some constitutional provision.

No such violation is cited in the majority opinion. That opinion rests entirely on the argument that the purpose of the assessments was to pay for the bonds, and that when the bonds were cancelled there was no longer any purpose to be served by the assessments. In my opinion the rights of the defendants after the purchase of the bonds depended, not on the county's holding the bonds, but on the legislation governing relief to special assessment districts. That legislation empowered the legislative bodies granting relief to such districts to determine the extent of that relief and the conditions under which it should be granted. They determined that the relief should not be extended to the cancellation of delinquent assessments but that such assessments should be collected. The purpose of the assessments was not fulfilled when the bonds were purchased and cancelled, for the decision that the outstanding delinquent assessments should not be cancelled was in effect a decision that collections on such assessments should be used to reimburse the county and its taxpayers generally for funds advanced to purchase the bonds. Reimbursement is in order here as in other instances where creditors of insolvent debtors accept payment by third parties in settlement of their claims and such parties are subrogated to the claims of the creditors. See 4 Williston, Contracts, Rev.Ed., 3628, 3664; 4 Pomeroy, Equity Jur., 5th Ed., 640; McClintock, Equity, 210; 50 Am.Jur., Subrogation, §§ 28, 70; 23 Cal.Jur. 920; Meyers v. Bank of America, 11 Cal.2d 92, 94, 77 P.2d 1084; Brantley v. Kelly, 226 Ala. 47, 145 So. 649.

The purchase and cancellation of the bonds occurred after the delinquency of the assessments in question. The decline in property values had resulted in an overwhelming number of delinquencies in the payment of special assessments, which often exceeded the actual value of the properties. The districts were unable to meet the interest on their bonds, let alone redeem them as they fell due. The public interest required emergency legislation to rescue the special assessment districts from insolvency and to enable the properties subject to assessments to bear their share in the general tax burden. The legislative bodies of cities and counties were therefore given wide powers to establish and carry out plans to restore the solvency of special assessment districts and to liquidate in whole or in part the indebtedness of such districts. They were given authority to use "any and all necessary funds, moneys, taxes, assessments and contributions, from whatsoever source derived." Deering's Gen.Laws, Act 3303*l*, Stats.1935, p. 1250.[1] Their position was comparable to that of a trustee in bankruptcy of such districts.

County boards of supervisors were also given wide powers under sections 1626, 1626.5, 1627 and 1628 of the Streets and Highways Code, as amended by Stats.1935, pp. 2178, 2199, Stats.1937, p. 160. Section 1626 provides among other things that "the boards of supervisors in their respective counties may purchase or redeem at a discount, and may at any time in their discretion cancel or retire, bonds of any special assessment district, for the payment of which special assessments * * * have been or are to be levied, if the proceeds of such bonds are or have been used exclusively for the acquisition of rights of way or easements for, or for the construction, maintenance, improvement or repair of highways, bridges or culverts within such county or any city therein. * * *" Section 1626.5 provides: "In accordance with the provisions of sections 1627 and 1628, the boards of supervisors, in their respective counties, may appropriate money to refund, repay and adjust, and may refund, repay and adjust, by any method established by law, the principal, or any portion of the principal, of any special assessments or bonds issued to represent special assessments, which have become liens on lands and which have been levied under the direct or specific assessment method to pay for the acquisition of rights of way or easements for, or the construction, maintenance, improvement or repair of public highways, bridges, or culverts within such county or any city therein. If the board of supervisors shall appropriate money to refund, repay or adjust assessments or bonds levied or issued by a city, it may delegate to the legislative body of such city the disbursement of the funds appropriated therefor, on such terms and conditions as may be agreed upon by the board and the city." Section 1627 specifies the county funds that the board of supervisors may use for the relief transactions defined in sections 1626 and 1626.5.

Since the board of supervisors has discretion to determine whether the county should engage in such a relief program, it may make the granting of such relief dependent on the use of other resources, such as outstanding assessments, in addition to county funds. In this as in other instances of a grant-in-aid for a specific purpose, the expenditure of public funds may be made to depend on contributions of others. In the present case, the condition that the owners of the assessed properties should contribute the amount of the delinquent assessments to the relief of the district was apparent from the determination that the delinquent assessments should not be cancelled. So long as they were not cancelled the assets of the district represented by them remained available as a contribution of the property owners to the relief of the district.

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[1] This act vests authority in "the legislative body of any city or county * * * acting individually or in conjunction with any other such legislative body or bodies, wholly or partly within the boundary of which any special assessment district has been created, and the outstanding bonds or indebtedness of which district are payable by taxes or assessments levied wholly or partly in accordance with the assessed value of lands or property * * * to purchase, adjust, liquidate or cancel such bonds or indebtedness, or any part of them or it, and to carry out any plan or plans for the purchase, adjustment, liquidation, or cancellation of such bonds or indebtedness, or any part of them or it, and if necessary or advisable to carry out such plan or plans under the bankruptcy laws of the United States of America * * * or under any law or laws of the State of California, enacted for the purpose of the purchase, adjustment, refunding, liquidation or cancellation of bonds or indebtedness of special assessment districts. In carrying out any such plan or plans the legislative bodies herein mentioned are fully authorized and empowered to adjust, waive or cancel in whole or in part, any tax or taxes, assessment or assessments, penalty or penalties and interest heretofore levied or taxed against any of the property or properties in such special assessment district which have been taxed or levied for the purpose of meeting the bonds or indebtedness of such special assessment districts." Section 1. Such legislative bodies are also authorized "to appropriate and use any and all necessary funds, moneys, taxes, assessments and contributions, from whatsoever source derived, for the furtherance, consummation and conclusion of the purchase, adjustment, liquidation or cancellation of any bond or bonds * * * in whole or in part of such districts, and to pay from such funds, moneys, taxes, assessments and contributions all expenses necessary to carry on the furtherance, consummation and conclusion of such plan or plans." Section 3.

The delinquent assessments did not have to be collected before the purchase of the bonds or before the bonds were cancelled in order to be appropriated for that purpose. The order in which the various steps were taken is immaterial. To delay the relief of the district until the delinquent assessments were actually collected would have led to additional assessments and prolonged the insolvency of the district. So long as the bonds were outstanding, plaintiff and the other property owners were threatened with future assessments, which made the collection of delinquent assessments impractical. The removal of that threat would increase the value of the properties and thus pave the way for the collection of the delinquent assessments. It was therefore in the public interest as well as in the interest of the property owners that the county should advance the funds necessary to purchase the bonds rather than postpone the relief program until the delinquent assessments were collected.

The assessments continued on the tax rolls as valid liens against the property involved, and no statute or rule of law made their validity dependent on the county's holding the bonds until the assessments were paid. Bonds were essential in the relationship between the city, the bondholders, and the property owners. The redemption of the bonds, however, eliminated all outside creditors and made it unnecessary for the county to retain the bonds, for the rights of the defendants depended, not on the county's holding the bonds, but on the relief legislation under which the bonds were purchased and cancelled and under which the delinquent assessments were continued on the tax rolls. It is implicit in the decision made under the authority of that legislation not to cancel the delinquent assessments, that collections thereon should be used to reimburse the county for advances made to purchase the bonds. The statutory authority to retain the assessments on the tax rolls after the claims of the bondholders are satisfied is clearly designed to enable the agency, which under authority of the same statute satisfied those claims, to obtain reimbursement for part of its advances. Even before the enactment of the relief legislation of 1935, it was contemplated that legislative bodies could use their general funds to pay the principal and interest due on special assessment district bonds and reimburse those funds out of the subsequent collection of delinquent assessments. Section 41 of the Acquisition and Improvement Act provides: "Whenever any of said bonds or any payment of principal or interest thereon shall become due and there shall not be sufficient money in said interest and sinking fund to pay the same, the legislative body which conducted the proceeding may, pending the levy and collection of a special assessment tax therefor, order the amount of money necessary to pay said bonds, or payment of principal or interest so falling due, to be transferred from the general fund of the county or municipality, as the case may be, to said interest and sinking fund, and the amount of money so transferred shall be deemed a loan to said interest and sinking fund and shall be repaid to the general fund from the first money coming into said interest and sinking fund thereafter." Deering's Gen.Laws 1931, Act 3276a.

The majority opinion cites no cases in support of its position. Plaintiff, however, relies upon two lines of cases that are clearly distinguishable. In the first, the improvement was abandoned before completion. Grimes v. County of Merced, 96 Cal.App. 76, 273 P. 839; Bradford v. City of Chicago, 25 Ill. 411; Valentine v. City of St. Paul, 34 Minn. 446, 26 N.W. 457; City of San Antonio v. Peters, Tex.Civ.App., 40 S.W. 827; City of San Antonio v. Walker, Tex.Civ.App., 56 S.W. 952. In the second, the actual cost of the improvement was less than the original estimate. Paving Dist. No. 5 v. Fernandez, 144 Ark. 550, 223 S.W. 24; City of Chicago v. Fisk, 123 Ill.App. 404; In re Schneider, 136 App. Div. 444, 121 N.Y.S. 9; Wolfe v. Edgewood Borough, 58 Pa.Super. 38. Thus in all these cases the assessments exceeded the value of the improvements. In the present case, however, the plaintiff has received the full benefit of the improvement and has not been assessed beyond its cost. In fact, even with the payments in question it has paid less than its pro rata share of the cost of the project. All the property owners in the district should be treated alike. The allowance to plaintiff of a refund of the payments of its delinquent assessments creates a discrimination against the other property owners who paid their assessments, which plaintiff concedes cannot be refunded, and gives plaintiff a windfall as a reward for its delinquency.

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26 Cal.2d 696

McDOWD v. PIG'N WHISTLE CORPORATION.

L. A. 19232.

Supreme Court of California.

June 29, 1945.

1. Trial 🔑303

A trial court has authority to permit jury to separate before or after submission of case, in view of statute requiring admonition if jury is permitted to separate before or after submission of case. Code Civ.Proc. § 611.

2. Trial 🔑303

In absence of authorizing statute, court may order separation of jury.

3. Statutes 🔑225

The statute requiring jury to be kept together after retirement, under charge of officer, must be construed with statute impliedly giving court power to permit separation, by requiring admonition if such permission is given. Code Civ.Proc. §§ 611, 613.

4. Trial 🔑303

The statute requiring that jury be kept together after retirement, under charge of officer, is concerned only with duties of officer in charge of jury, and does not prevent court from permitting separation of jury. Code Civ.Proc. § 613.

5. Evidence 🔑82

It is presumed that jury has performed its duty as required by law, and that jurors have not communicated with anyone during separation. Code Civ.Proc. § 1963, subs. 1, 15, 33.

6. Appeal and error 🔑1032(1)

The burden rests on appellant to show that error was prejudicial.

7. Appeal and error 🔑1032(1)
Trial 🔑303

Permitting jury to separate for the night because of war conditions, involving possibility of blackouts, air raids, etc., was discretionary, and was no ground for reversal in absence of showing of prejudice. Code Civ.Proc. §§ 611, 613.

8. Appeal and error 🔑1069(1)

A verdict will not be set aside because of separation of jury without leave of court unless there is evidence of other misconduct in addition to the mere fact of separation, which has operated to the complaining party's prejudice.

9. Evidence 🔑351, 370(4)

A hospital record covering period when plaintiff was in hospital for care was admissible to show nature and extent of plaintiff's injuries, where proper foundation was laid for admission of record, which was made in regular course of business and contained matters customarily contained in such record. Code Civ. Proc. § 1953e, 1953f.

EDMONDS, SHENK and SCHAUER, JJ., dissenting.

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In Bank.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action for negligence by Alice Edward McDowd against the Pig'n Whistle Corporation. From a judgment for plaintiff, defendant appeals.

Affirmed.

Prior opinion, 151 P.2d 850.

Sidney A. Moss, of Los Angeles, for appellant.

Arthur C. Webb, of Los Angeles, for respondent.

CARTER, Justice.

This is an appeal from a judgment in favor of the plaintiff entered on the verdict of a jury in a negligence action. The chief contention made by appellant for reversal of the judgment is that the trial judge permitted the jurors to separate after the case was submitted to them.

The record discloses that after the case had been submitted to the jurors for their deliberation, at the request of the trial judge, they were returned to the courtroom at about 5 o'clock in the afternoon, and questioned by him as to whether they could reach a verdict. Receiving conflicting views from the jurors the judge dispersed the jury in order that they might return to their homes remarking:

"The court lately has departed from the rule that jurors may not separate at night because of the war conditions, so jurors are allowed to go to their respective homes rather than be kept together at night, because of the possibility of blackouts, air raid, and that sort of thing. So if you think there is no chance at all by working a while longer, we will continue the case until tomorrow morning." The court instructed the jury to return to their deliberations on the following morning at 9.30. The afternoon of that day they arrived at the verdict. Defendant objected to the separation. (There is some question of the sufficiency of defendant's objection but in view of the conclusion reached herein it may be assumed to have been in proper form.)

[1-4] Defendant contends that the separation without the consent of both parties constituted prejudicial error. The issue may be stated as whether in a civil case the separation of the jury over night after the submission of the case to them, standing alone, is prejudicial error requiring a reversal of the judgment. To solve that question it must first be determined *what power is vested in the trial court to permit such a separation.* To that end we must examine the statutory provisions. We must start with section 611 of the Code of Civil Procedure. It reads: *"If the jury are permitted to separate, either during the trial or after the case is submitted to them,* they shall be admonished by the court that it is their duty not to converse with, or suffer themselves to be addressed by any other person, or any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them." (Emphasis added.) The inescapable implication from that section is that the trial court has authority to separate the jury either before or *after* submission of the case to them. It refers to the jury being *permitted* to separate. The only one in a position to give such permission is the trial judge and it is contemplated that he has such power. It has been held that statutes of that character impliedly confer power on the court to separate the jury. United Verde Copper Co. v. Kovacovich, 42 Ariz. 159, 22 P.2d 1085; State v. McNeil, 59 Kan. 599, 53 P. 876; State v. Haines, 128 Kan. 475, 278 P. 767; State v. Howland, 157 Kan. 11, 138 P.2d 424, 428. In absence of an authorizing statute the court may in its discretion order the separation of jurors. Dulaney v. Burns, 218 Ala. 493, 119 So. 21; Tolley v. Alexander, Mo.App., 3 S.W.2d 1050; McGill v. Alabama Fuel & Iron Co., 221 Ala. 614, 130 So. 379; Hand v. Hill, 167 Misc. 583, 5 N.Y.S. 2d 838; 53 Am.Jur., Trial, § 864; 64 C.J. 1010; 16 R.C.L. 307. Section 613 of the Code of Civil Procedure reads, "When the case is finally submitted to the jury, they may decide in court or retire for deliberation; if they retire, they must be kept together, in some convenient place, under charge of an officer, until at least three-fourths of them agree upon a verdict or are discharged by the court." That section interpreted in the light of the power granted to the court by section 611, and it should be so interpreted (United Verde Copper Co. v. Kovacovich, supra; State v. McNeil, supra; State v. Haines, supra; State v. Howland, supra), must mean that the jury is not to separate *on their own volition or by permission of the officer in charge.* It does not mean that the court may not order a separation. It provides that the jury must be kept together. That duty falls on the officer in charge. Hence, it is concerned with his duties rather than the power of the court to direct a separation. It follows therefore that it was not error for the court to exercise its discretion and separate the jury inasmuch as it had the authority to do so.

[5-7] The court having power to permit a temporary separation, the question is whether or not there has been an abuse of that power, and also the analogous question of whether prejudice has been suffered by the separation. Upon those matters several rules are pertinent. First, the jury is presumed to perform its duty as required by law. It is presumed "That official duty has been regularly performed; * * *" (Code Civ.Proc. § 1963(15); "That a person is innocent of crime or wrong; * * *." (Code Civ.Proc. § 1963(1), and "That the law has been obeyed." Code Civ.Proc. § 1963(33). Particularly applied it is presumed that the jurors have not communi-

cated with anyone during the period of separation. It is also true that the burden rests on the appellant to show on appeal that the error was prejudicial. 2 Cal.Jur. 1007-1009. In the instant case the defendant (appellant) made no showing of prejudice whatsoever either in the trial court or here except the bare fact of separation. Nor has it shown any abuse of discretion. On the contrary, the court stated a good and sufficient reason for the separation.

[8] Even when the separation is not by leave of court it is almost the universal rule that in order to set aside the verdict *"there must be some evidence of other misconduct, in addition to the mere fact of separation,* which has operated to the party's prejudice." Saltzman v. Sunset Telephone & Telegraph Co., 125 Cal. 501, 508, 58 P. 169, 171. This court said in the Saltzman case at page 508 of 125 Cal., at page 171 of 58 P.:

"The matter is fully discussed in a note to McKenny [McKinney] v. People, 43 Am. Dec. 65. The annotator says it is almost the universal rule that in order to set aside the verdict 'there must be some evidence of other misconduct, in addition to the mere fact of separation, which has operated to the party's prejudice.'

"The rule in this state, I take it to be, in civil cases, that a separation, against the instruction of the court, with *evidence that improper influence* might have been brought to bear upon the juror, puts the burden upon the party seeking to sustain the verdict to negative the presumption, and show that no such attempt was made. I think that was done in this case." (Emphasis added.) It will be noted that there must be *evidence* of misconduct occurring during the separation, that is, the complainant has the burden of establishing prejudice. This rule is iterated in Re Estate of McKenna, 143 Cal. 580 at page 589, 77 P. 461, at page 464: "But in civil cases *proof of mere separation is not sufficient to set aside a verdict. It must appear in addition thereto that some prejudice to the moving party has occurred,* and that some substantial right of his has been affected by the separation. Counsel for contestants call our attention to several decisions in criminal actions upon this point, but they have no application, as a different rule applies in civil than obtains in criminal cases." (Emphasis added.) And even in criminal cases the general rule is that where there is a separation authorized by the court, where it may give such authorization, the burden is upon the defendant to establish prejudice. People v. Yeager, 194 Cal. 452, 229 P. 40; 79 A.L.R. 828; 34 A.L.R. 1214.

[9] Defendant contends that the court erred in admitting the hospital record covering the period when plaintiff was there for care, asserting that it was improper for use in showing the diagnosis of plaintiff's condition and the nature and extent of her injuries. A proper foundation was laid for the admission of the record. It was made in the regular course of business of the hospital and contained matters customarily contained in such records. It was held in Loper v. Morrison, 23 Cal.2d 600, 145 P.2d 1, 4, that such records are admissible since the addition of sections 1953e, 1953f to the Code of Civil Procedure. In the Loper case the record contained entries "relative to the *condition*" of plaintiff while she was in the hospital. Although it was sought to use these records to impeach plaintiff's testimony as to her condition, that is not important. It is true that in passing upon the claimed error in the exclusion of the records in that case, and holding the exclusion was not prejudicial error, the court did not determine the question of whether a proper foundation was laid for the introduction of the record. In the instant case a proper foundation was laid and the Loper case clearly held the records admissible in such event. The Loper case has since been followed. Gunter v. Claggett, 65 Cal.App.2d 636, 151 P.2d 271. See, also, Ulm v. Moore-McCormack Lines, 2 Cir., 115 F.2d 492, rehearing denied 2 Cir., 117 F.2d 222; Reed v. Order of United Commercial Travelers, 2 Cir., 123 F.2d 252; and Gile v. Hudnutt, 279 Mich. 358, 272 N.W. 706.

The judgment is affirmed.

GIBSON, C. J., TRAYNOR, J., and SPENCE, J., concurred.

EDMONDS, Justice (dissenting).

The conclusion that, in a civil action, a trial judge may, without the consent of the parties, allow the jurors to separate during their deliberations and before they have reached a verdict, in my opinion, not only rests upon a strained and unwarranted construction of the applicable statute but also sets aside procedure which has been established in this state for more than fifty years. Moreover, the decision equally justifies the separation of the jurors in a criminal case, contrary to the practice long recognized as fundamentally necessary for a fair administration of justice.

There is nothing in section 611 of the Code of Civil Procedure requiring an admonition of the jurors upon their separation, which is inconsistent with the mandate of section 613 directing that, when a cause is finally submitted to them, "they must be kept together." No interpretation of implied power reasonably may be drawn from section 611; on the contrary, the statute, in effect, only declares that when and if, under circumstances allowed by law, the jurors are permitted to disperse, they must be admonished. Certainly there is nothing in either section which justifies the implication that after a case has been submitted to the jurors, they may be allowed to separate over the objection of the parties.

In support of the assertion that statutes of the character of section 611 of the Code of Civil Procedure "impliedly confer power on the court to separate the jury," Justice Carter cites State v. Howland, 157 Kan. 11, 138 P.2d 424; State v. Haines, 128 Kan. 475, 278 P. 767; State v. McNeil, 59 Kan. 599, 53 P. 876, and United Verde Copper Co. v. Kovacovich, 42 Ariz. 159, 22 P.2d 1085. The decision in the Howland case was not based upon legislation identical to or even remotely similar to the California statute, nor was the court there determining whether the trial judge had any discretion to separate the jury. It appears that during the deliberations of the jury after usual court hours, two of its members, in the company of the bailiff, left their associates for the purpose of obtaining information from the trial judge, who was near by. In holding that the conduct of the jury under such circumstances was not prejudicial, the court emphasized the fact that the separation was with the knowledge of the defendant's counsel. Also, unlike the present case, no objection was interposed to the separation nor was any motion made for a mistrial or to discharge the jury.

Another Kansas decision, State v. Haines, supra [128 Kan. 475, 218 P. 769], considered a statute which clearly concerned a separation of the jury "after being impaneled" and before "the cause is finally submitted to them." Rev.St.Kan. 1923, 62—1446. From the statement of facts it does not appear that the dispersal was after submission of the cause to the jury. But again the court emphasized, "the record does not show that any objection was made to the separation of the jury * * *." Nor is State v. McNeil, supra, a third Kansas case, authority for construing section 611 of the Code of Civil Procedure as empowering a trial judge to allow the separation of the jury. A statute of Kansas provided as a ground for new trial, "When the jury has been separated *without leave of the court* after retiring to deliberate upon their verdict." Gen.St.Kan. 1897, Cr. Code, § 274. By implication, said the court, the statute allowed the separation of the jury after the submission of a case. The California Code of Civil Procedure does not specify separation of the jury as the ground for a new trial although almost the exact wording of the Kansas statute is found in section 1181, subd. 3 of the Penal Code of this state.

In United Verde Copper Co. v. Kovacovich, supra [42 Ariz. 159, 22 P.2d 1086], it appears that after the jury was sworn the trial judge, upon application of the prevailing parties, "ordered that it be held together in the custody of the sheriff throughout the trial." Under the common law, said the court, the jury was not permitted to separate after being sworn but "it has become the fairly general practice in recent years to permit them to separate during recesses in civil cases." However, the court continued, there is not "any law requiring this to be done; in fact, under the statutes of this state the regular procedure is to hold them together * * *." The following statement, that "the court in the exercise of its discretion may permit them to separate" is dictum and is limited by the observation that such an order is not usually made "unless requested by one of the parties." In any event, in the Kovacovich case the court was considering a separation of the jury "throughout the trial" and "during recesses" rather than after submission of the cause for deliberation.

The additional fact, relied upon by Justice Carter, that courts in a relatively insignificant number of jurisdictions have held that a trial court may in its discretion order the separation of jurors in the absence of a statute authorizing it to do so, certainly has no controlling effect as against the legislative mandate in this state. Section 613 of the Code of Civil Procedure provides: "When the case is finally submitted to the jury, they may * * * retire for deliberation; if they retire, they must be kept together, in some convenient place, under charge of an officer, until at least three-fourths of them agree upon a verdict or are discharged by the court. Unless by order of the court, the officer having them under his charge must not suffer any communication to be made to them, or make any himself, except to ask them if they or three-fourths of them are agreed upon a verdict * * *."

Although in Saltzman v. Sunset Tel. & Tel. Co., supra, 125 Cal. 501, 58 P. 169, 171 a judgment was affirmed notwithstanding a very brief absence of one juror from his associates, the court held that a separation "with evidence that improper influence might have been brought to bear upon the juror, puts the burden upon the party seeking to sustain the verdict to negative the presumption, and show that no such attempt was made." This language was quoted with approval in People v. Adams, 143 Cal. 208, 76 P. 954, 66 L.R.A. 247, 101 Am.St.Rep. 92. The decision of In re Estate of McKenna, 143 Cal. 580, 77 P. 461, 464, at almost the same time as the Adams case, was placed upon the ground that it was "doubtful, except technically, whether there was a separation at all." The fact that one of the jurors was delayed "no more than two minutes" in returning to the court room did not affect the substantial rights of the parties, said the court. These cases uphold the statutory mandate that there be no separation of the jury during the consideration of a case and where there has been any deviation from the prescribed procedure, require the party in whose favor the verdict has been returned to show that there was no attempt to bring influence to bear upon the determination.

In the present case it may be argued that objection of counsel for Pig'n Whistle was only directed to the proposed action of the court in allowing deliberation of the jurors notwithstanding their apparent inability to reach a verdict. But, according to the record, after the trial judge informed the jury that it would be permitted to separate over night, counsel stated: "I wonder if your Honor will be good enough to ask each of the jurors whether they think they can get together because certainly I wouldn't want to see them come back here and have to sit here all day tomorrow—" "It isn't necessary for that comment," was the judge's answer, "it doesn't make any difference whether they have to stay here tomorrow —". Counsel then continued: "I do not have to stipulate that the jury be discharged because I strenuously object—" but was interrupted by the ruling: "The jury will be discharged until 9:30 tomorrow morning. You may go straight to the jury room tomorrow morning." The next and final statement of counsel was: "May the record show my objection to the jury being back here tomorrow morning?" The reply was: "The record will so show * * *."

The jurors then left the court room for their homes and the next day, after reassembling and deliberating for some time, they were returned to the court room for the reading of some testimony. Consideration of the case was then resumed. During this time, counsel for Pig'n Whistle, out of the presence of the jury, moved for a mistrial upon the ground that the jurors, while deliberating, had been permitted to separate and go home. The motion was denied. Later in the day the jury returned a verdict for the respondent.

Although counsel might have been much more specific in resisting the proposed order, it appears that he was in a difficult position because of the trial judge's announcement in regard to the policy followed in that department of the court. Certainly counsel for Pig'n Whistle did not consent to the order allowing the jurors to go to their homes. At least impliedly, he was insisting that the jurors be kept together as required by section 613 of the Code of Civil Procedure. The requirements laid down by that statute are clear and certain and there should be no departure from them except upon the definite and unequivocal stipulation of counsel. Pig'n Whistle gave no such stipulation, and Mrs. McDowd has made no attempt to show lack of opportunity for improper influence to reach the jurors during the time they were apart.

For these reasons, in my opinion, the judgment should be reversed.

SHENK and SCHAUER, JJ., concurred.

26 Cal.2d 732

VANCIEL et al. v. KUMLE et al.

Sac. No. 5671.

Supreme Court of California.

July 6, 1945.

1. Banks and banking 🔑116(1)

The knowledge of an agent, including a bank's agent, acting within the scope of his authority, is the knowledge of his principal.

2. Banks and banking 🔑114

In mining lessors' action against lessees for royalties assigned to a bank, wherein bank was made a party defendant and a judgment was entered for bank against lessees, evidence warranted finding that for more than a year before bank raised the question, bank knew of lessees' payment to lessors of advance royalties included in the judgment, and that bank assented to the payments.

3. Banks and banking 🔑114

Where advance royalties under a mining lease were assigned to a bank, to secure a loan to lessors made by a branch of the bank, and bank knew for more than a year that lessees were paying the royalties to the lessors, bank's passivity was an assent to, and a ratification of, the approval of the branch bank's manager, of the payments to the lessors, precluding the bank from recovering the payments from the lessees. Civ.Code, § 2310.

4. Banks and banking 🔑114

Where, after advance royalties under a mining lease assigned to a bank to secure a loan to lessors had been paid to lessors with acquiescence of the manager of the branch bank making loan, and manager with bank's knowledge procured a subsequent agreement by lessees to increase subsequent payments to bank to put loan in better shape, the subsequent agreement and consent to the prior payments were so closely related that bank could not retain benefits of agreement and deny that it ratified the prior payments to the lessors. Civ. Code, § 2310.

5. Principal and agent 🔑171(1)

A ratification of an agent's act can be made by accepting or retaining the benefit of the act with notice thereof. Civ.Code, § 2310.

In Bank.

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Action by Charles F. Vanciel and others against Hubert G. Kumle and others, for royalties under a mining lease, in which the Bank of America National Trust & Savings Association, assigned the royalties by plaintiffs to secure a loan, was made a party defendant. From a judgment for the bank against defendants, defendants appeal.

That part of the judgment appealed from reversed.

Prior opinion, 153 P.2d 785.

Bush & Ackley, of Oakdale, for appellants.

T. B. Scott, of Modesto, and G. D. Schilling and Kenneth M. Johnson, both of San Francisco, for respondent.

TRAYNOR, Justice.

Plaintiffs brought this action to recover royalties from defendants Hubert and Donald Kumle, Leon Brier and Placer Properties Company, lessees, under the terms of a mining lease. To secure a loan of $25,000 plaintiffs assigned all royalties due or to become due from the lessees to the Bank of America National Trust & Savings Association. The loan was made by the Oakdale branch of the bank in conjunction with other mining operations in which both plaintiffs and defendants were interested. The bank was made a party defendant to the action. The lease provided that the lessees pay advance royalties of $200 per month and be credited for such payments when royalties accrued. After defendants had received written notice of the assignment and agreed in writing to pay all royalties to the bank, they made fourteen monthly payments to plaintiffs of advance royalties aggregating $2,800, the last in April, 1941. This action was begun in February, 1942, and came to trial in June, 1942. Not until the close of the evidence did the bank file a pleading entitled "Plea for Moneys Unlawfully Paid to Vanciel After Assignment, to Conform to Proof" in which it protested for the first time the advance royalties paid to plaintiffs. The trial court found that T. C. Smethers, the manager of the Oakdale branch of the bank, consented to the first payment and by failing to object, acquiesced in the remaining ones, but that none was made with the knowledge or consent of the head office. The court also found that Smethers was not authorized to waive the payments to the bank, although defendants acted in good faith in the belief that he was. The court entered judgment in favor of the bank against defendants in the sum of $4,731.85, which included the $2,800 that defendants had previously paid to plaintiffs. Defendants appeal from that part of the judgment awarding the bank the latter sum.

[1] Defendants contend that Smethers had ostensible authority to waive the payments and that in any event the bank subsequently ratified his conduct. Defendants knew that Smethers had no authority to make loans in excess of $5,000 and that the head office of the bank consented to the loan of $25,000 only on condition that it be secured by an accepted assignment of the royalties involved in the present action. In March, 1941, Smethers admittedly received from defendants a statement setting forth that twelve payments of advance royalties had been made to plaintiffs. His testimony indicates that he reported that fact to the head office of the bank. At about that time national bank examiners made an examination of the Oakdale branch. Excerpts from their reports criticizing the loan here involved were sent from the head office to Oakdale and returned to the head office with comments of the branch manager. A few days later the manager of a San Francisco branch of the bank, Andrew Rocca, who in 1939 had investigated the loan on behalf of the bank, was again sent to Oakdale. After that visit Smethers prevailed upon defendants to agree to an increase in their payments of advance royalties from $200 to $500 a month for a period of ten months. The lease was modified accordingly and defendants subsequently made ten payments of $500 each to the bank. On April 3, 1941, Smethers wrote Rocca that the $500 would include the $200 that defendants had previously been paying plaintiffs and that he would insist that plaintiffs reimburse the bank for the money that they had received. The settled statement on appeal, which defendants elected to use in lieu of a reporter's transcript, does not indicate whether the correspondence between Smethers and the head office following the visit to Oakdale of the national bank examiners disclosed to the head office the fact of defendants' payments to plaintiffs. Rocca, however, acquired that information on his trip to Oakdale and the letter that he subsequently received from Smethers confirmed that information. The knowledge of Rocca, an agent acting within the scope of his authority, is the knowledge of his principal. Hunter v. Watson, 12 Cal. 363, 73 Am.Dec. 543; Chapman v. Hughes, 134 Cal. 641, 58 P. 298, 60 P. 974, 66 P. 982; Iverson v. Metropolitan Life, etc., Co., 151 Cal. 746, 91 P. 609, 13 L.R.A.,N.S., 866; Bogart v. George K. Porter Co., 193 Cal. 197, 223 P. 959, 31 A.L.R. 1045; Shamlian v. Wells, 197 Cal. 716, 242 P. 483.

[2-5] The evidence thus shows without conflict that for more than a year before it raised the question the bank was aware of defendants' payments to plaintiffs. The bank's passivity under such circumstances is tantamount to assent to the acts of its agent. Ralphs v. Hensler, 97 Cal. 296, 302, 303, 32 P. 243; Pacific Vinegar, etc., Works v. Smith, 152 Cal. 507, 511, 93 P. 85; Ford v. Lou Kum Shu, 26 Cal.App. 203, 211, 146 P. 199; Bank of America v. Perry, 41 Cal.App.2d 133, 141, 106 P.2d 53; Gaine v. Austin, 58 Cal.App.2d 250, 260, 136 P.2d 584; Waldteufel v. Sailor, 62 Cal.App.2d 577, 581, 144 P.2d 894. Moreover, the bank knew that Smethers had obtained from defendants the agreement to increase the subsequent payments to "put the loan in better shape." Defendants obviously would not have agreed to that increase had the bank at that time objected to the payments previously made to plaintiffs. By procuring their agreement Smethers confirmed his consent to these payments. The agreement as to future payments and the consent to payments made in the past are so closely related that the bank cannot at the same time retain the benefits of the former and deny that it ratified the latter. "A ratification can be made * * * by accepting or retaining the benefit of the act, with notice thereof." Civ.Code, § 2310; Phillips v. Sanger Lumber Co., 130 Cal. 431, 62 P. 749; Curtin v. Salmon River, etc., Co., 141 Cal. 308, 74 P. 851, 99 Am.St.Rep. 75; Gardner v. City of Glendale, 45 Cal.App. 641, 118 P. 307; Patterson v. Realty Holding Corp., 122 Cal.App. 402, 10 P.2d 174; Transmarine Corp. v. R. W. Kinney Co., 123 Cal.App. 411, 11 P.2d 877; see 1 Cal. Jur. 773.

In view of our decision that the bank ratified Smethers' approval of the fourteen payments to plaintiffs, it is unnecessary to consider other contentions made by defendants.

That part of the judgment appealed from is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.

26 Cal.2d 634

STEELDUCT CO. v. HENGER-SELTZER CO. et al.

L. A. 18994.

Supreme Court of California.

June 29, 1945.

1. Appeal and error 🔑639(2)

Where appellant attempted an appeal from certain orders and rulings, but no such orders or rulings appeared in the record, the attempted appeal was dismissed.

2. Appeal and error 🔑1099(3)

Where issue whether the sales agency contract between the parties was invalid because of want of mutuality was raised on first appeal, and question was necessarily determined adversely to defendant on the first appeal, such determination, although not express, became the law of the case.

3. Appeal and error 🔑1099(1)

A decision on a matter properly presented on a prior appeal becomes the law of the case even though it may not have been absolutely necessary to the determination of the question whether the judgment appealed from should be reversed.

4. Appeal and error 🔑1099(3)

Where the issue whether defendants were justified in breaching sales agency contract was raised on the first trial and determined adversely to defendants on first appeal, and defendants did not claim that evidence produced on second trial differed in any respect from the evidence adduced at the first trial, decision on former appeal became the law of the case.

5. Appeal and error 🔑1096(3)

Where the defense of mutual abandonment of sales agency contract sued upon was not pleaded in the answer to first complaint, and the opinion of the District Court of Appeal on prior appeal did not indicate that the defense was there urged, and the record of the first trial was not before the trial court on the second trial, or before the Supreme Court, decision on former appeal did not become the law of the case as respects such issue.

6. Appeal and error 🔑1096(3)

The doctrine of the "law of the case" does not extend to the facts or to points of law which might have been but were not presented and determined on a prior appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

7. Appeal and error 🔑1066
Principal and agent 🔑44

In principal's suit for breach of sales agency contract, where the evidence was insufficient to sustain defense that the contract was mutually abandoned, instructing jury that if they found that the parties had mutually relinquished their rights under the contract their verdict should be for defendant was prejudicial error.

8. Principal and agent 🔑44

If the agents under a sales agency contract intended to withdraw their repudiation of the contract it was incumbent upon them to so advise the principal instead of taking part in negotiations instituted by the principal for purpose of inducing agents to perform contract.

9. Contracts 🔑313(2)

Annexing an unwarranted condition to an offer of performance is a refusal to perform.

10. Principal and agent 🔑44

That agents, unknown to principal, continued to sell the principal's products out of stock on hand, after giving principal notice of termination of contract, was no indication that the repudiation of the contract had been withdrawn, in absence of any other conduct signifying any intention to market new stock or otherwise resume full performance of the contract.

11. Contracts 🔑256

Mutual assent to abandon a contract may be manifested by conduct of the parties.

12. Principal and agent 🔑44

That the principal urged agents to perform sales agency contract and sought to regain the business of a customer which had been lost did not prevent principal from treating agents' renunciation of the contract as a breach, or indicate the principal agreed to the condition which agents sought to impose with respect to continuing under the contract.

13. Contracts ⚷313(2)

Where a party to a contract insists that he is not under legal obligation to perform, and that insistence is coupled with a continuance of his original stand and refusal to perform, the breach is plain and he cannot successfully take refuge in the plea that he must be excused because the other party urges that the contract be carried out.

14. Appeal and error ⚷1176(1)

In principal's suit for breach of sales agency contract, where the verdict and judgment for defendant agents might have been based on the implied finding, unsupported by evidence, that the contract was mutually abandoned, but there was no verdict or necessarily implied finding that plaintiff suffered damage, the Supreme Court could not, on reversal, direct the trial court to enter judgment in plaintiff's favor for the amount of damage assertedly proved.

15. Appeal and error ⚷1122(1)

The power of an appellate court to make findings of fact contrary to, or in addition to, those made by the trial court exists only in cases where trial by jury is not a matter of right or has been waived. Code Civ.Proc. § 956a.

16. Principal and agent ⚷44

Principal suing for breach of sales agency contract cannot recover for loss which by reasonable means it could have avoided, and its subsequent appointment of another as its agent was in pursuance of this rule, often called the duty to mitigate damages. Civ.Code, §§ 1512, 3300, 3358.

17. Principal and agent ⚷44

In principal's suit for breach of sales agency contract, that defendant agents made sales of competitive merchandise in the territory did not furnish conclusive proof, which defendants were estopped to deny, that such sales could have been made for plaintiff to the same customers and in the same amounts, and defendants were not estopped to introduce evidence in mitigation of damages.

18. Damages ⚷163(4)

Where the promisor by his willful breach of contract has given rise to the difficulty of proving the amount of loss of profits, it is proper to require of the promisee only that he show the amount of damages with reasonable certainty and to resolve uncertainties against the promisor. Civ.Code, §§ 1512, 3300, 3358.

19. Damages ⚷176

Where promisor by his willful breach of contract has given rise to difficulty of proving the amount of loss of profits, promisee, in order to furnish a reasonable basis for estimating amount of such profits, may introduce evidence of past profits received by promisee under contract, or occasionally of profits in a similar enterprise, or of profits made by promisor in violation of contract, or of sales, made after breach of contract, on which, had they been made under the contract, the promisee would have received profits. Civ. Code, §§ 1512, 3300, 3358.

20. Damages ⚷190

Where the promisor has breached the contract, and because of such breach it cannot be determined whether the profits shown as a basis of estimation of damages would not have been gained by the promisee, reasonable basis of estimation constituting the best and most convincing evidence of damage of which the situation admits is properly accepted as sufficient proof of damages. Civ.Code, §§ 1512, 3300, 3358.

21. Principal and agent ⚷44

In determining amount of damages for agents' breach of sales agency contract, that agents made sales of substantially similar competing products in the territory covered by the contract with plaintiff and that some of those sales were to customers to whom they had formerly sold plaintiff's products was sufficient to show that the agents could have made the sales for plaintiff. Civ.Code, §§ 1512, 3300, 3358.

22. Damages ⚷6

The defendant who willfully breaches his contract cannot wholly escape on account of the difficulty which his own wrong has produced of devising a perfect measure of, or method of proving, damages. Civ.Code, §§ 1512, 3300, 3358.

23. Principal and agent ⚷44

In principal's suit for breach of sales agency contract, where plaintiff undertook to show that every sale defendants made for a competitor of plaintiff was a benefit which plaintiff would have received if defendants had not breached the contract, defendants could show that in fact there was no loss of benefits to plaintiff, or not that amount of loss, since a sale of competitor's products to a customer who would not have purchased plaintiff's products if solicited by defendants deprived plaintiff of no benefit. Civ.Code, §§ 1512, 3300, 3358.

24. Principal and agent ⚷44

Where the principal under sales agency contract has sole power to determine sale price, a showing, in principal's suit for breach of the contract, that plaintiff sold its substantially similar products at the list or usual price would support an inference that the sales could have been made by defendants at such price, but no presumption arises from such a showing, and it would be competent for defendants to attempt to overcome this prima facie showing by evidence that the purchasers would not have bought the products except at the low price at which defendants sold. Civ.Code, §§ 1512, 3300, 3358.

25. Principal and agent ⚷44

In principal's suit for breach of sales agency contract, if plaintiff introduced evidence of amount of defendants' sales for competitor in violation of the contract, to provide a reasonable basis for estimating amount of profits plaintiff would have received if defendants had performed, defendants might introduce evidence to show that plaintiff's product was less readily marketable than the competitor's, and that market conditions were such that sales of the product could be made only at the low prices at which the competitior's products were sold. Civ.Code, §§ 1512, 3300, 3358.

26. Principal and agent ⚷44

In principal's suit for breach of sales agency contract, that plaintiff offered no proof as to the results accomplished through new agent appointed by principal after defendants' breach was not a vital defect in plaintiff's proof of damages, since the burden of proof is on the party whose breach caused the damage to establish matters relied on to mitigate damages. Civ. Code, §§ 1512, 3300, 3358.

27. Principal and agent ⚷44

In principal's suit for breach of sales agency contract, evidence offered by defendant to show, in reduction of damages, the amount of profits made for plaintiff by new agent appointed by plaintiff was improperly rejected. Civ.Code, §§ 1512, 3300, 3358.

28. Principal and agent ⚷44

In principal's suit for breach of sales agency contract, evidence offered by defendants in mitigation of damages, as to profits made for plaintiff by its agent subsequently appointed was admissible under defendants' allegation that plaintiff had been adequately represented in the territory involved. Civ.Code, §§ 1512, 3300, 3358.

29. Principal and agent ⚷44

In principal's suit for breach of exclusive sales agency contract, profits gained by plaintiff through the efforts of another agent were not rendered unavailable in reduction of damages on theory that plaintiff had shown that such profits could have been gained by plaintiff even if defendants had performed their contract, since if defendants had performed plaintiff could not have received the benefits of another agent's services under the exclusive agency contract. Civ.Code, §§ 1512, 3300, 3358.

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In Bank.

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Action by the Steelduct Company against Henger-Seltzer Company for damages for breach of an agency contract, for an accounting and an injunction. From an adverse judgment with respect to the first two causes of action, and from orders and rulings, plaintiff appeals.

Judgment reversed and cause remanded, and attempted appeal from orders and rulings dismissed.

Prior opinion, 153 P.2d 195.

Evans, Pearce & Campbell and Daly B. Robnett, all of Los Angeles, for appellant.

Walter Lyon and Derthick, Cusack & Ganahl, all of Los Angeles, for respondents.

SCHAUER, Justice.

Plaintiff asks damages for breach by defendants of an exclusive sales agency contract under which defendants had been marketing plaintiff's products. From a judgment for defendants entered pursuant to jury verdict plaintiff appeals, contending, among other things, that the court erred to its prejudice in certain instructions given the jury. We have concluded that such contention must be sustained and the judgment reversed.

In order that the application and effect of the instructions complained of may be more readily comprehended it is expedient, before quoting them, to relate some history of this litigation and portray the relative situations of the parties. Plaintiff The Steelduct Company is an Ohio corporation which produces steel conduit. Defendants are the Henger-Seltzer Company, a partnership (successor to Henger-Seltzer Company, a California corporation), and the partners Henger and Seltzer. On September 1, 1928, the corporate Henger-Seltzer Company entered into an agreement with plaintiff whereby Henger-Seltzer was appointed exclusive agent to sell plaintiff's products in California. The agreement provided, among other things, that "either party to this contract may terminate the same upon ten (10) days written notice of its intention so to do to the other party." On May 31, 1938, at defendants' request the agreement was amended to appoint defendants exclusive agents for the term of five years thereafter. In February, 1939, defendant Seltzer went to Pittsburgh and there, according to his testimony, "discussed a possible contract" with representatives of Central Tube Company, a competitor of plaintiff. On March 10, 1939, defendants wrote to plaintiff "that we are terminating our agreement with the Steelduct Company on conduit and that we are making other arrangements. We would very greatly appreciate your giving us your disposition on the stocks we have immediately." On March 16, 1939 (the day after plaintiff received this notice), plaintiff telegraphed defendants, "Cannot accept cancellation and expect you to maintain contract." Mr. Collier, president of plaintiff, came to California from Ohio during the week of March 20 and unsuccessfully attempted to persuade defendants to continue their representation of plaintiff. A contract by which defendants were appointed exclusive agents of Central Tube Company for the California territory was executed under date of March 20, 1939. Defendant Seltzer testified that such contract was signed by him on April 1, 1939. On about April 17, 1939, plaintiff notified defendants that it had appointed Tri-State Supply Company its representative in the California territory.

[1] Thereafter plaintiff instituted this action seeking an injunction, an accounting, and damages for breach of contract. The trial court, sitting without a jury, interpreted the contract as permitting cancellation by defendants on ten days' written notice, found that the contract had been so terminated, and rendered judgment for defendants. On appeal the District Court of Appeal (Steelduct Co. v. Henger-Seltzer Co. (1942), 50 Cal.App.2d 475, 123 P.2d 100, 101, hearing denied) reversed the judgment and held that by the 1938 amendment of the contract "the provision for cancellation * * * was impliedly eliminated."

Upon the going down of the remittitur plaintiff filed its amended complaint seeking damages, an injunction, and an accounting of the amount and value of all products sold by defendants for Central during the term of defendants' contract with plaintiff. The case was tried before a jury and pursuant to their verdict judgment was entered for defendants on July 1, 1943. Plaintiff's motion for a new trial was denied on September 17, 1943. Plaintiff appeals "from that certain judgment and orders * * * entered * * * on the 20th day of July, 1943, in favor of defendants * * * and * * * from the orders and rulings * * * entered on or about the 20th day of July, 1943." No order or ruling of July 20, 1943, appears in the record or is referred to in the briefs. The attempted appeal from such "orders and rulings" is therefore dismissed. We shall treat the appeal as one from the judgment entered on July 1, 1943.

Plaintiff no longer urges its claim for injunctive relief because, as stated by plaintiff's counsel at the opening of the second trial, "This is a moot question. The five years [the term of the contract] has run." Plaintiff's demand for an "accounting" was satisfied by defendants' production of invoices showing sales made by defendants for Central during the term of the Steelduct Company contract. The action, therefore, was tried and comes before us as one for damages for breach of contract only.

Among the pertinent admissions, denials, and averments of defendants' answer to the amended complaint are the following: Defendants admit the execution of the agreements of September 1, 1928, and May 21, 1938; they "admit that on the 20th day of March, 1939, they gave the plaintiff written notice of termination of their said agency contract, but therafter defendants did continue to represent the plaintiff and use their best efforts so to represent the plaintiff until on or about the 17th day of April, 1939, when plaintiff advised the defendants that it had appointed Tri-State Supply Corporation as its representative in the territory involved, and thereafter defendants commenced to act as agents for the Central Tube Company * * * and sold its products [which, defendants admit, are "of a like nature and kind" to plaintiff's products] to many, but not all, of the electrical wholesalers to whom it had previously sold the products of plaintiff"; defendants deny that they breached the contract; they raise the general issue as to the fact and amount of plaintiff's damage. Interspersed among the denials are averments which set up the defense that the sales agency contract was invalid because plaintiff's obligation thereunder was illusory and averments which raise the issue of whether and in what amount plaintiff minimized its damages by appointing Tri-State as its agent in the territory. Set up as separate affirmative defenses are averments that the contract was abandoned by mutual agreement of the parties and that defendants were justified in sending their notice of termination because plaintiff had previously breached the agreement.

Plaintiff contends that it is the law of the case, established on the prior appeal, that the following defenses cannot be sustained: that the contract was invalid; that because of plaintiff's asserted prior breach defendants were justified in sending their notice of termination; that the contract was mutually abandoned. Defendants urge that only the issue as to the ten-day cancellation clause was determined on the prior appeal; that "the reversal of the decision of the trial court by the District Court of Appeal threw open all other questions involved in the case."

Defendants on this appeal have not stressed their contention that the reversal of the first judgment threw open the questions of the validity of the contract and the plaintiff's asserted breach thereof. For the reasons hereinafter discussed we agree with plaintiff that the doctrine of the law of the case applies to these two defenses.

[2] The question whether the sales agency contract was invalid because of want of mutuality of obligation thereunder was raised on the first trial.[1] If "the decision relate to a matter which cannot be thus presented under a different aspect—as the construction of a contract * * * —the first decision of the appellate court is conclusive upon the second trial and second appeal * * *." (Leese v. Clark (1862), 20 Cal. 387, 418; Cole v. Merchants' Trust Co. (1921), 54 Cal.App. 392, 397, 202 P. 488.) The question was necessarily determined adversely to defendants on the first appeal. Therefore, such determination, although not express, became the law of the case. (Eversdon v. Mayhew (1890), 85 Cal. 1, 7, 8, 21 P. 431, 24 P. 382; Davis v. Edmonds (1933), 218 Cal. 355, 359, 23 P.2d 289; Coats v. General Motors Corp (1938), 11 Cal.2d 601, 607, 81 P. 2d 906.) The trial court on the second trial properly ruled, "I don't see how I can give you any relief on the mutuality," and instructed the jury "that the defendants herein are precluded by the law of the case now to attack the validity of the contract."

[3, 4] The issue of whether plaintiff first breached the contract, so that defendants were justified in sending their notice of March 10, was also raised on the first trial.[2] The District Court of Appeal said (page 477 of 50 Cal.App.2d, page 101 of

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[1] Defendants by their answer to the original complaint (upon which the first trial was had) "deny that any valid or enforcible contract of agency * * * was ever entered into between plaintiff and defendants, in this, that any and all purported agreements between plaintiff and defendants failed to bind the plaintiff to furnish any of its products to defendants except such as the plaintiff might elect, wish or desire to furnish." Defendants by their answer to the amended complaint (upon which the second trial was had) "deny that * * * Henger-Seltzer Co. was granted an exclusive agency to sell plaintiff's products in said territory, and in this connection * * * allege that the only products which they were accorded the right to sell were such as the plaintiff wished or desired to sell in said territory."

[2] The contract provided that plaintiff "shall have full and complete determining power as to both the list and net sales prices to be charged by the said Principal through its said Agents."

The answer to the original complaint alleged that plaintiff in November or December, 1938, breached an implied covenant

123 P.2d) that defendants' "contention that they had just cause for cancellation is plainly an afterthought. Such cause, if any, was not made the basis for cancellation. Moreover, the evidence does not sustain the contention and there is no finding on it." A decision on a matter properly presented on a prior appeal becomes the law of the case even though it may not have been absolutely necessary to the determination of the question whether the judgment appealed from should be reversed. (Westerfeld v. New York Life Ins. Co. (1910), 157 Cal. 339, 345, 107 P. 699; People's Lumber Co. v. Gillard (1907), 5 Cal.App. 435, 437–439, 90 P. 556.) Defendants do not claim that they could have introduced evidence on this issue differing in any respect from the evidence adduced at the first trial. Therefore, the ruling of the District Court of Appeal that the evidence was legally insufficient to sustain such contention of defendants, has become the law of the case. (In re Estate of Baird (1924), 193 Cal. 225, 234, 236, 223 P. 974; Coats v. General Motors Corp. (1938), supra, 11 Cal.2d 601, 606, 81 P.2d 906; Clayton v. Schultz (1941), 18 Cal.2d 328, 332, 333, 115 P.2d 446.)

[5, 6] The answer to the amended complaint alleges as an affirmative defense that any agreement between the parties "was mutually abandoned by plaintiff and defendants on or about the 17th day of April, 1939, by means of plaintiff's appointment of Tri-State Supply Corporation as its exclusive agent in said territory, and by defendants' consent thereto." Plaintiff's argument that defendants are precluded by the law of the case from maintaining this defense is based only on the assertions of plaintiff's counsel. The defense was not pleaded in the answer to the first complaint. The opinion of the District Court of Appeal on the prior appeal does not indicate that the defense was there urged. During the second trial plaintiff's counsel stated that the matters relied on by defendants to show mutual abandonment were in evidence at the first trial; defendant's counsel stated that they were not. Plaintiff's counsel refused to bring in the record of the first trial; therefore, there was nothing before the trial court and there is nothing before us to show that such matters were in evidence on the first trial or that the defense was previously urged. The doctrine of the law of the case (in this state) does not extend to the facts or to points of law which might have been but were not presented and determined on a prior appeal. (Moore v. Trott (1912), 162 Cal. 268, 273, 122 P. 462, and cases there cited; Cowell v. Snyder (1915), 171 Cal. 291, 298, 165 P. 920; Central Nat. Bank v. Peck (1936), 15 Cal.App.2d 512, 514, 59 P.2d 599.) Therefore, the doctrine can have no application to the issue of mutual abandonment.

[7] Upon such issue of mutual abandonment the court instructed the jury, apparently of its own motion, that "if you find from the evidence in this action that the plaintiff and the defendants mutually relinquished and surrendered their rights and obligations under the contract existing between them, then your verdict should be for the defendants" and that "if you find from the evidence that the plaintiff and defendants abandoned the contract existing between them on or about the 17 day of April, 1939, by mutual consent or by mutual agreement, then the defendants were free thereafter to serve a competitor of the

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to fill orders obtained by defendants "at the prevailing prices in the territory involved."

The answer to the amended complaint alleged that plaintiff "breached and revoked" any agreement between the parties in November and December, 1938, and January and February, 1939, by refusing "to permit its products to be sold in the territory in competition with products of like character and quality" and by allowing greater discounts to some purchasers in the territory than to others. Defendants' counsel at the second trial took the position that "the contract contained an implied provision that the seller would meet competition in the territory." The trial court ruled, "You go ahead and prove your abandonment and leave all this failure to meet competition out."

The evidence introduced at the first trial is not before us. However, from the allegations of the respective answers and from evidence introduced and offers of proof made by defendants at the second trial it is apparent that the same conduct of plaintiff comprised (according to the answer to the original complaint) a breach in November or December, 1938, of an asserted implied covenant to fill orders at prevailing prices and (according to the answer to the amended complaint) a breach in November and December, 1938, and January and February, 1939, of an asserted implied covenant to meet competitive prices.

plaintiff." Plaintiff contends, in effect, that the evidence, as a matter of law, is insufficient to show mutual abandonment and hence that it was prejudicial error to give the above-quoted instructions. With this contention we agree for the reasons hereinafter set forth.

Defendants rely upon the following evidence to show mutual abandonment: Defendant Seltzer testified that "Following the 10th day of March, 1939, and the 1st day of April of 1939 * * * [defendants] continued to sell Steelduct and conduct business in the same general way as we had before"; that after defendants gave their notice of March 10, they sent in no more orders to plaintiff but continued to sell plaintiff's products out of stock on hand until about the 17th or 19th of April when, at plaintiff's direction, defendants turned over to Tri-State the Steelduct stock. (It will be remembered that defendant Seltzer in February commenced the negotiations with plaintiff's competitor Central which culminated in the execution by Seltzer on April 1, of defendants' exclusive agency contract with Central bearing date of March 20. Seltzer further testified that prior to April 7, and "evidently" prior to April 6, defendants had placed an order with Central.)

Stultz, a customer of plaintiff and defendants since 1930, testified that "in the first part of 1939, March or April, 1939," he withdrew his patronage. According to an offer of proof by defendants on the issue of plaintiff's asserted breach of contract (to which plaintiff's objection was sustained), Stultz' dissatisfaction began in or after November, 1938, and was due to plaintiff's failure to meet competitive prices. The loss of Stultz' patronage contributed to defendants' refusal to continue to represent plaintiff. On about March 27, there was a conference among plaintiff's president Collier, Stultz, and Seltzer. Seltzer testified that "I asked Mr. Stultz in the presence of Mr. Collier, if he had told Mr. Collier that if I would go along, that he would also. He * * * said he would not. * * * It was not a very satisfactory meeting. * * * I told Mr. Collier, after hearing the statement of Mr. Stultz, that I couldn't see any use in our continuing under the circumstances"; that Collier replied that "he couldn't see that we were going to get very far either under the circumstances." Thereafter plaintiff, on about April 17, appointed Tri-State its exclusive agent in the territory.

Defendants further sought to show mutual abandonment by a conversation between Collier and defendant Seltzer on March 24. From their offer of proof and from testimony of Seltzer pursuant thereto which was stricken on plaintiff's motion, it is apparent that nothing in this conversation supports defendants' position. Such testimony was that Seltzer reiterated defendants' refusal to perform the contract; that Collier said he would try to regain Stultz' business; and that Seltzer "told him [Collier] *if* he could do that we would *probably* continue." (Italics added.)

The evidence plainly fails to show the mutual abandonment alleged by defendants; i. e., "on or about the 17th day of April, 1939 [at a time when defendants were representing a competitor of plaintiff], by means of plaintiff's appointment of Tri-State Supply Corporation as its exclusive agent * * * and by defendants' consent thereto." But defendants now assert that before plaintiff elected to treat defendants' notice of repudiation as a breach defendants impliedly retracted it by their conduct "in continuing to represent the appellant and in negotiating with appellant's president when he came to California," and that "the things the parties said at the meeting [on March 27] amounted to acquiescence in an abandonment of their contract and the things they did after the meeting, completed and carried into effect their agreement to abandon."

[8-10] If defendants intended to withdraw their repudiation it was incumbent upon them so to advise plaintiff. (Hulen v. Stuart (1923), 191 Cal. 562, 571, 217 P. 750; Ross v. Tabor (1921), 53 Cal.App. 605, 610, 611, 200 P. 971.) This they did not do. Instead, they took part in "negotiations" instituted by Collier, plaintiff's president, for the purpose of inducing them to perform their contract. The only "negotiations" shown by the evidence were those of March 27, when defendants reiterated their refusal to perform. Defendants' offers of proof as to the conversation of March 24 indicate at the most that they offered to withdraw their repudiation on a condition which they had no right to impose: the restoration of Stultz' patronage. (Cf. Alderson v. Houston (1908), 154 Cal. 1, 14, 96 P. 884. Annexing an unwarranted condition to an offer of perform-

ance is a refusal to perform. (Loop Building Co. v. DeCoo (1929), 97 Cal.App. 354, 364, 275 P. 881.) Furthermore, the fact that the meeting of March 27 was arranged by Collier in an effort to induce defendants to perform indicates that they had not prior thereto retracted their notice of March 10. The fact that defendants continued to sell plaintiff's products out of stock on hand is in itself of no significance, since it is not shown that this was known to plaintiff or that it signified, or was accompanied by, any intention to market new stock or otherwise resume full performance of the contract.

[11] Mutual assent to abandon a contract may be manifested by conduct of the parties. (Treadwell v. Nickel (1924), 194 Cal. 243, 259, 228 P. 25; Tuso v. Green (1924), 194 Cal. 574, 582, 229 P. 327; Lohn v. Fletcher Oil Co., Inc. (1940), 38 Cal. App.2d 26, 30, 100 P.2d 505.) And if there is any material and competent evidence from which it can be inferred that plaintiff manifested such assent, it was proper to give the questioned instructions and the verdict must be sustained insofar as that issue is concerned. But it does not appear that the above summarized evidence, under any reasonable view, can give rise to such inference.

[12, 13] The facts that plaintiff's president urged defendants to perform the contract and sought to regain Stultz' business do not prevent plaintiff from treating defendants' renunciation as a breach or indicate that plaintiff agreed to the condition which defendants sought to impose. (Cf. Alderson v. Houston (1908), supra, page 7 of 154 Cal., page 886 of 96 P.) "Where a party to a contract insists that he is not under legal obligation to perform the contract, and that insistence is coupled with a continuance of his original stand and refusal to perform, the breach is plain, and he cannot successfully take refuge in the plea that he must be excused because the other party urges that the contract be carried out * * *." (Tri-Bullion Smelting & Development Co. v. Jacobsen (2 Cir., 1916), 233 F. 646, 649, 147 C.C.A. 454; see United Press Ass'n v. National Newspaper Ass'n (8 Cir., 1916), 237 F. 547, 150 C.C.A. 429.)

The evidence which seems most nearly to admit of an inference that plaintiff consented to abandonment of the contract is that (according to the testimony of Seltzer, which must be accepted as true in every reasonable implication favorable to defendants) Collier, in reply to Seltzer's statement "that I couldn't see any use in our continuing under the circumstances," said that "he couldn't see that we were going to get very far either under the circumstances." The jury, however, had no right to detach this single statement from its context. It was made at a time when defendants had announced and reiterated their refusal to perform their contract obligations. Only by disregarding uncontradicted evidence and indulging in definitely strained construction can it be taken to refer to anything more than the plaintiff's efforts to induce defendants to perform their contract obligations. The application of the rule which requires us to indulge every reasonable construction of evidence in favor of supporting a verdict stops on the word reasonable. The verdict here cannot be sustained on the theory of mutual abandonment and since, under the instructions given, that may well have been the theory on which the jury did arrive at its verdict the judgment must be reversed.

[14, 15] Plaintiff-appellant asserts that "By reason of the fact that there is no dispute in this case on the right of appellant to recover judgment against respondents, and no valid or legal defense was established against such right and by reason of the fact that there is absolutely no conflict in the evidence as to the amount of damage suffered by appellant," this court should direct the court below to enter judgment in plaintiff's favor for the amount of damage assertedly proved. We have no power so to do upon the case shown here, for, although the verdict and judgment may be based on the implied finding of the jury (unsupported by the evidence) that the contract was mutually abandoned, there is no verdict or necessarily implied finding that the plaintiff suffered damage. The power of an appellate court to "make findings of fact contrary to, or in addition to, those made by the trial court" exists only in "cases where trial by jury is not a matter of right or where trial by jury has been waived." (Code Civ.Proc. § 956a; Tupman v. Haberkern (1929), 208 Cal. 256, 268, 280 P. 970; Kings County Packing Co. v. Sunland Sales, etc., Ass'n (1929), 100 Cal.App. 126, 134, 279 P. 1036.) Here the trial was by jury as a matter of right. (Code Civ.Proc. § 592.) Moreover, as hereinafter discussed, the asserted lack

of conflict in the evidence as to the amount of damage is due to the trial court's erroneous refusal to admit certain evidence.

Since the judgment must be reversed and, inferentially, a new trial had, we note in some detail untenable contentions advanced by each party in connection with the matter of damages.

[16] The measure of damages for defendants' breach of contract is the amount which will compensate plaintiff "for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." (Civ. Code, § 3300.) Plaintiff is entitled to all the benefits which it would have obtained if the contract had been performed by both parties (Civ.Code, § 1512) but not to more than it would have received by such performance (Civ.Code, § 3358). Plaintiff cannot recover for loss which by reasonable means it could have avoided (Alaska Salmon Co. v. Standard Box Co. (1910), 158 Cal. 567, 572, 112 P. 454; Ash v. Soo Sing Lung (1918), 177 Cal. 356, 361, 170 P. 843; Vitagraph, Inc., v. Liberty Theatres Co. (1925), 197 Cal. 694, 697, 242 P. 709), and plaintiff's appointment of Tri-State as its agent was in pursuance of this rule, often called the duty to mitigate damages.

So far as appears from the record before us, examined in the light of the above-stated rules, the elements of plaintiff's damages are two: the reasonably necessary expense to which plaintiff was put in procuring a new agent, and the loss of profits (if any profits were lost) caused by defendants' breach. Plaintiff alleged that it necessarily incurred certain expenses in connection with the appointment of its new agent but offered no evidence as to this element of damages. As to the second element of damages—loss of profits—plaintiff alleged that all sales made by defendants for Central "could have, and except for said breach and violation of said contract by said defendants would have, been business and patronage of plaintiff, and that such customers and purchasers would have purchased such products in the same amount, and that plaintiff could have, and would have, made a profit thereon * * * which has been lost to plaintiff, to its damage, solely by reason of said violation of said contract by defendants."

[17] It is plaintiff's theory (adopted by the trial court in certain rulings on the evidence and instructions to the jury) that the fact that defendants made sales of competitive merchandise in the territory furnishes conclusive proof, which defendants are estopped to deny, that such sales could have been made for plaintiff to the same customers and in the same amounts, and, further, that mitigation of damages "is no element of this case" and defendants are estopped to introduce evidence thereof. This theory ignores the fundamental rules as to damages for breach of contract which are stated above.

In support of its theory, plaintiff relies upon certain language in Schiffman v. Peerless Motor Car Co. (1910), 13 Cal. App. 600, 110 P. 460, and in Hacker, etc., Co. v. Chapman V. Mfg. Co. (1936), 17 Cal.App.2d 265, 61 P.2d 944. In each of those cases *defendant principal*, in violation of an exclusive sales agency contract, sold its products in the territory reserved to *plaintiff agent*. In the Schiffman case it was held that evidence that defendant principal made such sales in violation of contract was sufficient to support a finding that plaintiff suffered damages. The court said (page 604 of 13 Cal.App., page 462 of 110 P.), "We are not informed by counsel for either party upon what theory the balance of $3,995, for which judgment was given, was reached." In the Hacker case the amount for which judgment was given "was arrived at by applying the percentage of profit which plaintiff had realized upon its own sales during the life of the contract to the total amount of sales made by defendant in alleged violation of the agreement, the theory of the court resting upon the assumption that plaintiff would have made the sales in the usual course of its business, and at its usual profit, had it been allowed to do so. The basis adopted by the court for computing the damages was a correct one if the assumption was justified by the evidence" (page 267 of 17 Cal. App.2d, page 945 of 61 P.2d). The opinion discloses that the sales made by defendants in violation of contract were at such low prices that plaintiff could have made no profit thereon, and continues: "Defendants were allowed to prove the conditions under which their sales were made in an effort to show that plaintiff could not have obtained higher prices. The court found, however, that plaintiff could have made such sales and defendants do not question this finding except by their assertion that plaintiff would have had to sell at the same prices which they received." (Pages 270, 271 of 17 Cal.App.2d, page 947 of 61 P.2d.) The District Court of Appeal held that the evidence was sufficient to support the attacked finding.

In the Schiffman case the court further stated (page 604 of 13 Cal.App., page 462 of 110 P.) that defendant principal was estopped "to deny that plaintiff would have made sale of these machines but for its violation of the contract." And in the Hacker case the court stated (page 271 of 17 Cal.App.2d, page 948 of 61 P.2d) that "Any uncertainty as to the amount of profit that plaintiff might have made upon the sales results solely from the arbitrary prices fixed by defendants upon the goods which they sold secretly. Defendants, having taken the matter into their own hands, and having refused plaintiff an opportunity to make the sales or assist in making them, cannot be heard to say that the arbitrary prices which they fixed were the highest that could have been obtained. They cannot profit by their own wrong."

From the last-quoted statements plaintiff, in effect although not in terms, draws the proposition that defendants here (who were agents, not principals), because they breached their contract, estopped themselves to introduce competent evidence on the issue of damages. We do not believe that the factual bases of those cases afford true parallels or that the language used is susceptible of such meaning.

[18-20] The courts have often noted the difficulty of proving the amount of loss of profits. Where the promisor by his wilful breach of contract has given rise to this difficulty it is proper to require of the promisee only that he show the amount of damages with "reasonable certainty" and to resolve uncertainties against the promisor. (Schumann v. Karrer (1920), 184 Cal. 50, 57, 192 P. 849, and cases there cited and quoted from; Hollywood Cleaning & P. Co. v. Hollywood L. Service (1932), 217 Cal. 131, 134, 17 P.2d 712; Erskine v. Marchant (1918), 37 Cal.App. 590, 593, 174 P. 74). So the promisee, in order to furnish a reasonable basis for estimating the amount of such profits, may introduce evidence of past profits received by the promisee under the contract (Hollywood Cleaning & P. Co. v. Hollywood L. Service, supra; Caspary v. Moore (1937), 21 Cal.App. 2d 694, 699, 70 P.2d 224) or, occasionally, of profits in a similar enterprise (Sanford v. East Riverside I. Dist. (1894), 101 Cal. 275, 280, 35 P. 865) or of profits made by the promisor in violation of the contract (Gregory v. Spieker (1895), 110 Cal. 150, 155, 42 P. 576, 52 Am.St.Rep. 70) or of sales, made after breach of contract, on which, had they been made under the contract, the promisee would have received a profit. (Schiffman v. Peerless Motor Car Co. (1910), supra, 13 Cal.App. 600, 110 P. 460; Erskine v. Marchant, supra; Hacker, etc., Co. v. Chapman V. Mfg. Co. (1936), supra, 17 Cal.App.2d 265, 267, 61 P.2d 944.) In the last-mentioned situation it may be that the profits shown as a basis of estimation would not have been gained by the promisee; that is a matter which, because of the promisor's breach, cannot be determined. In such a case the reasonable basis of estimation constituting the best and most convincing evidence of damages of which the situation admits is properly accepted as sufficient proof of damages. (Friedman v. McKay Leather Co. (1919), 179 Cal. 566, 570, 178 P. 139.)

Plaintiff introduced evidence (invoices and commission sheets of defendants) of the total amount of sales made by defendants from the time of their appointment as Central's agents until the expiration of the term of defendants' contract with plaintiff. Plaintiff's president, Collier, computed and testified to the amount of profit plaintiff assertedly would have received if all such sales (except certain sales made at unusually low prices, hereinafter discussed) had been made for plaintiff at the prices shown on the defendants' records. Defendants admitted that the products of plaintiff and of Central were "of a like nature and kind." Seltzer testified that for a time during the period in question there was a "tremendous demand" for such products. Collier testified that plaintiff could have furnished all the material sold by defendants for Central in addition to the material which was sold by plaintiff's new agent, Tri-State. At the time of defendants' breach and prior thereto there were about 15 sellers of steel conduit (including the plaintiff) in the territory; these sellers competed for the business of some 30 or 40 customers.

Plaintiff, it will be remembered, was not seeking to furnish a basis for estimation of profits which it would have received if defendants had performed their contract. It was not seeking to show that if defendants had devoted their diligent efforts to selling plaintiff's products as they had agreed to do, they could have made sales in the same amount even though not to the same customers. Plaintiff alleged, sought to prove, and now argues that it did prove, that every sale which defendants made for Central would have been made for plaintiff if defendants had performed their contract.

[21, 22] The facts that defendants (as they admitted) made sales of substantially similar competing products in the territory covered by their contract with plaintiff and that (as defendants admitted) some of those sales were to customers to whom they had formerly sold plaintiff's products, in the light of the other evidence above summarized, are sufficient to show that defendants could have made the sales for plaintiff. As above indicated, the defendant who wilfully breaches his contract "cannot wholly escape on account of the difficulty which his own wrong has produced of devising a perfect measure of," or method of proving, damages. (Schumann v. Karrer (1920), supra, 184 Cal. 50, 57, 192 P. 849, 853, and cases there cited.)

[23] But "defendants deny that any of the merchandise which it has sold for the manufacturers now represented by it, could have been sold for the plaintiff." This denial raised a simple issue of fact. Plaintiff undertook to show that every sale defendants made for Central was a benefit which plaintiff would have received if defendants had not breached their contract. It was competent for defendants to show that in fact there was no loss, or not that amount of loss, of benefits to plaintiff. A sale of Central tubing to a customer who would not have purchased plaintiff's tubing if solicited by defendants deprived plaintiff of no benefit. (Cf. Continental Car-Na-Var Corp. v. Moseley (1944), 24 Cal. 2d 104, 113, 148 P.2d 9.)

[24] Certain sales made by defendants for Central were at such low prices that plaintiff would have made no profit thereon. Plaintiff's president computed and testified to the amount of profit plaintiff assertedly would have received on such sales, had they been made for plaintiff at "the selling price that we had in effect at that time." Although defendants do not attack the sufficiency of the evidence in this regard, plaintiff failed to show that sales of its substantially similar competing merchandise were made at the price adopted by plaintiff's president as the basis of his computation. Plaintiff during the course of its argument also asserts that the fact that defendants made sales of competitive merchandise furnishes *sufficient* proof that those sales could have been made for plaintiff at "list prices," and that *the law will presume* that the sales could have been made at "the usual price"; however, plaintiff introduced no evidence as to what was the usual price or the list price at the time of the sales in question, and no evidence that plaintiff (through its agent Tri-State) at such time was able to make sales at "list" or "usual" price or at all. A showing that plaintiff sold its substantially similar products at "the selling price" or at list or usual price, in the light of the other evidence above recited and since plaintiff under the contract with Henger-Seltzer had full power to determine its sales price, would support an inference that the sales could have been made by defendants at such price. But no presumption arises from such a showing and it would be competent for defendants to attempt to overcome this prima facie showing by evidence that the purchasers would not have bought conduit except at the low price at which defendants sold.

[25] Plaintiff, as above suggested, might have introduced the evidence of the amount of defendants' sales for Central in violation of the contract to provide a reasonable basis for estimating the amount of profit plaintiff would have received if defendants had performed, rather than undertaking the more difficult showing that every sale made for Central could have been made for plaintiff. If plaintiff chose the former mode of showing loss of profits, defendants might introduce evidence to show that plaintiff's basis of estimation was inaccurate: e. g., that plaintiff's product was less readily marketable than Central's and that market conditions were such that sales of conduit could be made only at the low prices at which Cenetral's products were sold. (Cf. Wiley v. California Hosiery Co. (1893), 3 Cal.Unrep. 814, 823, 32 P. 522; Hacker, etc., Co. v. Chapman V. Mfg. Co. (1936), supra, 17 Cal.App.2d 265, 270, 61 P.2d 944.)

We make the above observations, not because defendants have argued persuasively that they have been harmed because the case was tried on the theory that they were "estopped" to introduce evidence of the types suggested, but because such theory is so greatly at variance with the code law of this state as to damages.

[26] Defendants assert that plaintiff "offered no proof as to the results accom-

plished through the new agent so there is a vital defect" in plaintiff's proof of damages. In this defendants are mistaken. The burden of proof is on the party whose breach caused damage, to establish matters relied on to mitigate damage. (Utter v. Chapman (1872), 43 Cal. 279, 284; Hancock v. Board of Education (1903), 140 Cal. 554, 562, 74 P. 44; Vitagraph, Inc., v. Liberty Theatres Co. (1925), supra, 197 Cal. 694, 699, 242 P. 709; Cope v. Sutter County (1929), 206 Cal. 445, 455, 274 P. 750; Andersen v. La Rinconada Country Club (1935), 4 Cal.App.2d 197, 201, 40 P. 2d 571; De La Falaise v. Gaumont-British Picture Corp. (1940), 39 Cal.App.2d 461, 469, 103 P.2d 447; cf. Marconi W. T. Co. v. North P. S. S. Co. (1918), 36 Cal.App. 653, 655, 656, 173 P. 103.)

It was said in Spitzer v. Pathe Exchange, Inc. (1933), 132 Cal.App. 612, 619, 23 P.2d 308, 310, that "If by reason of any peculiar circumstances it was impossible by reason of the nature of the commodity or the nature of the market for the plaintiffs to have obtained another sales agency, the plaintiffs should have pleaded and proved the facts. The burden was on them." This statement has no application to the present case. It proceeds on the assumption that another equally efficient agent can be obtained. (See 5 Williston, Contracts, § 1362A, p. 3823.) There is no basis for such an assumption in this case. Plaintiff alleged in its amended complaint that defendants had represented it for more than ten years and had built up and maintained friendly personal contacts with customers during that period. The repudiation by defendants of their agreement to represent plaintiff and the breach of their covenant not to sell competing merchandise might well be expected, in the ordinary course of things, to have an injurious effect on the volume of plaintiff's business; even if (as was the case) plaintiff was able to procure a new sales agent without great delay, it is reasonable to suppose that such agent's efforts might be less profitable than the efforts of defendants.

[27] Despite their argument that plaintiff should have proved that it minimized its damages, defendants at the trial offered to show, in reduction of damages, the amount of profits made by Tri-State for plaintiff. This evidence was improperly rejected. Defendants assert that such evidence would have shown that plaintiff's profits were greater during the years when it was represented by Tri-State than during the years when it was represented by defendants, and so would tend to show that defendants' breach did not cause any loss of profits to plaintiff.

The unsoundness of plaintiff's contention that this evidence was properly rejected because, as stated by plaintiff's counsel, defendants "are estopped to set up or offer such proof," has been shown.

[28] Plaintiff further contends that this evidence as to mitigation of damages was properly excluded because defendants did not plead the facts on which they sought to rely. It was said in Vitagraph, Inc., v. Liberty Theatres Co. (1925), supra, 197 Cal. 694, 699, 700, 242 P. 709, 712, that "It is generally held to be the duty of the defendant to plead the facts in mitigation of damages if he would rely thereon." (See, also, Ramsay v. Rodgers (1923), 60 Cal. App. 781, 785, 214 P. 261.) This contention of plaintiff (which defendants do not attempt to answer directly) is without merit. The evidence was admissible under defendants' allegation "that the plaintiff has been adequately represented in the whole of said territory since the 19th day of April, 1939, and that the sales of said agent so appointed have supplied the demand for plaintiff's product in said territory."

[29] Plaintiff next asserts that the profits gained by plaintiff through the efforts of Tri-State are not available in reduction of damages because plaintiff has shown that such profits could have been gained by plaintiff even if defendants had performed their contract. (See Nuckolls v. College of Physicians (1907), 7 Cal.App. 233, 236, 94 P. 81; Wendt v. Smith (1920), 50 Cal.App. 233, 237, 238, 194 P. 736.) Plaintiff refers to no evidence, and we find none in the record, which tends to show that defendants, if they had performed their contract, could have made sales for plaintiff in an amount equal to all sales made by them for Central and all sales made by Tri-State for plaintiff. The proposition on which plaintiff relies plainly can have no application here. The contract which defendants breached was an exclusive agency contract; plaintiff could not have received the benefit of another agent's services if defendants had performed.

Other asserted errors in instructions complained of need not occur on a new trial and hence are not here discussed.

The attempted appeal from "the orders and rulings * * * entered on or about the 20th day of July, 1943," is dismissed. The judgment is reversed and the cause is remanded for a new trial.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concurred.

EDMONDS, Justice.

I concur in the judgment upon the ground that the instruction to the jury upon the issue of the abandonment of the contract was prejudicially erroneous. That determination is decisive of the appeal.

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26 Cal.2d 716

STEEN v. BOARD OF CIVIL SERVICE COM'RS et al.

L. A. 19276.

Supreme Court of California.

June 29, 1945.

Rehearing Denied in Bank July 26, 1945.

1. Municipal corporations 🔑218(11)

Under Los Angeles charter provisions that removal, discharge or suspension of employee shall take effect upon filing of statement of cause for discharge and that demand for reinstatement must be presented in writing within 90 days after discharge, demand for reinstatement must be filed within 90 days after order of Board of Civil Service Commissioners sustaining the discharge. St.1925, p. 1067, § 112(a); St.1937, p. 2858, § 112½.

2. Municipal corporations 🔑218(8)

The Los Angeles charter provision that removal, discharge or suspension of employee shall take effect upon filing of statement of grounds for discharge does not imply finality to the filing of such notice but means that employee shall be required to cease working and that department need not accept his services pending ultimate disposition of the matter. St.1925, p. 1067, § 112(a); St.1937, p. 2858, § 112½.

3. Municipal corporations 🔑218(11)

If discharged employee of Los Angeles fails to pursue remedies afforded by charter, court will not listen to his plea for reinstatement, since he has not exhausted his administrative remedies. St.1925, p. 1067, § 112(a); St.1937, p. 2858, § 112½.

4. Action 🔑11

Generally a demand is not a prerequisite where it would be futile or an idle gesture.

5. Officers 🔑11

The purpose of civil service is to abolish the spoils system and to increase efficiency of the service by assuring employees of continuance in office regardless of what party may then be in power.

6. Statutes 🔑184

In ascertaining legislative intent, purpose sought to be achieved by statutes is significant.

7. Officers 🔑72(1)

The goal of civil service, assurance of continuity in position, should not be thwarted by leaving employee without remedy for full consideration of propriety of his discharge, unless the statute unquestionably requires such result.

8. Officers 🔑72(1)

If by statute an officer or civil service employee may not be removed or discharged except for cause, clear implication is that opportunity be afforded for full hearing, unless statute expressly negatives necessity of hearing.

9. Municipal corporations 🔑218(8)

The Los Angeles charter prohibiting employees' discharge except for cause impliedly requires a hearing. St.1925, p. 1067, § 112(a); St.1937, p. 2858, § 112½.

10. Municipal corporations 🔑218(8)

The term "investigation" in Los Angeles charter providing for investigation of removal, discharge or suspension of city employee does not detract from fact that hearing is required, with all that the term implies. St.1925, p. 1067, § 112(a); St.1937, p. 2858, § 112½.

See Words and Phrases, Permanent Edition, for all other definitions of "Investigation".

11. Mandamus 🔑154(4)

A petition for mandate to compel reinstatement of discharged Los Angeles employee, alleging that investigation of discharge was delegated to employee of civil service department who filed unsigned and unsworn compilation of rumor and hearsay as report, and refused to permit employee's counsel to participate in hearing based on such report, stated a cause of action. St. 1925, pp. 1067, 1068, § 112(a); St.1937, p. 2858, § 112½.

12. Officers 🔑103

Generally, in absence of special statutes, an administrative agency cannot, over objection, make findings of facts supported solely by hearsay evidence.

13. Municipal corporations 🔑218(8)

Where Los Angeles Board of Civil Service Commissioners effectually denied a discharged employee the opportunity of making objection by arbitrarily refusing to allow employee's counsel to participate in proceeding, there was a denial of hearing to which employee was entitled. St. 1925, pp. 1067, 1068, §§ 112(a), 116; St. 1937, p. 2858, § 112½.

14. Appeal and error 🔑77(1)

A minute order denying without prejudice an application for alternative writ of mandate was an order and no further order was contemplated, and hence was final and appealable. Code Civ.Proc. § 1107.

SHENK, EDMONDS, and SPENCE, JJ., dissenting.

In Bank.

Appeal from the Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Petition by Otto A. Steen for writ of mandate against the Board of Civil Service Commissioners and others, to compel reinstatement of employee. From a judgment denying the petition, petitioner appeals.

Reversed.

Prior opinion, 153 P.2d 89.

George E. Cryer and R. Alston Jones, both of Los Angeles, for petitioner.

Ray L. Chesebro, City Atty., and A. L. Lawson and George William Adams, Deputy City Attys., all of Los Angeles, for respondents.

CARTER, Justice.

According to petitioner's petition for a writ of mandate in the court below, he had been an employee of respondent Department of Water and Power, hereinafter referred to as department, of respondent city of Los Angeles since 1922. He had attained civil service status pursuant to the charter of the city. On August 12, 1943, there was served upon him a notice of suspension from his position. On August 16, 1943, he filed with the city's Board of Civil Service Commissioners, hereinafter referred to as board, a "written application for an investigation by said board of the grounds for his said *suspension;* * * *." On August 17, 1943, there was served on petitioner and filed with the board a "Notice of Removal, Discharge or Suspension" signed by an official of the department, advising him that he was discharged as of that date for the causes set forth therein. On August 18, 1943, he filed with the board the following:

"To the Honorable the Board of Civil Service Commissioners, * * *

"Re Notice of Removal, discharge or suspension dated August 17, 1943.

"Please be advised that I am an employee in the Water and Power Department and desire to appeal to your Honorable Body for relief from my discharge on Aug. 17, 1943; and further I respectfully request that your honorable body investigate the grounds for such discharge. I am prepared at your convenience to offer evidence, both oral and documentary to controvert the matter as set forth in the notice of discharge.

"Awaiting your pleasure in the matter, I am

"Yours truly,

"Otto A. Steen."

The department did not produce before the board any proof of its grounds for discharge; the board delegated to the manager of the civil service department the duty to investigate the charges and his report was filed with the board on December 5, 1943. On December 10, 1943, petipeared before the board on December 14, 1943, the board would consider the heretofore quoted request of petitioner. He appeared before the board on December 14, 1943, proceedings were had, and on the next day the board issued an order sustaining the discharge of petitioner by the department. On February 25, 1944, petitioner filed with the board a demand in writing that he be reinstated and with the city clerk a claim for compensation accruing during the period of the alleged wrongful discharge. Although no motion was made by respondents, the court made a minute order denying the petition for an alternative writ of mandate without prejudice, apparently proceeding under section 1107 of the Code of Civil Procedure providing for the service of an application for the writ and permitting the respondent to file points and authorities in opposition to its issuance. From the memorandum opinion of the court it is manifest that it denied the petition on the sole ground that petitioner had failed to file a demand for reinstatement within 90 days from the time he was first notified of his discharge.

The charter provisions bearing on that issue are as follows:

"Any board * * * having the power of appointment * * * shall have the power to remove, discharge or suspend any * * * employee of such department; but no person in the classified civil service of the city, * * * shall be removed, discharged or suspended except for cause, which shall be stated in writing by the board * * * and filed with the Board of Civil Service Commissioners, with certification that a copy of such statement has been served upon the person so removed, discharged or suspended, * * *. *Upon such filing such removal, discharge or suspension shall take effect.* Within fifteen days after such statement shall have been filed, the said board, upon its own motion, may, or upon written application of the person so removed, discharged or suspended, filed with said board within five days after service upon him of such statement, shall proceed to investigate the grounds for such removal, discharge or suspension. If after such investigation said board finds, in writing, that the grounds stated for such removal, discharge or suspension were insufficient or were not sustained, and also finds in writing that the person removed, discharged or suspended is a fit and suitable person to fill the position from which he was removed, discharged or suspended, said board shall order said person so removed, discharged or suspended, to be reinstated or restored to duty. The order of said board with respect to such removal, discharge or suspension, shall be * * * final and conclusive; * * *." (Emphasis added.) Los Angeles Charter, § 112(a), St.1925, p. 1067.

"Whenever it is *claimed by any person that he has been unlawfully* suspended, laid off or *discharged,* and that such lay-off, suspension or discharge is ineffective for any reason, any claim for compensation must be made and a demand for reinstatement must be presented in writing within ninety days following *the date on which it is claimed that such person was first illegally, wrongfully or invalidly* laid off, suspended or *discharged.* Such demand for reinstatement must be filed with the Board of Civil Service Commissioners and such claim for compensation for such allegedly wrongful, illegal or erroneous discharge must be filed with the City Clerk. Failure to file such demand for reinstatement within the time herein specified shall be a bar to any action to compel such reinstatement and proof of filing such a demand for reinstatement must be completed and proved a condition precedent to the maintenance of any action for reinstatement. Proof of filing the claim for compensation within the time and in the manner herein specified shall be a condition precedent to any recovery of wages or salary claimed to be due on account of said law-off, suspension or discharge." (Emphasis added.) Los Angeles Charter, § 112½, St.1937, p. 2858.

Respondents contend that the demand for reinstatement must be filed within 90 days from the date of the filing of the notice of discharge with the board by reason of the italicized sentence in section 112(a), and hence the demand filed within 90 days after the board's order sustaining the departmental discharge was too late.

[1-4] The only reasonable interpretation of the foregoing provisions of the charter is that the written demand must be filed as required by section 112½ within 90 days after the order of the board sustaining the action of the department. Section 112(a) establishes an orderly procedure by which action of the department in filing the notice of discharge shall be examined. It may be likened to an administrative or quasi judicial proceeding leading to the final discharge of a civil service employee. Although the department is given the power to discharge, it may only do so for cause. The grounds of the discharge must be set forth in its notice of discharge which must be both filed with the board and served upon the employee affected; thus indicating that the department's action is not to be deemed final, but rather as a preliminary step in a series. It is true the section states that

upon the filing of the notice the discharge shall take effect, but, rather than implying finality to the action, that provision means in effect that the employee shall be required to cease working in his position and that the department need not accept his services pending the ultimate disposition of the matter, thus establishing the policy of relieving the department from the detrimental aspects of having, in the interim, actively working on its staff, an employee considered unsatisfactory. Following the filing and service of the notice there are administrative remedies which may be pursued by the employee. Thus, within fifteen days the board may, on its own motion, or on the employee's application, made within five days, "investigate the grounds" for the discharge. If the board finds that the grounds for the discharge are insufficient and that the employee is fit and suitable, it may reinstate him. Although no express provision is made therefor, we believe it follows by necessary implication that the board may, as it did in the instant case, make an order sustaining the discharge. Presumably if the board did not act on its own motion within the fifteen days, or if no application for relief were filed by the employee within the time specified, the discharge would become final and effective at the expiration of such time. The proceedings before the board are in the nature of administrative remedies or process which are a part of the ultimate discharge. If the employee fails to pursue those remedies the court will not listen to his plea for reinstatement inasmuch as he would not have exhausted his administrative remedy (see Alexander v. State Personnel Board, 22 Cal.2d 198, 137 P.2d 433; Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715), thus further indicating that the procedure before the board is a part of the entire scheme for the discharge of civil service employees. That thought is further evinced by the final statement in section 112(a) that the action of the board is final and conclusive. One phase of the finality would be that the discharge proceedings had been completed and were effective for all purposes when the board made its order. With such a complete procedure for determining matters of discharge, no useful purpose could be served by the demand for reinstatement required by section 112½ before the board had an opportunity to follow the fixed procedure for determining the very issue of reinstatement as well as whether the grounds for the discharge were sufficient. The demand would accomplish no purpose inasmuch as the entire issue was then before the board. Generally a demand is not a prerequisite where it would be futile or an idle gesture. See 16 Cal.Jur. 772, 773.

Turning to section 112½ we find ample confirmation for the foregoing views. It refers to an employee claiming that he has been wrongfully discharged. As we have seen, any claim of the employee for relief when the department first files its notice of discharge is made to the board pursuant to the procedure set forth in section 112(a) and the discharge is not a finality until that procedure is followed. Then comes the requirement of 90 days, which runs from the date that "it is claimed" that the employee was first wrongfully discharged, that is, under the circumstances in the instant case that the board made its order. The section makes no provision for action, affirmative or negative, on the part of the board, in response to the employee's demand. That is natural as to the time elapsing while proceedings under section 112(a) are pending, inasmuch as the procedure in that respect is set forth in section 112(a). The section (112½) then reads that the filing of the demand is a condition precedent to bringing an action for reinstatement. Read as a whole it is concerned with fixing a time limit and formalities necessary as a basis for court action, presupposing that the procedure before the board has been followed. The demand may be somewhat analogous to the requirement of a petition for a rehearing addressed to the board. The board is given an additional opportunity to pass upon the issue before resort is had to the courts. While section 112(a) speaks of discharge in the past tense and of reinstatement of the employee after investigation, we believe the intent was to relate those thoughts to the proceeding before the board and that the reinstatement was to the roll as an active worker, that is, the temporary removal from that category would be nullified. On the other hand, when it comes to seeking court relief, the demand for reinstatement is from the final action of the board perfecting a final discharge. The preliminary step for action by the board was an application by the employee rather than the demand required in section 112½. The latter was preliminary to seeking judicial relief.

Respondents rely upon Campbell v. City of Los Angeles, 47 Cal.App.2d 310, 117 P.2d 901. No petition for a hearing in this court was filed in that case and it did not discuss the factors hereinabove mentioned. It is disapproved.

[5-7] Respondents take the position that under section 112(a) a formal hearing by the board is not necessary. In interpreting that section it should be kept in mind that "The purpose of civil service is twofold—to abolish the so-called spoils system, and to increase the efficiency of the service by assuring the employees of continuance in office regardless of what party may then be in power. Efficiency is secured by the knowledge on the part of the employee that promotion to higher positions when vacancies occur will be the reward of faithful and honest service", Allen v. McKinley, 18 Cal.2d 697, 705, 117 P.2d 342, 347, and that in ascertaining legislative intent the purpose sought to be achieved by a statute is a significant factor in its interpretation. People v. Moroney, 24 Cal.2d 638, 150 P.2d 888; Gage v. Jordan, 23 Cal.2d 794, 147 P.2d 387; City & County of San Francisco v. San Mateo County, 17 Cal.2d 814, 112 P.2d 595; California Drive-in Restaurant Ass'n v. Clark, 22 Cal.2d 287, 140 P.2d 657, 147 A.L.R. 1028. Thus, in the instant case the goal of civil service, assurance of continuity in the position, should not be thwarted by leaving the employee without remedy for a full consideration of the propriety of his discharge, unless the statute unquestionably requires such a result.

[8, 9] The rule is firmly established that if by statute an officer or civil service employee may not be removed or discharged except for cause, the clear implication is that there be afforded an opportunity for a full hearing to accomplish his removal; that unless the statute expressly negatives the necessity of a hearing, common fairness and justice compel the inclusion of such a requirement by implication. See Bannerman v. Boyle, 160 Cal. 197, 116 P. 732; Carroll v. California Horse Racing Board, 16 Cal.2d 164, 105 P.2d 110; Welch v. Ware, 161 Cal. 641, 119 P. 1080; Knights of Ku Klux Klan v. Francis, 79 Cal.App. 383, 249 P. 539; People v. Bailey, 30 Cal.App. 581, 158 P. 1036; Scott v. Donahue, 93 Cal.App. 126, 269 P. 455; Abrams v. Daugherty, 60 Cal.App. 297, 212 P. 942; Boyd v. Pendegast, 57 Cal.App. 504, 207 P. 713; 99 A.L.R. 336. Thus it is clear that the charter, by prohibiting removal except for cause, impliedly requires a hearing. There is nothing in the charter which negatives that implication. True, it is provided in section 112(a) that the board shall *investigate* the grounds for discharge. But an investigation is not necessarily inconsistent with a hearing. It may mean the same thing. See Luellen v. City of Aberdeen, 20 Wash.2d 594, 148 P.2d 849; Matter of Gilchrist, 130 Misc. 456, 224 N.Y.S. 210. And in the instant case there are numerous other factors which when taken together indicate that a hearing was intended. The grounds for the discharge must be stated in writing and served upon the employee and filed with the board. A time limit is specified within which the employee must apply to the board for relief. The board must find in writing whether or not the grounds for the discharge are sufficient, thus implying an examination and weighing of evidence. The board makes a determination —an order. The secretary of the board is empowered to administer oaths "in matters pertaining to the work of the board." Los Angeles Charter, § 116, St.1925, p. 1068. Returning to the use of the word investigate, it may be further observed that even if it implies an independent inquiry by the board outside and in addition to a formal hearing, yet there is no express intent to dispense with a hearing. A recent case (1944) in the Supreme Court of Washington expresses, we believe, views which are consonant with logic and the principles underlying civil service. In Luellen v. City of Aberdeen, 20 Wash.2d 594, 148 P.2d 849, 856, the ordinance provided that the employee could not be discharged by the appointing power unless the latter filed his reasons with the civil service board whereupon the employee may demand an "investigation" and the commission must make it. The commission was expressly given authority to subpoena witnesses and administer oaths, powers which are incidental to holding a hearing. Nothing was said in the ordinance about a hearing. The court held:

"While the ordinance provides for an investigation, it does not provide that any hearing, as a part thereof, shall be accorded the police officer or that he shall have any notice of the investigation or any opportunity to be heard in his own behalf. It is silent on these subjects.

"The ordinance contemplates that a police officer in classified civil service shall be removed for cause only; otherwise, there would be no occasion for the requirement that reasons therefor be given in writing to the commission and an investigation made by it. Where such is the case, the rule is that the accused officer is entitled to a hearing on the charges made against him after reasonable notice thereof has been given.

"Unless the governing statute or ordinance expressly excludes notice and hearing, both are implied, and this is particularly true when the statute or ordinance provides for an investigation and vests a commission with the power to administer oaths, summon witnesses, and produce evidence. * * * The net result is that, in cases of tenure under civil service, where the officer shall hold office until removed or retired, it is implied that he can be removed for cause only and then only after due notice and hearing or opportunity given to be heard."

[10] In Boyd v. Pendegast, supra, the court had before it a provision of the Los Angeles City Charter practically identical in wording with section 112(a) and in considering a discharge of a police officer thereunder stated [57 Cal.App. 504, 207 P. 714]: "However, it seems clear that it is contemplated that a police officer ordered to be suspended or removed *shall be accorded a hearing before the commissioners, if he applies for it within five days after the chief of police has given him notice of the order.* The provision does not in terms require that there be stated in the notice of the chief of police a description of the acts which make up the delinquency charged against the officer, although it will be presumed that, if an investigation is had, the commissioners will, upon request of the officer, acquaint him with such details. The manner in which the investigation is to be conducted and the class of evidence to be heard is left with the commission. It is imperative only that a hearing be accorded the officer upon his request, and that he be permitted to produce his evidence. The commission acts in a quasi judicial way (Speed v. Common Council, 98 Mich. 360, 57 N.W. [406], 407, 22 L.R.A. 842, 39 Am.St.Rep. 555), and may be required by appropriate writ to accord a hearing to the person affected by a removal order." In expressing the thought that the board had unlimited discretion as to the nature of the hearing, we believe the court there went too far. The term investigation does not detract from the fact that a hearing is required with all that the term implies. Cronin v. Civil Service Comm., 71 Cal.App. 633, 236 P. 339, should not be considered as contrary to these views. There the charter did not limit a discharge to instances where there was cause. The case of Krohn v. Board of Water & Power Com'rs, 95 Cal. App. 289, 272 P. 757, in expressing the view that no hearing was necessary under the charter provision here involved must be disapproved inasmuch as it is out of harmony with principles heretofore enunciated and authorities cited.

On the issue of whether petitioner was afforded an opportunity for a hearing he alleges in his petition that the board did not investigate the charges against him and did not "accord to petitioner a hearing or an opportunity to appear with counsel, or to produce evidence in his defense, or to be confronted by the witnesses against him; that respondent board examined no witnesses, received no evidence, and made no findings either in writing or otherwise in said matter; that on the contrary * * * respondents referred said appeal of petitioner and delegated the making of an 'investigation' and 'report' thereon to the manager of said civil service department; that on said last mentioned date said manager referred said appeal and delegated the making of an investigation and report thereon to Esther Reimers, an employee of said civil service department; * * *"; "That respondent Board of Water and Power Commissioners did not either within fifteen days after it filed with respondent Board of Civil Service Commissioners its statement of charges against petitioner, or at any other time, produce before said Civil Service Commission any proof whatever of its said charges against petitioner, and said Board of Water and Power Commissioners has never proven or established said charges or any of them; * * *." He goes on to allege, however, that Reimers "consulted many individuals and collected and compiled a mass of hearsay, rumor, and report concerning petitioner's record as an employee in said department * * * and * * * filed with respondent commission said compilation of unsworn matter as her report in said investigation; that said report of said Esther Reimers, and all matter therein contained, was unsigned, unsworn, and wholly without verification; * * *

"That thereafter * * * the manager of said civil service department notified petitioner that on December 14, 1943 at 2:30 P. M. respondent board would consider petitioner's discharge from his position of rigger and requested that petitioner 'be present, if possible, when the case is considered'; that petitioner asked that he be permitted to have counsel with him when his case was considered but was informed that counsel would be of no benefit to him, that the commission would not hold a hearing and would not listen to petitioner's counsel; * * *

"That on presenting himself on December 14 at 2:30 P. M. petitioner was confronted by respondent board and its attorney, by his three accusers from the Department of Water and Power, and by a deputy city attorney representing the last named department; that thereupon petitioner was asked by the president of respondent board if he had anything to say; that respondent was so overcome emotionally by the sudden and unexpected confrontation in force by his accusers, that he was unable to defend himself or to say anything in his defense; that thereupon after oral elaboration by his accusers of the charges against petitioner, it was moved by commissioner Woellner, and seconded 'that from the *information* presented by both the report and the questioning by the commission of those present, the commission find that the causes for the discharge of Mr. Steen, as set forth above are sufficient and are sustained, and therefore his appeal is denied.' * * *

"That in all that it did in the matter of the discharge of petitioner, in denying petitioner's appeal, and sustaining the charges against him, respondent board acted wholly without evidence and wholly upon hearsay, and entirely in excess of its jurisdiction, *as abundantly appears from the records and files of respondent board;* * * *."

[11-13] It is clear that the petition states a cause of action. The general rule is that in the absence of a special statute an administrative agency cannot, over objection, make findings of fact supported solely by hearsay evidence. See Consolidated Edison Co. v. National Labor Relations Bd., 305 U.S. 197, 59 S.Ct. 206, 83 L.Ed. 126; Walker v. City of San Gabriel, 20 Cal.2d 879, 129 P.2d 349, 142 A.L.R. 1383; Dyment v. Board of Medical Examiners, 93 Cal.App. 65, 268 P. 1073. Here the board effectually denied petitioner the opportunity of making an objection by arbitrarily refusing to allow petitioner's counsel to participate in the proceeding. This was a denial of a hearing. Powell v. State of Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527; Luellen v. City of Aberdeen, supra; Wisconsin Telephone Co. v. Public Service Commission, 232 Wis. 274, 287 N.W. 122, 133, 593; Roberts v. Anderson, 10 Cir., 66 F.2d 874.

[14] Finally, respondents urge that no appeal lies from the minute order denying without prejudice the application for the alternative writ. On the score of the lack of entry of a formal judgment or order upon the minute order, the Rules on Appeal provide that the date of entry of an order which is entered on the minutes shall be the date of its entry thereon unless the minutes expressly direct the preparation and filing of a written order. Rules on Appeal, rule 2(b) (2); see, also, Brown v. Superior Court, 70 Cal.App. 732, 234 P. 409; Colthurst v. Justice's Court, 100 Cal.App. 146, 279 P. 812. Hence, the minute order was an order and no further order was contemplated. In Brown v. Superior Court, supra, in proceedings for certiorari no demurrer or answer was filed and when the order to show cause was heard a minute order was made denying the writ. It was held that a final appealable judgment had been entered. In the instant case, as before stated, the procedure set forth in section 1107 of the Code of Civil Procedure was followed, under which a copy of the petition for the writ is served on the respondent before an alternative writ is issued and the respondent may file points and authorities in opposition to it. The court then made its minute order denying the petition. Its action was final insofar as appeal was concerned. No further order was contemplated. The case of Ross v. O'Brien, 1 Cal.App.2d 496, 498, 36 P.2d 1108, was decided prior to the addition of section 1107 to the Code of Civil Procedure and is not controlling. The court there discussed an appeal from an order sustaining a demurrer to the petition and denying the petition. On the latter score the court spoke of it as not meeting the requirements of a judgment of dismissal. However, under section 1107 it is clearly contemplated that there may be a simple order of denial when the application for the

alternative writ is heard on notice. It is neither a ruling on a demurrer or a dismissal. It is a simple denial of a petition and a final order.

The use of the words "without prejudice" following the denial mean little. Under the present circumstances it could mean nothing more than an expression by the court that petitioner could commence a new proceeding. Whether he is required to do that depends upon the correctness of the order of denial which we have determined on this appeal.

The judgment is reversed.

GIBSON, C. J., and TRAYNOR and SCHAUER, JJ., concur.

SHENK, Justice (dissenting).

The majority opinion changes a long standing interpretation of the Los Angeles City Charter provisions. In effect it amends the charter in two very substantial respects without a vote of the People. It expressly disapproves decisions in this state which have been followed by the administrative bodies of the city without any change in the charter in the interim.

Section 112½ of the charter provides that a claim for compensation and demand for reinstatement must be filed within ninety days following the date on which it is claimed that the employee was "first illegally, wrongfully or invalidly laid off, suspended or discharged." Under the charter the suspension or discharge is effective immediately upon notice thereof given by the employing board. The claim of the discharged employee has matured at that time and it is complete whether or not he has applied for an investigation by the commission. The discharge is not suspended pending action on his request for investigation. The case of Campbell v. City of Los Angeles, 47 Cal.App.2d 310, 117 P.2d 901, applied the language of the charter in conformity with its plain meaning. The contention in that case was that the demand for investigation under section 112(a) might be a substitute for the requirement of section 112½. The court pointed out the respective objectives of sections 112(a) and 112½, the former as a procedure by which the board might on its own investigation reinstate the employee or the employee might request an investigation; the latter as the only authority pursuant to which the employee could prosecute his "demand for reinstatement," and that the period of limitation commenced when the charter said it did, namely, from the date when the employee was discharged by the employing board.

The provisions of section 112(a) of the charter, which have been construed by the majority as requiring a hearing in the nature of a formal judicial trial, are that upon written application of the discharged civil service employee the board "shall proceed to investigate the grounds for such removal, discharge or suspension. If after such investigation said board finds, in writing, that the grounds stated for such removal, discharge or suspension were insufficient or were not sustained, and also finds in writing that the person removed, discharged or suspended is a fit and suitable person to fill the position from which he was removed, discharged or suspended, said board shall order said person so removed, discharged or suspended, to be reinstated or restored to duty. The order * * * shall be * * * final and conclusive; * * *."

In the case of Krohn v. Board of Water & Power Com'rs, 95 Cal.App. 289, 272 P. 757, 759, decided in December, 1928, the court traced the history of the provisions concerning the rights and duties of a discharged employee, culminating in the adoption of the provisions of section 112(a) of the present charter. In that case a request for an investigation was filed. Without a hearing and after an examination of the investigator's report the Board of Civil Service Commissioners made its order that the discharge was not sustained and that the employee be restored to duty. The employing board, the Board of Water and Power Commissioners of the City of Los Angeles, refused to comply with the order and the employee sought a writ of mandate in the superior court. It was therefore the Board of Water and Power Commissioners, on its appeal from the judgment directing it to reinstate the employee, which contended that pursuant to the provisions of section 112(a) the Board of Civil Service Commissioners had no jurisdiction to order the employee's reinstatement without a trial or hearing. The same argument was made in that case as in this, that the word "investigate" is identical in meaning or significance with the words "hearing" or "trial"; but the court, after reviewing the history of the charter provisions arrived at a construction opposed to that declared by the majority in this case. The court pointed out that it was not until 1903 (Stats. 1903, p. 555) that legislation was enacted providing a remedy for alleged wrongful discharge of employees of the city. Section 242 of the charter was then adopted providing that no employee should be discharged "except for cause upon written charges, and after an opportunity to be heard in his own defense" in a public investigation. The commission was given power to administer oaths and secure by subpoena the attendance and testimony of witnesses and the production of books and papers. In 1905 (Stats.1905, pp. 980, 992) the provision vesting power in the commission to administer oaths and secure attendance of witnesses and production of records by subpoena was deleted. The requirement for a public hearing on written charges remained intact until 1911, when section 241 (Stats.1911, pp. 2051, 2116) was amended to omit the provision for discharge only "for cause upon written charges, and after an opportunity to be heard in his own defense" and for a public investigation. That amendment substituted a provision that no employee may be discharged "except for cause," and that the commission may on its own motion or on the employee's request should investigate the grounds for removal. The court noted that all of the words connoting a trial or hearing or investigation of any public nature were eliminated by the amendments, and that a change in the requirements must thereby have been intended. It said: "It is therefore evident that the difference between the procedure and powers skeletonized by the provisions of the 1903 charter, and that of the present charter, is radical and significant," and that the difference pointed distinctly to an intention on the part of the people of the city and of the Legislature to abandon the former requirement of a trial in the nature of a judicial hearing and to substitute an "investigation" on the application of the discharged employee. The court followed time-honored decisions of other jurisdictions wherein it had been held that similar language did not contemplate a public hearing or trial. The administrative bodies of the city of Los Angeles have followed and its civil service employees have been governed by the law as thus laid down for almost seventeen years. The case of Cronin v. Civil Service Comm., 71 Cal.App. 633, 236 P. 339, distinguished by the majority, was in harmony with the Krohn case in that the court declined to read into the charter something that was not placed there by the framers.

There is no reason why a different construction of the charter provisions should be made when a discharged employee is the one aggrieved by the order of the commission. If it be conceded, in accord with the declarations of the court in Boyd v. Pendegast, 57 Cal.App. 504, 207 P. 713, that the employee is entitled to be heard if he request an investigation, he is entitled to no more than an opportunity to produce his evidence. As pointed out in that case anything more than that is within the discretion of the board. By the allegations of the petition in the present case it appears that the commission afforded to the petitioner that opportunity, and that he produced no evidence nor made any statement in his own behalf. The petitioner does not question that the charges upon which his discharge was grounded were sufficient to constitute cause for discharge.

The statement in the majority opinion that the board "must find in writing *whether or not* the grounds for the discharge are sufficient," inserts in the charter a requirement that is not there and that was apparently ex industria excluded. It is only when there is a restoration to duty that findings are required.

The rights of the civil service employees are such as are provided by the charter of the city. No constitutional rights are infringed by the method there provided for their suspension or discharge. Their primary duty is to serve the municipality faithfully. Proper discipline among the employees of the city is necessarily implied and no proprietary rights are involved. In re Carter, 141 Cal. 316, 320, 74 P. 997; French v. Senate of California, 146 Cal. 604, 80 P. 1031, 69 L.R.A. 556, 2 Ann.Cas. 756; Cline v. Superior Court, 184 Cal. 331, 193 P. 929; Garvin v. Chambers, 195 Cal. 212, 232 P. 696; Good v. Common Council, 5 Cal.App. 265, 90 P. 44; Boyd v. Pendegast, supra; Ludolph v. Board of Police Commissioners, 30 Cal.App.2d 211, 216, 86 P.2d 118.

If the people of the city of Los Angeles desire a change in the law governing the rights and remedies of its civil service employees, that change should come through legislative processes. The allegations in the petition in my opinion show a compliance with the present charter provisions, and the judgment of the trial court should be affirmed.

EDMONDS, and SPENCE, JJ., concur.

Rehearing denied; SHENK, EDMONDS, and CARTER, JJ., dissenting.

26 Cal.2d 739

SHAEFFER v. STATE BAR OF CALIFORNIA.

L. A. 19140.

Supreme Court of California.

July 13, 1945.

Rehearing Denied Aug. 9, 1945.

1. Attorney and client 🔑53(2)

Where, upon being informed by the executrix that attorney who drew will represented her, attorney left shortly afterwards and there was no proof that attorney made any effort to take advantage of the executrix or to improperly obtain any information from her, the evidence was insufficient to support a charge of professional misconduct.

2. Attorney and client 🔑53(2)

The testimony of deceased client's wife that deceased husband did not owe wages to son was insufficient to controvert attorney's testimony that deed was prepared by attorney on client's representation that client was indebted to son for wages, and would not support a finding of fraud in disciplinary proceedings against attorney.

3. Attorney and client 🔑53(2)

Evidence showed that an indebtedness existed in attorney's favor in the amount of note and mortgage and that attorney's secretary represented attorney as mortgagee in the transaction and that attorney's conduct in taking such mortgage was not fraudulent.

4. Attorney and client 🔑38

Where attorney in sale of interests in oil lease did not represent purchasers, attorney's failure to record limited partnership certificate did not constitute a violation of attorney's oath or duties, and attorney's ignorance of the requirements of the partnership act could be said to constitute moral turpitude.

5. Attorney and client 🔑38

Where attorney thought he had done everything necessary to complete limited partnership between himself and others whom attorney did not represent and there existed at the time some uncertainty whether transfer of interests in oil lease by means of a limited partnership violated the Corporate Securities Act, failure to comply therewith did not constitute moral turpitude on attorney's part. Gen.Laws 1937, Act 3814.

6. Attorney and client 🔑42

Attorney, who was counsel in a prior case which was opposed to position taken by attorney in subsequent case, should have called prior case to the court's attention and have distinguished it in line with attorney's theory that point relied on by adversary was dictum, but, where it did not appear that attorney in failing to do so intended to mislead the court, there was no occasion for imposition of disciplinary punishment. St.1939, p. 355, § 6068(d).

7. Attorney and client 🔑43

Where copies of subpoena, procured by attorney without affidavit required for subpoena duces tecum, directed production of certain books and records and attorney was directed by court to notify constable to advise witnesses that subpoena was ineffective as a subpoena duces tecum, and attorney who was engaged in trying a case was unable to reach constable at the time but left a letter addressed to constable who called at attorney's office every day or two, attorney was not guilty of any conduct calling for discipline because nothing further was done in the matter until a few days later when attorney was questioned by the court as to whether court's order had been carried out. Code Civ.Proc. § 1985.

8. Attorney and client 🔑53(2)

Evidence showed that in order to have matter heard attorney misrepresented to court the actual status of the case, which conduct constituted a violation of State Bar Act, in that it revealed a lack of recognition of the duties of an attorney and of the obligation and respect due to the courts. St.1939, p. 355, § 6068(b, d).

9. Attorney and client ⚷58

Where attorney had previously been suspended for three years in 1934 and in 1943 misrepresented to the court the status of a case, attorney's conduct required that he be suspended for a period of one year. St.1939, p. 355, § 6068(b, d).

CARTER, J., dissenting in part.

◆

In Bank.

Proceeding by Fred A. Shaeffer to review an order of the Board of Governors of the State Bar recommending that petitioner be suspended from the practice of the law for a period of two years.

Petitioner suspended for a period of one year.

T. A. Twitchell, of Santa Maria, for petitioner.

Edward J. Trevey and John A. Westwick, both of Santa Barbara, for respondent.

PER CURIAM.

This is a proceeding to review an order of the Board of Governors of The State Bar recommending that petitioner be suspended from the practice of the law for a period of two years.

The charges against petitioner were set forth in an order to show cause containing eleven counts, some of them involving personal business dealings unconnected with his practice of the law while others pertain to his conduct as an attorney. At the conclusion of its hearings the local administrative committee found against petitioner on all counts except count three, and recommended that he be suspended for a minimum period of one year. The Board of Governors adopted the committee's findings with modifications. In this latter respect, it rejected the findings favorable to petitioner on count three and substituted its own adverse findings. However, it dismissed counts one and four. The board thereupon recommended that petitioner be suspended for a period of two years, adding that in fixing the degree of discipline recommended it took into consideration the prior suspension of petitioner for three years, ordered by this court on April 30, 1934 (Shaeffer v. State Bar, 220 Cal. 681, 32 P.2d 140), which suspension was subsequently terminated on January 7, 1936.

Petitioner challenges the sufficiency of the evidence to support the findings or to show acts warranting discipline.

Count Two.

[1] This count charged petitioner with having violated rule 12 of the Rules of Professional Conduct which provides that "A member of the State Bar shall not communicate with a party represented by counsel upon a subject of controversy, in the absence and without the consent of such counsel." In October, 1940, a will was admitted to probate upon the petition of the executrix named therein. In April, 1941, a brother of the testator, who was not mentioned in the will, communicated with petitioner requesting him to look after his interests in the estate. He gave petitioner the name of the attorney who had drawn the will, and suggested that a copy could be obtained from the attorney. The brother also mentioned a prior will which assertedly named him as a beneficiary and gave petitioner the names of certain persons who might have information with respect to either or both of the wills. Shortly thereafter petitioner telephoned to the attorney who had drawn the will then being probated, and informed him he represented a brother of the testator, and asked for a copy of the will. It was mailed to petitioner. While this attorney had offered the will for probate on behalf of the executrix, he did not recall telling petitioner in this conversation that he represented the executrix, and petitioner testified he had not seen the probate file. Several days later petitioner went into the country to interview the persons whose names had been given to him by his client, with a view to getting information with respect to the execution of the will and the possible existence of a second will. After making inquiries as to the whereabouts of these persons, petitioner came to the home of the person named as executrix and interrogated her regarding the testator and his wills. The executrix testified that she informed petitioner that the other attorney, whom she named, represented her and that petitioner should see him with respect to his inquiries. Petitioner left shortly thereafter and there is nothing in the record which indicates that he made any effort to take advantage of the executrix or to improperly obtain any information from her. In our opinion, the evidence does not support a charge of professional misconduct.

Count Three.

During the period 1932-1940 petitioner had served as attorney for a client who was in the beverage business. In the course of this relationship petitioner had not only rendered legal services but from time to time had advanced money to the client for the purchase of equipment and stock. Petitioner testified that in 1937 the client was indebted to him in a sum in excess of $2,000, representing unpaid legal fees and loans. He was also indebted to petitioner, according to the latter's statement, in the further sum of $1,500, representing the aggregate of unpaid loans made by the client's brother-in-law and assigned by the latter to petitioner. At the time of the hearings before the local administrative committee in 1943 the client was dead, but petitioner's testimony as to the existence of these two debts and the assignment of the latter to him is corroborated in many essentials by the testimony of the client's wife and brother-in-law. Thus, there is testimony that in 1937 the client was indebted to petitioner in an amount approximating $3,500. Respondent, however, refers to a statement sent by petitioner to the client in November, 1937, showing a balance due of $198.11. Petitioner explained that this statement included only the charges for specific services rendered to the client in connection with the Coca Cola account, which charges were then being paid with the approval of the Coca Cola Company, and that the statement did not include his charge for other services that had been rendered or the loans theretofore made to the client.

The client was indebted, to petitioner's knowledge, to the Coca Cola Company in the sum of $7,400. The company was pressing for payment of its claim. In view of this, the debtor and petitioner, according to respondent, proceeded to place all of the debtor's property beyond reach of the Coca Cola Company for the purpose of defrauding it. In furtherance of the assertedly fraudulent scheme, it is urged that petitioner prepared and the client executed (1) a declaration of homestead; (2) a deed to certain property naming the client's son as grantee; and (3) a note and chattel mortgage, in the amount of $3,500, naming petitioner's secretary as payee and mortgagee, respectively. The Coca Cola Company in subsequent litigation attacked these instruments. The homestead was declared valid. The litigation in regard to the deed to the debtor's son was compromised. The chattel mortgage was held to be invalid.

[2] Petitioner testified that prior to preparation and execution of the deed his client stated that he was indebted to his son for wages, which indebtedness was to serve as the consideration for the deed. We find no evidence controverting petitioner's testimony that he prepared the deed upon the representation of his client that he was indebted to his son for unpaid wages. The testimony of the client's wife, relied on by respondent, to the effect that they were not indebted to their son does not controvert the fact that such a representation was made by her husband to petitioner to induce the preparation of the deed. The evidence will not support a finding of fraud against petitioner in this particular.

According to petitioner, the note and chattel mortgage were executed to secure the sum of $3,500 owing to him, and his secretary named therein as payee and mortgagee represented him in the transaction. The chattel mortgage covered the client's stock in trade and fixtures, in addition to some automobile trucks. As the result of an oversight, petitioner explained, a notice of intention to execute the mortgage was not recorded as required by the code. The mortgage was therefore conclusively presumed to be fraudulent as to the stock in trade and fixtures (Civ.Code, § 3440) and was decreed to be invalid for this reason in Coca Cola Bottling Co. v. Feliciano, 43 Cal. App.2d 652, 111 P.2d 422. Thus petitioner gained no advantage by his failure to record the notice of intention. On the other hand, he failed to obtain a valid lien as against existing creditors.

[3] The cited case also declared the mortgage to be invalid as to the trucks because it was given to the secretary without consideration, and when the debtor was insolvent. No showing was made in the civil action or in this proceeding that petitioner's claim against the client had been assigned to his secretary, but he testified that she represented him in the transaction. Petitioner also testified that his client felt the Coca Cola Company was unfairly pressing him for payment of its claim after he had built up the business and he therefore decided he "wanted to protect other people who had been friendly to him, who had financed him and kept him going." Petitioner further testified that he "thought and I still think * * * that a debtor has the right to prefer a creditor when he owes money." See Civ.Code, §§ 3431, 3432, 3451. The evidence shows that an indebtedness existed in petitioner's favor in the amount of the note and mortgage and that the secretary represented him in the transaction.

Under the circumstances, we are of the opinion that the local administrative committee correctly concluded that petitioner's conduct was not fraudulent.

Counts 5, 6, 7 and 8.

These several counts have been consolidated by the parties and will be considered together. They do not involve an attorney-client relationship and have to do solely with personal business transactions in which petitioner was dealing at arm's length with the other parties. Respondent contends, however, that "the acts of petitioner involved moral turpitude and dishonesty" and that he was guilty of "gross negligence in his conduct of his professional work." The charges arose out of petitioner's sale of small interests in an oil lease to two business men named Yelkin and Rice. It appears that Yelkin, a real estate broker, who had oil properties in the same area and admittedly was familiar with oil ventures and their speculative nature, was told by petitioner that for $750 he could acquire a 1 per cent interest in a second well about to be drilled under a lease in which petitioner and others were interested. Yelkin agreed to invest and gave petitioner $375 in cash and a receipt cancelling an indebtedness of $375 owing to him by R. W. Wilson, one of petitioner's associates in the venture. Yelkin testified that at the time he cancelled the Wilson indebtedness he had no hope of otherwise collecting it because of Wilson's financial status. The evidence discloses that all of the cash received by petitioner from Yelkin went into the drilling operations. Later, Yelkin invested $750 for a 1 per cent interest in a third well to be drilled on the property. Difficulties were encountered in the drilling operations and thereafter no dividends were paid. Approximately two years later, Yelkin turned the matter over to an attorney for the purpose of salvaging what he could from the investment. Yelkin's attorney and petitioner worked out a compromise settlement, without suit, whereby petitioner personally paid Yelkin $1,000. This sum plus dividends received, exceeds the cash investment made by Yelkin. The balance of his investment, represented by cancellation of the $375 Wilson indebtedness, probably would have been lost to him even if he had not entered the oil venture with petitioner. Thus, for all practical purposes, Yelkin was wholly reimbursed. In fact, he testified that at the time of the settlement with petitioner he was entirely satisfied with the outcome of the matter and remained so at the time of the hearings herein.

Counts 7 and 8 are substantially the same as counts 5 and 6 except that they involve two separate cash investments of $750 each by Rice, a real estate salesman and partner of Yelkin, who likewise received a 1 per cent interest in the oil lease for each investment. Rice, having heard of his partner's investment in the oil venture, sought out petitioner and solicited the right to invest. He, like Yelkin, had previously had experiences with oil leases and was acquainted with their speculative nature. He testified that petitioner had made no representations to him as to when he might expect a financial return on the investments. Several years later he consulted an attorney solely for the purpose of ascertaining whether he had any money coming from the venture. Petitioner worked out a compromise whereby he paid to Rice $900 which, with the dividends received, aggregated a return of $994. It is significant that here, as in the Yelkin matter, the compromise and payment were made long prior to institution of this proceeding. Rice testified that he was fully aware of the risks involved in oil-lease investments and that he was wholly satisfied with the settlement. He added, "I have no ill feeling toward Mr. Shaeffer whatever, and if I have occasion to use an attorney, he will be the one, with due respect to everyone."

[4] It appears that petitioner told Yelkin and Rice that they would be limited partners and that he prepared and they executed articles of limited partnership but that petitioner failed to record the certificate. Petitioner testified that he thought he had done all that was necessary to protect all persons involved in the venture and explained his failure to record the certificate by his unfamiliarity with the provisions of the code relating to limited partnerships. Respondent argues that the neglect of petitioner in this regard deprived Yelkin and Rice of the protection to which they were entitled. Inasmuch as petitioner was not acting as attorney for Yelkin and Rice it cannot be said that he violated his oath or duties as an attorney and his ignorance of the requirements of the Partnership Act cannot be said to constitute moral turpitude.

[5] Respondent urges that petitioner should be disciplined because he sold the partnership interests to Yelkin and Rice

without having first applied for or procured a permit under the Corporate Securities Act [Stats. 1917, p. 673, as amended; Deering's Gen.Laws, Act 3814]. Petitioner testified that at the time he believed that such a permit was not necessary to validate a sale of the type of interest purchased by Yelkin and Rice. In substantiation thereof he further testified that Wilson, his associate, had theretofore furnished him with a form of limited partnership agreement stating at the time that it had been prepared for him by an attorney who said that its use did not require a permit from the Corporation Commissioner. In view of this, petitioner stated that he did not check the Corporate Securities Act to ascertain if a permit was essential to the valid consummation of the Yelkin and Rice transactions. It was stipulated by respondent "that at the time of the transaction some uncertainty existed as to whether a transfer of interest by the medium of creating a limited partnership constituted a violation of the Corporate Securities Act." It is now argued by respondent that since petitioner failed to complete the formation of the limited partnership by filing a certificate, this stipulation "merely meant that if a proper limited partnership had been formed, there was at that time an uncertainty as to whether the Corporate Securities Act would have applied." The argument lacks merit. Petitioner thought he had done everything necessary to complete the partnership and his innocent failure to comply with the Partnership Act should not subject him to discipline for an equally innocent violation of the Corporate Securities Act, particularly when, as conceded by respondent, there was uncertainty as to whether a permit was required. As before stated, since petitioner was not acting as attorney for Yelkin and Rice, no question of the violation of his oath or duties as an attorney is involved, and certainly it cannot be said under the circumstances that his failure to comply with the provisions of the Corporate Securities Act constituted moral turpitude.

Count Nine.

This count charged petitioner with having misled a trial court into making an erroneous order by citing as controlling law a case which he knew was not in point and failing to cite a later case in which petitioner had been attorney of record. The evidence discloses that petitioner, as attorney for the defendant in a pending action, moved to dissolve a restraining order upon several grounds, one of which was that the amended complaint failed to state a cause of action because it incorporated by reference various allegations and exhibits of the original complaint. In presenting the motion to the court, petitioner cited the case of People v. De la Guerra, 24 Cal. 73, as holding that an amended pleading could not incorporate by reference allegations or exhibits of the original complaint. He failed, however, to cite the case of Turney v. Collins, 48 Cal.App.2d 381, 119 P.2d 954, in which six months earlier he had appeared as counsel for appellant and unsuccessfully advanced a similar contention. The latter case expressly declared that a pleading may incorporate by reference an allegation or exhibit found in another pleading in the same case, and distinguished the De la Guerra case, on the ground that it held that an exhibit set forth in the pleadings in another case could not be incorporated by reference.

Respondent urges that, by failing to cite the Turney case in which he had appeared as counsel, petitioner was guilty of an intentional effort to mislead the court in violation of subdivision (d) of section 6068 of the State Bar Act, St.1939, p. 355.

[6] When the matter was called to petitioner's attention by the trial court, which in turn was apprised of the true situation by adversary counsel, petitioner addressed a letter to the court in which he stated, and reiterates here, that in his opinion the declaration in the Turney case is dictum and did not serve to overrule the De la Guerra case relied on by him. In view of petitioner's familiarity with the Turney case, he should in all fairness have directed the trial court's attention to the decision and argued to the court the contentions which he makes here that the case was not controlling. However, since petitioner apparently left to opposing counsel, who was present, the burden of presenting the other side of the argument, and since it does not appear that petitioner intentionally attempted to mislead the court, we do not believe the incident warrants the imposition of disciplinary punishment.

Count Ten.

The evidence and findings pertinent to this count disclose that petitioner was counsel for the plaintiffs in an accounting action. During the course of trial, petitioner secured from the clerk of the court an ordinary form of subpœna, signed in blank by the clerk. Upon instructions from petitioner, his secretary filled in the original subpoena with the names of witnesses to be served therewith, but in the copies there were also inserted the names of certain books and records which petitioner desired the witnesses to bring into court. Petitioner had not, as required by law, made application to the clerk for a subpoena duces tecum nor had he filed the affidavit necessary therefor. When the matter was later called to the attention of the trial court, petitioner was ordered to notify the constable who had served the subpoena to advise the witnesses that it was ineffective as a subpoena duces tecum.

Being unable to reach the constable that day, petitioner states he dictated and signed a letter addressed to him with instructions to carry out the court's order. The letter remained in petitioner's office, however, subject to the constable's call, the explanation being that he dropped in every day or two. Petitioner did nothing further in the matter until the court questioned him a few days later as to whether its order had been carried out. In the interim, the constable had not appeared at petitioner's office and consequently had not received the letter. Considering the fact that the parties lived in a rural community and that the constable, as testified by petitioner and his secretary, called at petitioner's office several times each week, it was not unreasonable for petitioner, after being unable to reach the constable the same day, to leave the explanatory letter in his office for him.

[7] Formerly a subpoena duces tecum, like an ordinary subpoena was issued without the necessity of filing an affidavit. The provision requiring an affidavit specifying the exact matters or things to be produced and the materiality thereof was added to section 1985 of the Code of Civil Procedure by amendment in 1933. While petitioner admitted that previously he had used subpoenas duces tecum in a "few cases," the evidence is silent as to whether his experience therewith was before or after the amendment. He testified that when the subpoenas were issued he was engaged in a contested trial and that their issuance in the form above described resulted from his failure to look up the law on the subject. Respondent has not shown that petitioner knowingly violated the amended section, and the evidence will not support punishment under any provisions of the State Bar Act.

Count Eleven.

Petitioner filed a divorce complaint on behalf of a client in the Superior Court of Santa Barbara County against a nonresident defendant who was personally served on June 1, 1942, in Michigan. Thereafter an attorney of that state forwarded to the clerk of the court an answer on behalf of the defendant and served petitioner by mail with a copy. Although the answer was received on June 10, it was not filed until June 29, due to the failure of defendant's attorney to forward the filing fee. In the interim, however, petitioner, believing the answer had been filed, served by mail on defendant's counsel and filed a notice setting the trial for July 10, at Santa Maria. On that date, petitioner appeared with his client and a corroborating witness and the matter was called by Judge A. W. Westwick. It was then brought to petitioner's attention that his notice of trial was premature in that the case was not at issue when the notice was filed. Petitioner informed Judge Westwick that his client, a soldier, was in court and shortly thereafter was to leave on maneuvers, and requested permission to put on his evidence with the understanding that it could later be stricken if he did not succeed in getting a stipulation from opposing counsel permitting the cause to be heard as a default. It was further explained by petitioner that as the result of an exchange of communications with opposing counsel, the only matters in dispute concerned attorney's fees and the support of the children, and that counsel were attempting to adjust these matters. Evidence was taken and Judge Westwick continued the case in order to enable the parties to reach an agreement and present a stipulation permitting the cause to be heard as a default.

Thereafter the parties signed a stipulation, dated July 23, which petitioner mailed to the clerk, together with a form of interlocutory decree, with the request that it be signed and filed. On July 30, petitioner received a letter from the clerk stating that Judge Westwick would not accept the stipulation and had written thereon: "This stipulation, for obvious reasons, apparent on its face, cannot be accepted by the Court, and the matter cannot, as suggested, be treated as a default matter." Judge Westwick testified he had rejected the stipulation permitting the matter to be heard as a default because it was conditioned on the making of certain orders in the divorce proceeding. The clerk at the request of the judge returned to petitioner the form of interlocutory decree with the statement that the case would be heard on August 28. On that date the matter was again continued. Petitioner testified that he talked with Judge Westwick on three or four occasions and "asked him if he had made up his mind" on the divorce case and also asked the clerk "to see if he could get a ruling in the matter." The minutes in the action disclose that on October 23, the matter was submitted "for decision and by the court taken under advisement." Sometime in October or November, 1942, petitioner testified, he asked Judge Westwick to "set the whole thing aside and set it on the calendar to be heard again." According to petitioner, Judge Westwick replied, "All right, when I go to Santa Barbara, I will set it aside and start over." On December 2, however, petitioner wrote to Judge Westwick asking "for a decision in the matter." Petitioner testified he was "either waiting for a decision or waiting for him to set it aside and let me submit new testimony." On December 12, Judge Westwick replied to a letter from petitioner and after reciting much of the chronology of the case as herein outlined, stated, "the matter, it seems to me, could easily be handled by a simple agreement between the parties and by stipulation that the matter be heard as a default matter—if the parties wished to handle it that way. * * * If you wish, I will simply deny the divorce and let it go at that." Judge Westwick testified that "so far as [he] was concerned, the testimony had been taken and it was a mere matter of those people getting together so the children would be protected." He added that he desired a proper stipulation in place of the rejected one.

On December 17, petitioner forwarded a proposed new stipulation to defendant's attorney and informed him that the court refused to go ahead in the matter until a stipulation was filed permitting the cause to be heard as a default matter. In the meantime, petitioner testified, he and opposing counsel had reconciled their differences as to support money and fees. On December 21, defendant's counsel replied to petitioner's letter by referring to the earlier stipulation (which had been rejected by the court) but without enclosing the proposed new stipulation.

One week thereafter (December 28) petitioner appeared before another judge (Hon. E. D. Wagner) sitting in Santa Maria, and requested him to hear the divorce action. The record in the case was at Santa Barbara, the county seat, some seventy miles distant. Petitioner testified that when he asked Judge Wagner to hear the case he "assumed" that Judge Westwick had made an order setting aside the submission of the cause to him and inasmuch as the support money had been agreed upon he thought it was "perfectly satisfactory to go ahead" before Judge Wagner. In describing the nature of his request that Judge Wagner hear the cause, petitioner testified that he did not remember referring to it as a "default" but had simply asked him "if he would hear the matter." Judge Wagner testified that petitioner initially presented it to him as a "default" matter, while the court clerk did not recall that petitioner mentioned the word "default." The testimony indicates that the clerk immediately informed the court that the cause had been partially heard by Judge Westwick. Petitioner said he explained that Judge Westwick had stated he would enter an order setting aside all proceedings and for that reason he was starting over again. Petitioner also testified that he did not think the matter of whether there was an answer on file or that there was a stipulation that the matter could be heard as a default was discussed at all.

Judge Wagner, on the other hand, testified that on the morning in question petitioner "asked if we could hear a short default"; that the clerk called his attention to the fact that testimony had been taken in the case before Judge Westwick; that petitioner explained the matter "was partially heard before Judge Westwick, but we are starting again. * * * We are proceeding in the matter as a default." Petitioner informed him, Judge Wagner testified, that there was a stipulation on file permitting the matter to be heard as a default. The clerk testified to the same effect as regards petitioner's reference to the stipulation, adding that petitioner said Judge Westwick had relieved himself of the case and that it was all right to proceed. The record reveals, and petitioner's testimony discloses, that a formal stipulation had not been submitted or filed other than the one submitted several months earlier which had been rejected by Judge Westwick. Judge Wagner refused to proceed and during the court recess unsuccessfully attempted to reach Judge Westwick by telephone, but talked with the clerk in Santa Barbara and learned an answer was on file. After the recess Judge Wagner told petitioner he would not hear any portion of the matter.

Following his unsuccessful effort to have Judge Wagner hear the matter, petitioner addressed a letter to Judge Westwick requesting that he order the case on the calendar "so that the same can be reset and let us get it cleaned up in that manner. As soon as it is restored to the calendar, I will file another Memorandum of Motion to Set and get it disposed of." As events later developed, however, the parties finally agreed upon and filed sometime in the middle of January, 1943, a stipulation satisfactory to Judge Westwick who, on February 8, 1943, ordered the prior testimony stricken and after further hearing, granted an interlocutory decree of divorce.

[8] It thus appears that in order to have the matter heard petitioner misrepresented to Judge Wagner the actual status of the case. His conduct in this regard constituted a violation of section 6068 (subds. b and d) of the State Bar Act in that it reveals a lack of recognition by him of the duties of an attorney and of the obligation and respect due to the courts.

Summary.

[9] Our examination of the entire record reveals nothing of a serious nature warranting the imposition of discipline under the first ten counts, although it must be conceded in some instances petitioner's conduct is not to be commended. The evidence with respect to certain of those counts reflects a pattern of conduct that might give rise to doubt as to petitioner's honesty, which doubt we have resolved in his favor. However, as before indicated, his conduct with respect to the matter involved in count eleven requires discipline. The board having found against petitioner on nine counts recommended suspension for a period of two years. In view of the prior disciplinary action against him, his conduct with respect to the matter involved in count eleven justifies his suspension for a period of one year.

It is ordered that petitioner be suspended from the practice of law for a period of one year, effective thirty days after the filing of this opinion.

CARTER, Justice (concurring and dissenting).

I concur in the conclusion reached as to the first ten counts but I dissent from the holding in the majority opinion that petitioner should be disciplined for his conduct embraced in count 11. In my opinion the record does not disclose any attempt of petitioner to mislead the court or take an unfair advantage of the adverse party. No one was injured or suffered any loss as the result of petitioner's conduct. His explanation of what took place is as reasonable as that contended for by The State Bar, and even if we accept respondent's theory as to petitioner's conduct, it affords no justification for the extent of the discipline administered.

In my opinion the entire proceeding against petitioner should be dismissed.

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26 Cal.2d 680

GRUPE v. GLICK et al.

L. A. 19108.

Supreme Court of California.

June 29, 1945.

1. Appeal and error 🔑969
Trial 🔑27

Granting or withholding permission to make a test operation, results of which are to be presented as evidence of material facts in controversy, is largely within discretion of trial court and its ruling will not be disturbed except upon clear showing of abuse thereof.

2. Trial 🔑27

Where court twice granted defendant's motions for leave to operate machine sold as a test of breach of warranty and to offer demonstrative proof of such operation, but defendant failed to make demonstration within time allowed and did not explain such failure, denial of third motion, made when case was called, for permission to make a 30-hour demonstration, was not error.

3. Appeal and error 🔑1032(1)

Where appellant complained of trial court's refusal of permission to make experimental test of machine, respondent did not have burden of showing that he would have been harmed if additional time had been allowed to hold 30-hour demonstration.

4. New trial 🔑144

Affidavits in support of motion for new trial, by which defendants first attempted to explain failure to hold demonstration within time allowed by court and in manner agreed upon, were insufficient to show abuse of discretion in refusing to permit demonstration.

5. Appeal and error 🔑1046(1)

Alleged error in refusing permission to make experimental test to demonstrate efficiency of machines sold was not prejudicial to sellers in action for breach of warranty, where cause was tried without jury and there was abundant evidence that machines failed to operate as warranted.

6. Sales 🔑442(1)

Under statute governing damages for breach of warranty, "value" and "worth to plaintiff" may under certain circumstances be approximately the same, but are not necessarily synonymous. Civ.Code, § 1789 (7).

See Words and Phrases, Permanent Edition, for all other definitions of "Value" and "Worth to Plaintiff".

7. Sales 🔑442(5)

Availability of a reasonable substitute in the market does not preclude recovery for loss of resale profits resulting from breach of warranty, where buyer has delivered a mechanical device to vendee according to resale contract without knowledge of its unsuitability. Civ.Code, § 1789 (7).

8. Sales 🔑442(5)

The amount of prospective profits from resale was properly included in general damages for breach of warranty if it might fairly be supposed to have entered into contemplation of parties when they made contract, and if reasonably certain, especially where buyer was made an exclusive agent for sale of the equipment. Civ. Code, § 1789(7).

9. Sales 🔑442(5)

Where buyer of machinery was made exclusive agent for sale of such machinery and had specific contracts for resale, buyer was within rule allowing recovery of lost resale profits where such loss is reasonably foreseeable and certain.

10. Sales 🔑442(5)

The time of making resale contracts is immaterial to buyer's right to recover loss of resale profits for breach of warranty where, at time of sale, seller knows that buyer as a dealer is purchasing for resale in ordinary course of business. Civ.Code § 1789(7).

11. Sales 🔑442(5)

In computing damages recoverable by buyer for breach of warranty in sale of machinery based on loss of resale profits, charge for services to be rendered by buyer in securing business for subpurchasers, which was included in resale price, should be deducted. Civ.Code, § 1789(7).

12. Sales 🔑442(6)

In action against seller for breach of warranty of quality, buyer may recover for money and time spent in reasonable efforts to make the machine sold conform to the warranty. Civ.Code, § 1789(7).

13. Sales 🔑442(13)

A buyer who resells machine with a warranty similar to that made by seller, without knowledge that machine is unsuitable for its purpose, may recover from seller the amount for which buyer is liable to subpurchaser because of subpurchaser's expenditure of time and money in reasonable efforts to make the machine conform to the warranty, though buyer has not settled with subpurchaser or suffered judgment. Civ.Code, § 1789(7).

14. Appeal and error 🔑843(2)

Where action for breach of warranty was tried upon theory that, under issues framed by the pleadings, buyer could recover loss of profits upon prospective sales if evidence tended to prove such detriment, whether complaint charging breach of warranty would justify award of such damages need not be determined.

15. Damages 🔑23, 40(2)

An award of damages for loss of future profits is subject to general rule that amount which would have come to plaintiff must be certain and must have been within contemplation of parties when they contracted.

16. Sales ⚷427

A cause of action for loss of profits on future resales that probably would have been made but for breach of warranty is different from and does not include claim for damages for injury to buyer's business or good will resulting from resale of inferior goods, and is not an action for breach of an exclusive sales agency contract, but is limited to compensation for gains prevented by inability to make additional sales in ordinary course of business.

17. Damages ⚷40(3)
Sales ⚷442(5)

Where operation of established business is prevented or interrupted, as by tort or breach of contract or warranty, damages for loss of prospective profits that otherwise might have been made are generally recoverable because ascertainable with reasonable certainty from past volume of business and other provable data.

18. Damages ⚷40(3)

Where operation of an unestablished business is prevented or interrupted, damages for prospective profits that might otherwise have been made from its operation are not recoverable, since their occurrence is uncertain, contingent and speculative.

19. Damages ⚷40(1)

Although generally objectionable as conjectural and speculative, anticipated profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability.

20. Sales ⚷440(4)

Where exclusive sales agency held by buyer of machinery was a new venture, so that there was no evidence of past volume of business, evidence of his expense and profits on sales made was admissible to show net profits he would have received on additional sales, as element of damages for seller's breach of warranty. Civ.Code, § 1789(7).

21. Sales ⚷442(5)

On showing that, when machines sold were determined to be useless, buyer had offers for purchase of 5 additional machines at specified price, court properly estimated the prospective net profits lost on such contemplated resales. Civ.Code, § 1789(7).

22. Sales ⚷447

As basis for allowing loss of profits on prospective resales, as element of damages to buyer for seller's breach of warranty, court was required to make finding as to availability of a reasonable substitute in the market for the machinery sold.

CARTER, J., dissenting in part.

In Bank.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by George G. Grupe, Jr., against Fred P. Glick and others for damages for breach of warranty in sale of oil refining equipment. From a judgment for plaintiff and from an order denying leave to introduce testimony in support of a motion for new trial, defendants appeal.

Judgment reversed with directions, and appeal from order dismissed.

Prior opinion, Cal.App. 148 P.2d 887.

Ben Gould, of Los Angeles, for appellants.

Turner & Wald and Preston Turner, all of Santa Ana, for respondent.

EDMONDS, Justice.

A judgment for damages followed findings that oil refining equipment sold by Fred P. Glick, doing business as Fabriform Steel Products Company, did not operate as represented by him. Upon the appeal from that judgment, the principal questions presented for determination concern the measure of damages to be applied and the sufficiency of the evidence to support the findings as to certain amounts of damage sustained by the purchaser.

It appears that three machines which the appellants sold to George G. Grupe, Jr., upon representations that they would re-refine oil, were not properly designed or constructed. Grupe paid $500 for each of them under a contract which gave him the exclusive selling rights for the device, and upon the express warranty that they were suitable for the purpose of refining oil. Grupe sold each machine for $1,500 and he was negotiating for the sale of five more at a price of $1,800, respectively, when it was ascertained that the equipment was unsuitable for the warranted purpose. The trial court found that the equipment bought by Grupe had a total value of $75, at the time of its delivery but, if as represented, its value would have been $4,500, and awarded general damages in the amount of $4,425. In addition, the court found that Grupe is entitled to special damages for loss sustained as a result of the breach of warranty in the amounts of $321.34 expended by him, $526.50 expended by one and $600 by another of his vendees, and $1,000 as prospective profits on future sales. Judgment was rendered for the sum of $6,872.84. The appeal of Glick individually and as doing business under the fictitious name is not only from the judgment but also from an order denying a motion to introduce evidence in the form of a demonstration of equipment of the kind sold by him.

The findings to the effect that the machines were not properly designed and constructed rest upon conflicting evidence and, the appellants concede, are not now subject to objection insofar as the basis for them is concerned. But it is argued that the judgment should be reversed because the trial court refused to receive additional evidence. The same offer of proof was made at the time a motion for a new trial was heard and denied.

The appellants also vigorously attack the several amounts for which the judgment was rendered and first challenge the sum of $4,425 given to the buyer as general damages. They urge that as the buyer's resale price included the cost of procuring customers for his vendees, the value of that service should have been deducted from the amount of damages. Regarding the award made for the expenditures of purchasers from Grupe in attempting to make the machines conform to the warranty, although the amounts are not questioned, it is claimed that they are not recoverable in this action because it does not appear either that the respondent has paid them or that his vendees have sued him for breach of warranty. As to the loss of anticipated profits on sales for which $1,000 was allowed, it is contended that this is not a proper item of damage in an action brought by the owner of a business which has not been established long enough to have a record of profitable operation. In any event, the appellants say, the evidence does not show that the damages awarded were within the contemplation of the parties at the time they contracted. In support of the judgment in his favor, the respondent urges that the authorities cited by the appellants are not in point or, upon the facts shown in this case, are distinguishable. Moreover, he asserts, the findings of the trial court are supported by substantial evidence, and all conflicts must be resolved in his favor.

Considering the appellants' complaint regarding the court's refusal to receive experimental evidence, the record shows that at the conclusion of the presentation of testimony, Glick asked leave to operate one of the three machines which he had sold and to offer demonstrative proof as to its operation under such conditions as might be imposed. This motion was granted. The following day the conditions for operation were agreed upon. It was determined that 1,000 gallons of oil were to be run through the equipment and that the test was to be completed within one week. Thereupon the court, for the announced purpose of allowing sufficient time to make the demonstration, continued the trial for 12 days, with the understanding that if counsel were not present on that day, it would go over for one week, and if necessary for an additional week thereafter.

Pursuant to this understanding, counsel took the full time allowed, a total of 26 days from the date when leave was granted to make the demonstration. But this time was given with the express requirement that the test must be completed by March 30th, the date which had been fixed by the court for final arguments. On March 30th, counsel for Glick again advised the court that the demonstration had not been made and, for their accommodation, the matter was again continued to April 9th, with the direction that the parties then must be prepared to argue the case. Two days were set aside for that purpose.

When the case was called on April 9th, Glick's counsel stated that the promised demonstration had not been made, and he requested permission to make a continuous run of the machine for 30 hours. If the device performed at a capacity of 20 gallons per hour, according to the representation upon which Grupe purchased it, that time would allow the processing of 600 gallons of oil instead of 1,000 gallons, which was the amount contemplated by the operation originally proposed. In making the request, counsel for Glick agreed with the trial judge that he had been very lenient in allowing time within which to make the proposed test. The motion was opposed by counsel for Grupe, who pointed out that considerable time had been consumed by the prior continuance and there was no explanation for the failure to make the promised demonstration within the 26 days which had been provided for that purpose. The motion was denied.

It is argued that the objection to the proposed 30-hour demonstration was arbitrary, that it does not appear that the respondent would have been harmed by the delay, and that, as the motion was based upon an offer to show that the machine could re-refine oil at the rate of 20 gallons per hour, the appellants were prejudiced by the court's ruling. The appellants also complain that prejudicial error resulted from the failure of the trial court, at the hearing of the motion for a new trial, to receive into evidence the results of a trial run of the machine or to permit a demonstration originally proposed.

In its ruling at the time the motion for new trial was heard, the court pointed out that during the trial ample time had been given within which to make the demonstration but that Glick had not taken advantage of the opportunity afforded him, nor had he made any adequate explanation of his failure to do so. Moreover, the trial judge observed that the affidavits presented in support of the motion for a new trial did not show that Glick had any evidence which, with due diligence, could not have been produced at the trial.

[1] The granting or withholding of permission to make a test operation, the results of which are to be presented as evidence of the existence or nonexistence of a material fact in controversy, is a determination largely within the discretion of the trial court and its ruling will not be disturbed except upon a clear showing of an abuse thereof. Miller v. Dollar S. S. Lines, Inc., 19 Cal.App.2d 206, 64 P.2d 1163; Collins v. Graves, 17 Cal.App.2d 288, 61 P.2d 1198.

[2-4] In the present case, there is no basis whatever for attacking the rulings of the court upon any motion made in regard to the offer of proof. Certainly the respondent does not have the burden of showing, as claimed by the appellants, that he would have been harmed had additional time been allowed to hold the proposed 30-hour demonstration. And the affidavits in support of the motion for a new trial, by which the appellants first attempted to explain the failure to hold a demonstration within the time allowed by the court and in the manner agreed upon, do not show sufficient facts, even had they been offered at the trial, to justify the holding that under all of the circumstances the court abused its discretion in refusing to permit a demonstration.

W. H. Walker, an employee of the appellants, in stating the reasons why the test had not been made before, said that he did not commence to make the repairs necessary to put the machine in order for the demonstration until March 30th and that not until the week of March 23rd to March 28th did he and other employees do anything toward setting up the equipment to be used for the trial run. No excuse was given for such delay. And although, according to other statements made by Mr. Walker in his affidavit, on April 9th the machine was satisfactorily operated for 3½ hours, and on April 10th for another 3½ hours, in view of the evidence showing that failures in operation developed after the machine had operated for a considerably longer period, his statements are neither relevant nor convincing. More particularly, the test described by him was not made under conditions similar to those existing when the machines were being used by the respondent's vendees.

[5] Moreover, it does not appear that the appellants have been prejudiced by the fact that the trial court did not have the benefit of the demonstration in reaching his decision. The cause was tried without a jury, and there was abundant evidence to show that, in the hands of Grupe and his vendees, the three machines failed to operate as warranted. The fact that Glick or his employees assertedly could operate one of the machines for a relatively short time with apparent success very probably was properly considered by the trial judge as having but little evidentiary value in determining the issue concerning the general usefulness of the device.

Considering the other points relied upon by the appellants, section 1789, subsection (7), of the Civil Code provides that, "in the case of breach of warranty of quality," the general measure of damages "is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty." The subsection also provides that the presence of "special circumstances showing proximate damage of a greater amount" may justify the allowance of additional damages.

In its findings, the trial court declared that if the machines had been fit and suitable for the purpose of re-refining oil, they "would have been worth" $4,500 to Grupe, but that at the time they were delivered to him they were totally worthless except for a junk value of $75, and Grupe "thereby suffered damages in the sum of $4,425." The court also found that as a direct and proximate result of the failure of the machines to comply with the representations and warranties made by the seller, Grupe had lost $3,000 in profits which he would otherwise have realized under specified resale contracts; that he thereby suffered damages in the amount of $1,500 paid for the machines, and damages to the extent of $3,000 for loss of profits on the resale of them, a total of $4,500, less $75, found to be the value of the machines as junk.

These findings declare that Grupe is entitled to damages in the amount of $4,425 upon two different theories. First, it is said, the sum represents the difference between $4,500, the amount the machines "would have been worth to plaintiff" if they had performed as warranted, and $75, their value at the time they were delivered to Grupe. The court also reasoned that $4,425 is recoverable as the difference between $1,500, the amount paid by Grupe, and $75, plus the profit of $3,000 which Grupe lost on the resales which failed as a consequence of the breach of warranty.

[6] Under the latter theory the profits which Grupe would have made on the resales of the machines are allowed as a separate item, whereas the first measure of damages includes such profits by computing the award upon Grupe's sales at $1,500 per machine. In this connection, it may be noted, the trial court departed from the code provision specifying as the basis for awarding damages "the value [the goods] would have had if they had answered to the warranty" (Civ.Code, § 1789(7)), and specified in its findings the amount the machines would have been "worth to plaintiff." Although "value" and "worth to plaintiff" may, under certain circumstances, be approximately the same, they are not necessarily synonymous. Hurd v. Barnhart, 53 Cal. 97, 99; Shurtleff v. Marcus Land & Investment Co., 59 Cal.App. 520, 211 P. 244.

The alternative findings of the trial court, one of which directly and the other indirectly fixes the loss of profits sustained by Grupe, indicate the uncertainty in the law as to the basis upon which a buyer may recover for breach of warranty upon goods purchased for resale and resold. Notwithstanding that, in actions for damages consequent upon the breach of a warranty of quality, damages have been awarded upon the theory that the buyer may recover, in addition to general damages, the profits lost on resales made prior to knowledge of the breach (Hubshman v. Louis Keer Shoe Co., 7 Cir., 129 F.2d 137; Parker v. S. G. Shaghalian & Co., 244 Mass. 19, 138 N.E. 236; Lissberger v. Kellogg, 78 N.J.L. 85, 73 A. 67; Reese v. Miles, 99 Tenn. 398, 41 S.W. 1065), the majority of courts make no such segregation but indirectly allow the recovery of damages for the loss of profits upon the theory that the resale price obtained by the buyer from his vendee represents the value the goods would have had if as warranted (McKinney v. Baker, 212 Ala. 490, 103 So. 467; Geo. W. Robinson & Co. v. Hyer Bros., 35 Fla. 544, 17 So. 745; Loxtercamp v. Lininger Implement Co., 147 Iowa 29, 125 N.W. 830, 33 L.R.A.,N.S., 501; Lewis v. Rountree, 79 N.C. 122, 28 Am.Rep. 309; Smith, de Maceda & Co. v. Swift & Co., 267 Pa. 365, 110 A. 141; Newbern v. Joseph Baker & Co., 147 Va. 996, 133 S.E. 500; see: Germain Fruit Co. v. J. K. Armsby Co., 153 Cal. 585, 96 P. 319; Johnston v. Faxon, 172 Mass. 466, 52 N.E. 539; Trigg v. Clay, 88 Va. 330, 13 S.E. 434, 29 Am.St.Rep. 723; anno. 64 A.L.R. 883) or, at least, is evidence of the value of the goods purchased for resale and resold (Milton v. Rowland, 11 Ala. 732; see: Jordan, Marsh & Co. v. Patterson, 67 Conn. 473, 35 A. 521; Johnston v. Faxon, supra), unless the resale price includes an unreasonable profit not contemplated by the parties when they contracted (Martin v. Neer, 126 Or. 345, 269 P. 342; see: Guetzkow Bros. Co. v. A. H. Andrews & Co., 92 Wis. 214, 66 N.W. 119, 52 L.R.A. 209, 53 Am.St.Rep. 909). However, whether the loss of profits is allowed as a separate item of damages, or indirectly as a part of the general damages, the recovery of them has generally been limited to cases where the goods are unobtainable on the market (National, etc., Mfg. Co. v. Producers' Refining Co., 169 Cal. 740, 147 P. 963; McKay v. Riley, 65 Cal. 623, 4 P. 667; Coates v. Lake View Oil & Refining Co., 20 Cal.App.2d 113, 66 P.2d 463; Long Beach Fisheries Co. v. Curtis Corporation, 58 Cal.App. 318, 208 P. 372; note, 52 L.R.A. 209; note, 53 L.R.A. 33; anno. 88 A.L.R. 1439; 46 Am.Jur.

Sales, p. 817, § 689) and, consequently, the buyer cannot offer his vendee a reasonable substitute to fulfill his resale contract.

[7, 8] Although the findings of the trial court fail to state that oil re-refining machines of the kind and quality manufactured by the seller in this case were not on the market at or about the time the Glick machines were found to be unusable, there is evidence to that effect. But assuming the availability of a reasonable substitute in the market, it does not follow that damages for the loss of resale profits are not recoverable where, as in the present case, the buyer has delivered a mechanical device to his vendee according to the terms of the resale contract without knowledge that it was unsuitable for the purpose for which it was warranted. The amount lost by Grupe on account of these prospective profits was therefore properly included in the sum allowed as general damages for breach of warranty if the evidence shows that such damages are (1) such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, and (2) reasonably certain.

[9] There can be no question but that, according to the record in the present case, the parties at the time they contracted contemplated that if the machines did not perform according to warranty, resale profits would be lost by the buyer. Although there is other evidence concerning the dealings of the parties which warrants this conclusion, the fact that Grupe was made an exclusive agent for the sale of the equipment is sufficient to bring the case within the rule that the loss of profits on goods resold, to be recoverable, must be reasonably foreseeable by the seller at the time the parties contracted for the original sale.

[10] Notwithstanding that in some jurisdiction it is required that the resale contract be in existence at the time of the original sale, for the reason that otherwise the resale would not be a transaction within the contemplation of the parties, the weight of authority is to the effect that the time of making the resale contract is immaterial where, at the time of the sale, the seller knows that the buyer, as a dealer, is purchasing for resale in the ordinary course of his business. 88 A.L.R. 1471. The latter rule is based upon sound reason, for it is unrealistic to say that the seller, knowing the purpose for which the buyer is purchasing, cannot foresee the damages that will follow from a breach of warranty not ascertainable until the goods are put to use by the buyer's vendee. Also, under the measure of damages applicable in the present case, it cannot be claimed that the amount awarded lacks a basis of certainty; on the contrary, the general damages may be measured with a mathematical exactness not ordinarily required.

[11] In arriving at its conclusions, however, the trial court failed to take into account certain evidence which demonstrates that the resale price obtained by Grupe included a charge for services agreed to be rendered by him in securing business for the subpurchaser of each machine. The record shows that Grupe estimated the cost of this service as being somewhere between $300 and $500 per machine, and the findings should have included the amount determined to be reasonable for that purpose and made a deduction accordingly.

[12, 13] In regard to the items of $321.34, $526.50, and $600 awarded as special damages, it is generally held that, in an action against the seller for a breach of warranty of quality, the purchaser may recover damages for money and time spent in reasonable efforts to make the machine conform to the warranty under which it was sold (Fox v. Stockton Combined Harvester, etc., Works, 83 Cal. 333, 23 P. 295; McLennan v. Ohmen, 75 Cal. 558, 17 P. 687; W. T. Adams Machine Co. v. Castleberry, 92 Ark. 310, 122 S.W. 998; Bass Foundry & Machine Co. v. Sulzberger & Sons Co., 205 Ill.App. 454; Isaacs v. Jackson Motor Co., 108 Kan. 17, 193 P. 1081; Plumbers Supply Co. v. Lanter, 280 Ky. 523, 133 S.W.2d 739; Whitehead & Atherton Machine Co. v. Ryder, 139 Mass. 366, 31 N.E. 736; Peoples State Bk. of Butterfield v. Randby, 158 Minn. 309, 197 N.W. 265; Waynesville Wood Mfg. Co. v. Berlin Machine Works, 144 N.C. 689, 57 S.E. 455; Dahl Implement & Lumber Co. v. Campbell, 45 N.D. 239, 178 N.W. 197) and, in addition, where the purchaser resells the machine with a warranty similar to that made by his seller, without knowledge that the machine is unsuitable for the purpose for which it was designed, he may recover the amount for which he is liable to his subpurchaser because of the latter's expenditure of time and money in reasonable efforts to make the machine conform to the warranty (Lissberger v. Kellogg, supra; Carleton v. Lombard, Ayres & Co., 19 App.

Div. 297, 46 N.Y.S. 120, affirmed without opinion, 162 N.Y. 628, 57 N.E. 1106; Passinger v. Thorburn, 34 N.Y. 634, 90 Am. Dec. 753; Aldridge Motors Inc. v. Alexander, 217 N.C. 750, 9 S.E.2d 469; Reese v. Miles, supra; Hubbard Steel Foundry Co. v. Federal Bridge & Structural Co., 169 Wis. 277, 171 N.W. 949), notwithstanding that the purchaser has not settled with the subpurchaser or suffered judgment (Buckbee v. P. Hohenadel, Jr., Co., 7 Cir., 224 F. 14, 139 C.C.A. 478, L.R.A.1916C, 1001, Ann. Cas.1918B, 88; Davis v. Ferguson Seed Farms, Tex.Civ.App., 255 S.W. 655; Wolstenholme, Inc. v. Jos. Randall & Bros., Inc., 295 Pa. 131, 144 A. 909).

As it may be assumed that a buyer will spend time and money in reasonable efforts to make defective goods conform to their warranty, the amounts incurred or paid for that purpose should be considered as being within the contemplation of the parties at the time of the original contract of sale and, because such damages proximately result from the breach of warranty and can be ascertained with reasonable certainty, they are allowable. With respect to the expenditures of the subpurchaser in reasonable efforts to cure the breach of warranty, there can be no valid objection to their inclusion in the award upon the ground of lack of proximity or certainty and as Glick knew that Grupe was purchasing the oil re-refining machines for resale, such damages reasonably may be considered as a foreseeable consequence of the breach of warranty. Accordingly, the trial court properly allowed Grupe $321.34 which it was shown he expended in good faith in his efforts to enable his vendees to use the machines. Also, the amounts of $526.50 and $600, paid by subpurchasers Fred McTyr and Ben C. Shepherd, respectively, in connection with their efforts to operate and successfully use the oil re-refining machines were correctly charged to Glick in the findings and judgment.

[14] As an additional item of damages, $1,000 was awarded to Grupe for the loss of profits which he asserts he would have made upon prospective sales. From the filing of his complaint to and including his position for a hearing by this court, he proceeded upon the theory that damages for profits anticipated from future contemplated sales may be recovered in an action for breach of warranty. In the answer to the petition for a hearing, the appellants for the first time suggest, without citation of authority, that the loss of prospective profits upon future sales may not be recovered under a cause of action for breach of warranty. Damages for the loss of profits of that kind are generally recoverable in an action for breach of contract; also, apparently without question, they have been awarded as relief properly obtainable upon other causes of action, the basis of the determination being that such detriment is the proximate consequence of the breach of warranty. But it is here unnecessary to determine whether a complaint charging the breach of warranty will justify an award of such damages, because this case was tried upon the theory that under the issues framed by the pleadings they are recoverable by Grupe if the evidence tends to prove detriment in that category. Stewart v. Crowley, 213 Cal. 694, 3 P.2d 562; Silvers v. Grossman, 183 Cal. 696, 192 P. 534; Cross v. Bouck, 175 Cal. 253, 165 P. 702; Swanson v. Hempstead, 64 Cal.App.2d 681, 149 P.2d 404; Weiner v. Luscombe, 19 Cal.App.2d 668, 66 P.2d 151; McDaniel v. McDaniel, 134 Cal.App. 597, 25 P.2d 843.

[15] An award of damages for the detriment occasioned by the loss of future profits is subject to the general rule that the amount which, except for the defendant's wrongful act, would have come to the plaintiff, must be certain and must have been within the contemplation of the parties when they contracted. In this connection, the appellants contend that, because Grupe had an unestablished business, it is impossible to calculate with reasonable certainty the damages assertedly suffered by him and, therefore, any allowance to him would rest upon a speculative, contingent and conjectural basis. But, unquestionably, the loss of profits upon future sales was contemplated as a probable consequence of a breach of the contract made by the parties to this action. By its terms, in addition to naming Grupe exclusive agent for the sale of the machines, the contract provided that he was to purchase at least one machine per month for a period of six months and, thereafter, two machines per month, the contract to terminate at the seller's option should the buyer fail to comply with these minimum requirements.

[16-19] However, to justify the award of $1,000 allowed Grupe as compensation for profits he would have made upon additional sales, it must meet the further test of certainty. A cause of action for the loss of prospective profits on future sales that probably

would have been made but for the breach of warranty is different from and does not include a claim for damages for injury to the buyer's business or good will resulting from the resale of inferior goods; nor is it an action for breach of an exclusive sales agency contract. The plaintiff's claim is limited to compensation for the gains prevented by his inability to make additional sales in the ordinary course of business.

Upon this question, it is held that where the operation of an established business is prevented or interrupted, as by a tort or breach of contract or warranty, damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable for the reason that their occurrence and extent may be ascertained with reasonable certainty from the past volume of business and other provable data relevant to the probable future sales. Overstreet v. Merritt, 186 Cal. 494, 200 P. 11 (breach of contract); Schumann v. Karrer, 184 Cal. 50, 192 P. 849 (lease); Barnes v. Berendes, 139 Cal. 32, 69 P. 491, 72 P. 406 (tort); Hawthorne v. Siegel, 88 Cal. 159, 25 P. 1114, 22 Am. St. Rep. 291 (lease); Lambert v. Haskell, 80 Cal. 611, 22 P. 327 (tort); Hacker Pipe & Supply Co. v. Chapman Valve Mfg. Co., 17 Cal.App.2d 265, 61 P.2d 944 (breach of contract); Northwest Auto Co. v. Harmon, 250 F. 832, 163 C.C.A. 146, Ann.Cas.1918E, 461 (breach of contract); Neal v. Jefferson, 212 Mass. 517, 99 N.E. 334, 41 L.R.A., N.S., 387, Ann.Cas.1913D, 205 (lease); Randall v. Peerless Motor Car Co., 212 Mass. 352, 380, 99 N.E. 221 (breach of contract); Hubshman v. Louis Keer Shoe Co., supra (breach of warranty); Ann.Cas. 1917B, 1194; 6 Ann.Cas. 973; see: Germain Fruit Co. v. J. K. Armsby Co., supra (breach of warranty); Stephany v. Hunt Bros. Co., 62 Cal.App. 638, 217 P. 797; cf.: Muldrow v. Norris, 2 Cal. 74, 56 Am.Dec. 313; Eagle Lake Ice Co. v. Munson, 73 Ind.App. 496, 127 N.E. 839. On the other hand, where the operation of an unestablished business is prevented or interrupted, damages for prospective profits that might otherwise have been made from its operation are not recoverable for the reason that their occurrence is uncertain, contingent and speculative. California Press Mfg. Co. v. Stafford Packing Co., 192 Cal. 479, 221 P. 345, 32 A.L.R. 114 (breach of warranty); Martin v. Deetz, 102 Cal. 55, 36 P. 368, 41 Am.St.Rep. 151 (breach of contract); New York & Colorado Mining Syndicate & Co. v. Fraser, 130 U.S. 611, 9 S.Ct. 665, 32 L.Ed. 1031 (breach of warranty); Moulthrop & Stevens v. Hyett & Smith, 105 Ala. 493, 17 So. 32, 53 Am.St. Rep. 139 (breach of warranty); Winston Cigarette Machine Co. v. Wells-Whitehead Tobacco Co., 141 N.C. 284, 53 S.E. 885, 8 L.R.A.N.S. 255 (breach of contract); anno. 99 A.L.R. 938; note, 53 L.R.A. 38; see: Gibson v. Hercules Mfg., etc., Co., Inc., 80 Cal.App. 689, 252 P. 780; Alpha Checkrower Co. v. Bradley & Co., 105 Iowa 537, 75 N.W. 369. Consequently, it is generally held that a purchaser may not recover damages for the loss of prospective profits he anticipated making from the use of a machine which was not delivered or delivered in a worthless condition. California Press Mfg. Co. v. Stafford Packing Co., supra; 34 A.L.R. 114; cf.: Bryson v. McCone, 121 Cal. 153, 53 P. 637 (breach of warranty). But although generally objectionable for the reason that their estimation is conjectural and speculative, anticipated profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability. McConnell v. Corona City Water Co., 149 Cal. 60, 85 P. 929, 8 L.R.A.N.S., 1171; Lowe v. Yolo Co. Consol. Water Co., 157 Cal. 503, 108 P. 297; cf.: Pallett v. Murphy, 131 Cal. 192, 63 P. 366; Crow v. San Joaquin, etc., Irr. Co., 130 Cal. 309, 62 P. 562, 1058. All of these cases recognize and apply the general principle that damages for the loss of prospective profits are recoverable where the evidence makes reasonably certain their occurrence and extent.

[20] For the reason that Grupe's exclusive sales agency was a new venture, the record does not contain any evidence of a past volume of business in the sale of the particular machine in controversy, showing with reasonable probability that a fairly certain number of additional sales could have been made in the future. However, the evidence concerning his sales expense and his profit on sales made is admissible to show the net profit he would have received on additional sales.

[21] And as it appears that, at the time the oil re-refining machines were determined to be useless for the purpose for which they were designed, he was negotiating for and had offers for the purchase of five additional machines at a price of $1,800 each, the trial court properly esti-

mated the prospective net profit he lost on such contemplated resales. Ann.Cas.1917B 1194; 6 Ann.Cas. 976.

[22] The award of such profits, however, depends upon the existence of an additional factor upon which the trial court made no findings, namely, the absence of a reasonable substitute in the market. It is clear that if a machine of like quality as that warranted was reasonably available to Grupe, he could have completed the sales for which he was negotiating; in other words, the loss of profits from those sales could not be said to have been within the contemplation of the parties under such circumstances. Accordingly, the trial court was required to make a finding as to the availability of a reasonable substitute at the time in question.

The judgment is, therefore, reversed with directions to the trial court to determine the reasonable cost of the service agreed to be rendered by the respondent upon the sale of each machine made by him and upon the original findings as modified by additional findings to render judgment for the reduced amount recoverable by Grupe accordingly. Also, additional evidence should be offered and received tending to prove whether, at the time of the breach of warranty, there was a reasonable substitute for the machine sold by Glick, the award of future profits to be reconsidered in the light of that evidence and the rules stated in this opinion. The purported appeal from the order denying the motion to receive additional evidence is dismissed.

SHENK, TRAYNOR, and SCHAUER, JJ., concurred.

CARTER, Justice (concurring and dissenting).

I concur in that portion of the majority decision which directs the trial court to ascertain the reasonable cost of the services to be rendered by respondent in servicing the machines in accordance with his agreements of sale. However, I dissent from that part which requires a retrial and findings on the issue of profits, particularly a finding as to the availability on the market of a reasonable substitute for the oil refining machines warranted. The evidence on that subject is conflicting and would support a finding either way. The trial court has made a finding that there was no substitute and it must be approved. The finding to which I refer states that defendant knew of and contemplated the resale of the machines by plaintiff and "that as a direct and proximate result of the defective design and construction of said oil refining machines, as hereinbefore set forth, and the noncompliance with the warranties of defendants and their authorized agents and representatives, as hereinbefore set forth, plaintiff has been unable to make any other or additional sales of said oil re-refining machines and has been required to discontinue the effort, and has thereby suffered a loss of profits, to his further damage in the sum of one thousand ($1,000.00) dollars." While that finding is not directed specifically at the existence of a substitute on the market it is general and includes by necessary implication that element. In Valencia v. Shell Oil Co., 23 Cal. 2d 840, 147 P.2d 558, the damages awarded to plaintiff were for loss of use of a truck. The court did not make an express finding that plaintiff was financially unable to pay the repair bill on the truck and regain its use, and hence, excused him from the duty of obtaining possession of his truck. Nevertheless, this court said at page 846 of 23 Cal.2d, at page 561 of 147 P.2d:

> "The trial court did not make an express finding regarding plaintiff's ability or inability in this regard. It did, however, in accord with the issues made by the pleadings, find 'that plaintiff was by reason of the negligence * * * of defendant and the wrongful failure of * * * defendant * * * to pay said repair bill deprived of the use of his truck for a period of seventeen months.' *A finding that plaintiff was unable to pay the repair bill results by necessary implication therefrom.* Reiniger v. Hassell, 216 Cal. 209, 211, 13 P.2d 737; Tuso v. Green, 194 Cal. 574, 582, 229 P. 327. The essence of the rule denying recovery for losses which could have been prevented by the reasonable efforts and expenditures of plaintiff is that his conduct rather than that of defendants proximately caused such losses." (Emphasis added.)

Likewise, in the instant case the findings made, included by necessary implication, a finding that there were no other substitute machines available to plaintiff, otherwise the damages found to have been suffered would not have been the direct and proximate result of the breach of warranty.

70 Cal.App.2d 217

ROSENFIELD v. VOSPER et al.

Civ. 14200.

District Court of Appeal, Second District, Division 3, California.

July 18, 1945.

Rehearing Denied Aug. 6, 1945.

Hearing Denied Sept. 13, 1945.

1. Judges ⚿51(3)

Where, at a hearing on plaintiff's motion for new trial, the trial judge was informed of sworn statements in plaintiff's motion charging bias and prejudice of the judge, who then stated that he would examine the affidavit and file answering affidavit if necessary, there was a sufficient presentation to the judge at such proceeding of plaintiff's statement of alleged disqualification and upon judge's failure to file answering affidavit within five days as required by statute, the trial judge was disqualified as a matter of law. Code Civ. Proc. § 170.

2. Statutes ⚿227

Where the law prescribed the consequences that will follow the failure to do an act within a given time, the limitation is mandatory and not directory, and the prescribed consequence cannot be defeated by performance of the act after the time allowed.

3. Judges ⚿51(4)

The statute providing that where statement of disqualification of judge is filed and the trial judge fails to file his answer within five days, the action shall be heard and determined by another judge, is mandatory. Code Civ.Proc. § 170.

4. Statutes ⚿227

The rule of statutory interpretation that imperative words may be held to have only a directory meaning is not applicable when a consequence or penalty is provided for a failure to do the act commanded.

5. Appeal and error ⚿781(4)

An appeal from an order holding trial judge is not disqualified to rule on a motion for new trial was not rendered moot merely because the time allowed for the court to pass upon the motion had expired.

6. Judges ⚿51(3)

A statement of disqualification of a trial judge in the form of an affidavit was in proper form. Code Civ.Proc. §§ 170, 446.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Adolph B. Rosenfield against Sidney C. Vosper and others to recover for legal services rendered to defendants. From an order holding the trial judge in the case not disqualified to rule on plaintiff's motion for new trial, plaintiff appeals.

Reversed.

Adolph B. Rosenfield, of Long Beach, in pro. per.

D. A. Boone, of Long Beach, for respondents.

SHINN, Acting Presiding Justice.

This is an appeal from an order holding the trial judge in the case, Honorable William R. McKay, not disqualified to rule on a motion for new trial. The case has been on appeal before. Plaintiff, who is an attorney at law, recovered a judgment of $12,567.32 as the value of legal services rendered to the defendants, and this was reversed on appeal. Rosenfield v. Vosper, 1941, 45 Cal.App.2d 365, 114 P.2d 29. The costs of that appeal, amounting to $1,932.30, were assessed against plaintiff. Rosenfield v. Vosper, 1943, 57 Cal.App.2d 605, 134 P.2d 529, 135 P.2d 579. On February 2, 1942, at the conclusion of a retrial, the court caused to be made a minute order for judgment in favor of plaintiff in the sum of $3,000 as the value of plaintiff's services; on March 30, 1942, the court of its own motion vacated said order and directed further argument, following which the cause was reopened for the receipt of additional evidence on behalf of plaintiff. On September 23, 1942, the court rendered judgment in favor of plaintiff for $1,000 upon findings that he had performed the services for an agreed price. Plaintiff gave notice of intention to move for a new trial and on February 27, 1943, filed the affidavits of himself and his wife, each of which was labeled as an affidavit on motion for new trial. The statements contained in these affidavits are the basis of the charge of bias and prejudice on the part of Judge McKay. The clerk fixed March 10 as the time for hearing the motion. On March 8, in a proceeding to require defendants to produce a document upon the hearing of the motion for new trial, the charge of prejudice was brought to the attention of the court, and certain proceedings took place which will be set out hereinafter. At the conclusion of the hearing the court fixed March 15 as the time for presentation of the motion for new trial. On March 15 an affidavit was made and filed by Judge McKay as his answer to the charge of prejudice. A copy was served upon plaintiff, who acknowledged receipt thereof "subject to my right to object to delay in serving and all other objections to answer this March 15, 1943." The judge filed a supplemental answering affidavit on the same day. No agreement having been made for the hearing of the motion by another judge, the matter of the alleged disqualification was duly referred to the Judicial Council and Honorable Emmet H. Wilson was designated to try the issue. The same was duly heard and on March 18 an order was made to the effect that Judge McKay was not disqualified. This order was entered on March 19 and on the same day Judge McKay made and entered an order denying plaintiff's motion for new trial. The appeal is from the order of Judge Wilson.

It is the contention of appellant that the answering affidavit of the trial judge was not filed within the time allowed by section 170 of the Code of Civil Procedure and that by reason thereof a hearing of the motion for new trial by another judge was mandatory. Section 170 provides that where disqualification of the judge is to be urged, "* * * any party to such action or proceeding who has appeared therein may present to the court and file with the clerk a written statement objecting to the hearing of such matter or the trial of any issue of fact or law in such action or proceeding before such judge, and setting forth the fact or facts constituting the ground of the disqualification of such judge. Within five days after the presentation and filing of any such statement, the judge alleged therein to be disqualified may file with the clerk his consent in writing that the action or proceeding be tried before another judge, or may file with the clerk his written answer admitting or denying any or all of the allegations contained in such statement and setting forth any additional fact or facts material or relevant to the question of his disqualifications. The clerk shall forthwith transmit a copy of the judge's consent or answer to each party or his attorney who shall have appeared in such action or proceeding. Every such statement and every such answer shall be verified by oath in the manner prescribed by Section 446 of this code for the verification of pleadings. * * * If such judge admits his disqualification, or files his written consent that the action or proceeding be tried before another judge, *or fails to file his answer within the five days herein allowed,* or if it shall be determined after hearing that he is disqualified, the action or proceeding shall be heard and determined by another judge or justice not disqualified, who shall be agreed upon by the parties, or, in the event of their failing to agree, appointed by the chairman of the Judicial Council; * * *." (Italics added.)

The section requires the verified statement of the objecting party to be presented to the court and filed with the clerk. It appears from the record that plaintiff filed his affidavits with the clerk on February 27, 1943, but did not deliver them to the judge personally. The record before us contains a reporter's transcript of the proceedings held in Judge McKay's court on March 8, 1943, which transcript is duly certified by Judge Wilson as having been presented to and considered by him at the hearing in the matter of the alleged disqualification, excepting certain writings included therein which are not pertinent to our consideration. One of the attorneys for defendants in open court informed Judge McKay that the affidavits which plaintiff had filed charged "this court with bias and prejudice" and that he, defendants' counsel, had filed his affidavit in answer thereto. Then followed an extended discussion between the judge and both counsel in the case as to one of the incidents occurring at the trial which plaintiff had described in his affidavit. After this discussion defendants' counsel asked for time to file a further answering affidavit, with reference to the incident. The court inquired as to the purport of the statement in plaintiff's affidavit and defendants' attorney stated, "The purport is that you and I belong to some fraternal organization and that you are biased and prejudiced, and this matter is brought up on the oath, the inference being that you and I attended the same meeting or did something together." The particular incident under discussion was but one of many contained in plaintiff's affidavit of some 55 pages which purported to amplify plaintiff's general charges of bias and prejudice.

We find it difficult to discover any relevancy to the issue of bias and prejudice in many of plaintiff's rambling recitations but the general purport of most of them is that many rulings adverse to plaintiff in the course of the trial were tainted with bias and prejudice. Following a lengthy discussion of the particular incident, Judge McKay said, "Well I will peruse the affidavit very carefully and in the event this court is of the opinion that he should make an affidavit, he will make an affidavit." Plaintiff had requested earlier in the hearing that the application then before the court and the motion for new trial, as well, be heard on March 10, stating that that would give the court time to consider the affidavits upon the motion and he expressed the embarrassment to himself and to the judge occasioned by the attempted disqualification, and the judge stated, "It is rather unusual; the court started this case in October of 1941, and now in March of 1943, for the first time is the suggestion made that the court was biased and prejudiced; rather an unusual situation, but nevertheless one that we want to go into very carefully, and one which, I assure you, Mr. Rosenfield, will be gone into very carefully." The court then granted the attorney for the defendants two days within which to file additional answering affidavits and directed that they be served upon plaintiff within the two-day period.

As heretofore stated, the answer of the judge was not filed until seven days after the foregoing proceedings had taken place. In his affidavit the judge denied any bias or prejudice toward plaintiff and set forth a narration of the proceedings which evidenced a long and patient consideration of plaintiff's extensive evidence and arguments. In his supplemental affidavit the judge stated that plaintiff's affidavit had not been handed to him by the clerk until March 12 and that he first read the affidavit at that time.

[1] We are of the opinion that the proceedings which took place on March 8 constituted a sufficient presentation to the judge as of that date of plaintiff's statement of alleged disqualification. It was understood by the parties and the court that the issue of disqualification had been raised by the affidavits which were on file. In view of the statement of the judge that he would peruse the affidavits, give them his careful attention and file an answering affidavit if he concluded that he should do so, it was unnecessary that they be taken from the file and handed to the judge personally. The five days within which an answer of the judge might be filed commenced to run on March 8 and his answer was not filed until seven days thereafter.

[2-4] If the limitation of time for filing the answer is mandatory, the expiration of that time without the filing of an answer amounted to a disqualification of the judge as a matter of law. Prior to the amendment of section 170 of the Code of Civil Procedure in 1927, a judge could try the question of his own disqualification upon affidavits. The affidavit alleging disqualification had to be filed and served upon the adverse party or his attorney at least one day before the day set for trial of the action or proceeding, and counter affidavits might be filed at least one day thereafter, or within such further time as the court might grant, not exceeding five days, and the trial might be continued for this purpose. It was provided by the amendment of 1927, Stats. 1927, page 1403, chap. 744, that a judge who denied his disqualification should not hear or pass upon that question but that it should be heard and determined in every such case by some other judge to be agreed upon by the parties or, if they failed to agree, by a judge designated by the chairman of the Judicial Council. It was made the duty of the clerk to notify the chairman of the Judicial Council, within five days after the expiration of the time allowed for the judge to answer, of the fact that the parties had not agreed upon another judge to hear and pass upon the question of disqualification. Upon the point here in question the law has not been changed since 1927 except by the addition of the word "justice" as one who may be designated to hear and determine the question of disqualification. It was held in Grinbaum v. Superior Court, 189 Cal. 741, 209 P. 1005, decided in 1922, that a judge before whom an action was pending had jurisdiction to pass upon the question of his alleged bias and prejudice and to consider counter affidavits notwithstanding the fact that they were filed after the period fixed by statute, the statute in that regard being directory. This conclusion necessarily followed from the fact that the judge had jurisdiction to pass upon the question and there was nothing in the law depriving him of

jurisdiction through the failure to file counter affidavits within the prescribed five days. He had an undetermined and indefinite time within which to pass upon the question. The case illustrates the state of the law at the time the Legislature revised the entire procedure in 1927. Since that time it has been the law that the matter of disqualification must be heard by another judge, and the procedure therefor is specific and complete. Also the matter before the court for trial upon a question of law or fact must be heard by another judge in any one of three situations, namely, the admission by the judge of his disqualification, the failure of the judge to file an answer within the five days, or a finding of disqualification made by another judge. The Legislature could not have stated more clearly than it has that a judge accused of bias and prejudice becomes disqualified automatically upon his failure to file an answer within five days after the presentation and filing of the statement of disqualification. It is a well settled rule that where the law prescribes the consequences that will follow the failure to do an act within a given time, the limitation is mandatory and not directory, and that the prescribed consequence cannot be defeated by performance of the act after the time allowed. It was said in Thomas v. Driscoll, 1940, 42 Cal.App.2d 23, 27, 108 P.2d 43, quoted with approval in Whitley v. Superior Court, 1941, 18 Cal.2d 75, at page 79, 113 P.2d 449, at page 452: "Although imperative words are sometimes held to have only a directory meaning, this rule of interpretation is not applicable when a consequence or penalty is provided for a failure to do the act commanded. This is a California rule and is supported by the weight of authority in other jurisdictions."

The statute here is so clear that it leaves no room for interpretation. The law with reference to the determination of the question of disqualification, as it existed prior to 1927, was inadequate and unsatisfactory in many respects. The practice has been entirely changed. Where no answer is filed within the time allowed the judge to file one and if another judge is not agreed upon, the matter passes to the chairman of the Judicial Council, not for the designation of a judge to try the question of disqualification, but to try the pending action or proceeding. This definite procedure cannot be set at naught and defeated by the filing of an answer after the expiration of the allotted five days. It is of the very essence of the plan of section 170, supra, that the answer be filed within five days in order to pave the way for further proceedings, and this is an additional reason why the limitation is mandatory. Whitley v. Superior Court, supra.

[5] Respondent insists that the order should be affirmed for the reason that the appeal involves only a moot question, that even if the order be reversed the time allowed for the court to pass upon a motion for new trial has long since expired, and that the trial court will be without jurisdiction to grant plaintiff's motion. We have heretofore denied a motion to dismiss the appeal upon the same ground, considering it advisable to give effect to the holding in Collins v. Nelson, 1940, 41 Cal.App.2d 107, 106 P.2d 39, as authority upon the point, until the statutory law on the subject has been revised so as to provide for the addition to the sixty days allowed for ruling on a motion for new trial of the time consumed in the final determination of the question of disqualification of the judge before whom the action or proceeding is pending.

[6] Respondent points out that plaintiff's affidavit, while attested by a notary public, was not in the form of verification specified in section 446 of the Code of Civil Procedure, as required by section 170. The oath to an affidavit is in form more forceful than the oath made in the verification ofa pleading, and we think the statement of disqualification in the form of an affidavit was sufficient. If it was not, neither was the answer of the judge, for his verification was in the same form. The matter was heard upon the merits, without objection as to the form of verification of the statement or answer.

The order is reversed.

PARKER WOOD, J., and FOX, Justice pro tem., concur.

70 Cal.App.2d 103

HOLLYWOOD STATE BANK v. WILDE et al.

SAME v. EDWARDS et al.

SAME v. CARLSON et al.

SAME v. CLARK et al.

Civ. 14717.

District Court of Appeal, Second District, Division 2, California.

July 10, 1945.

1. Licenses 🔑18½, 39

Contracts for sale of chinchillas to be kept on seller's ranches for sale of offspring for profit, which would be shared in by buyers, were "securities", and were void in absence of permit under State Corporate Securities Act or filing of statement under Federal Securities Act. St.1917, p. 673; Securities Act of 1933, § 1 et seq., 15 U.S.C.A. § 77a et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Securities".

2. Licenses 🔑39

Evidence supported judgment denying recovery on assigned contracts for purchase of chinchillas on ground that contracts were securities as to which no permit had been obtained under state law or statement filed under federal law. St. 1917, p. 673; Securities Act of 1933, § 1 et seq., 15 U.S.C.A. § 77a et seq.

3. Appeal and error 🔑1010(1)

A finding of trial court supported by substantial and sufficient evidence will prevail in reviewing courts.

4. Evidence 🔑437

Parol evidence was admissible to show that contracts for sale of chinchillas were void because they were securities as to which no permit had been obtained under state law or statement filed under federal law, notwithstanding recital that contracts contained entire agreement between parties. St.1917, p. 673; Civ.Code, § 1625; Code Civ.Proc. § 1856; Federal Securities Act of 1933, § 1 et seq., 15 U.S.C.A. § 77a et seq.

5. Contracts 🔑138(1)

When evidence reveals that relations of parties to transaction are illegal and against public policy, court will deny relief based upon their contract.

6. Contracts 🔑136

A party may not waive right to urge illegality of contract by stipulation at time of execution thereof or afterward.

7. Evidence 🔑437

The parol evidence rule does not preclude evidence showing that consideration for contract was vicious or illegal. Civ. Code, § 1625; Code Civ.Proc. § 1856.

8. Bills and notes 🔑144

The character of negotiability must be implied by law as result of form and effect of instrument itself and cannot appear by stipulation of parties.

9. Contracts 🔑136

Where contracts are void because executed and assigned contrary to public policy and statute, all attempts to validate and vitalize them by inserting a waiver of such defense are likewise voidable for the same reason.

10. Licenses 🔑39

Contracts for sale of chinchillas to be kept on seller's ranches for sale of offspring for profit, which would be shared in by buyers, were nonnegotiable, and assignee took contracts subject to defense of violation of state and federal securities acts. St.1917, p. 673; Civ.Code, §§ 1459, 3086, 3543; Code Civ.Proc. § 1962, subds. 2, 3, Securities Act of 1933, § 1 et seq., 15 U.S.C.A. § 77a et seq.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Actions by the Hollywood State Bank against William H. Wilde and others, against S. H. Edwards and others, against Elmer E. Carlson and others, and against G. H. Clark, etc., and others, on certain contracts. From a judgment for defendants, plaintiff appeals.

Affirmed.

Fred Aberle, Walter G. Danielson, and Richard H. Forster, all of Los Angeles, for plaintiff and appellant.

G. L. Aynesworth and Irvine P. Aten, both of Fresno, for defendants and respondents.

MOORE, Presiding Justice.

These actions were consolidated for trial. They had been instituted for the purpose of enforcing the payment of the balance of a

$20,000 promissory note of the Chapman Chinchilla Sales Company, hereinafter referred to as the "Company," which had pledged to plaintiff certain contracts executed severally by respondents for the purchase of chinchillas. The defendants prevailed below upon the defenses that the contracts and their assignments were void in that they were made and assigned in violation of the Corporate Securities Act, St. 1917, p. 673, and of the federal Securities Act of 1933, § 1 et seq., 15 U.S.C.A. § 77a et seq. On this appeal by the bank from the consolidated judgment we are to determine whether the evidence justifies the findings and the judgment. A recital of a portion of the findings will serve to demonstrate the nature of the contracts and the justice of the court's conclusions.

The Facts Found

The Company is a Nevada corporation which operated in some twenty-eight states of the Union. A number of its officers participated in the organization of another corporation under the laws of Delaware, towit, National Chinchilla Breeders of America, Incorporated, hereinafter referred to as the "Breeders," and they continued to act as directors thereof. The Breeders authorized the Company to act as its sales agent. The latter trained some of its employees experienced in the industry to negotiate sales of chinchillas and others to manage fur farms on which the animals were raised. Both corporations cooperated in the development of such farms and in the creation of pooling agreements among the buyers of chinchillas. The sales company trained its large selling force in a uniform method of presenting inducements to investors. The salesman was equipped with blank forms for the purchaser to sign whereby the latter agreed to purchase chinchillas at $3200 a pair and to register its progeny with a breeders' association. Each salesman carried also application blanks for membership in the Breeders and was instructed to solicit membership therein by causing the buyer to execute such application and to advise the purchaser that the Breeders was the only association in which registration could be made or pedigree kept and that upon payment of $5 for a membership his application would go forward with the contract of purchase. The investor was told that the Company was the exclusive agent of the Breeders for the purchase as well as the sale of chinchillas and their pelts and that the Company had exclusive control of the chinchilla market in the United States and Canada. The salesman demonstrated, by a clocklike diagram called the "Chinchilla Dollar," the distribution of the $3200 received for each pair, according to which diagram such distribution was for the common benefit of the Company, the Breeders, and the investor. Pursuant to instructions he represented that it was better for a person to pay only one half of the price and to pay the remaining $1600 by delivery of a pair of the offspring to the Company; that owners could not sell the animals or their pelts to outsiders except through the sales company; that the two corporations would determine and control the quality and quantity of the animals and the prices to be obtained; that such overall control by the Company was essential to a sound and profitable investment; that it would be unnecessary for investors to give personal attention to the housing, feeding and caring for the chinchillas because (1) the Company maintained a service department with research laboratory and (2) the animals could be placed on farms and be cared for at a monthly charge of $5 a pair and that investors would enjoy large profits from the work of the Company.

In purchasing their chinchillas respondents severally believed that the two corporations would by their own efforts make the investments safe without the application of effort by the investors, who were engaged in other and diverse occupations and none of whom had any knowledge of handling or selling chinchillas. The Company knew that respondents relied for their profits upon the Company's skill and experience, and its officials knew that the Company's campaign for the sales of chinchillas was in violation of California's Corporate Securities Act (2 Deering's General Laws 1943, p. 1418, Act 3814) and of the federal Securities Act of 1933, 15 U.S.C.A. §§ 77a, 77e), since they had not procured a permit from California or filed with the Securities and Exchange Commission the statement required by the federal statute. At the same time respondents relied upon their assumption that the Company had complied with the law.

Conclusions Were Unavoidable

From the facts found it is readily apparent that the investor in chinchillas did not rely alone upon the processes of nature to enrich him. He reckoned upon sharing in profits to be earned by an intelligent, experienced and industrious organization in the care, breeding and sales of the rodents. The Company candidly represented that it was selling its ingenious services along with the chinchillas and it promised to invest the moneys received according to the "Chinchilla Dollar." Therefore it was not an investment in the animals only but in a service as well. It was the acquisition of the right to participate in an enterprise for the growing and selling of the animals and their pelts that induced respondents to execute the contracts in question. By making such investments respondents had no thought but that they would profit by the combined and organized efforts of the two corporations with the cooperation of all chinchilla owners.

[1] The established facts left no alternative for the trial court other than to hold that the contracts were securities. The inducements offered by the Company—of a controlled market, of a unified sales agency, and of the services of both of the interlocking corporations in achieving these ends—gave character to the investment. The national control of the industry as argued by the salesmen, the availability of the fur farms where all chinchillas would be kept, the sales of all animals and pelts by the Company as against the helplessness of a lone investor without a farm, without skill in rearing the rodents, without experience in preparing and marketing pelts or in selling the animals—these facts induce the inference that the most ordinary variety of intelligence and caution would have required a buyer to leave the future care of his animals and the potential profits from their increase to the Company which gained by the sale of the progeny of the animals sold to investors.

The Law Applicable

That the contracts pledged to appellant are void has been established by both state and federal courts. Securities and Exchange Commission v. Payne, D.C., 35 F. Supp. 873; Securities and Exchange Commission v. Bailey, D.C., 41 F.Supp. 647; Penfield Oil Co. of California v. Security Exchange Commission, 9 Cir., 143 F.2d 746; Atherton v. United States, 9 Cir., 128 F.2d 463; People v. Yant, 26 Cal.App. 2d 725, 735, 80 P.2d 506; People v. Davenport, 13 Cal.2d 681, 91 P.2d 892; People v. Jackson, 24 Cal.App.2d 182, 74 P.2d 1085; Moore v. Stella, 52 Cal.App.2d 766, 127 P.2d 300. These cases are all apropos and illustrative of the application of the law.

The facts of the Payne case are quite similar to those in the cases at bar. In purchasing 50 pairs of silver foxes from the Garveys, Payne agreed that they should remain in the possession of the vendors who should ranch them for five years for an agreed price per pair. The foxes were identified and conveyed by bill of sale and Payne was supplied with the numbers of the pens enclosing them. The vendors guaranteed an annual increase of three pups per pair and losses on any account within the year after purchase of breeding foxes to be replaced. Subsequently Payne actually sold many animals under similar contracts. But after citing section 2 (1) of the Securities Act of 1933 and quoting a case from the 7th Circuit Court of Appeals the court said that it is "controlled by an act of Congress which is intended to prevent overreaching and to mandate 'fair disclosure' "; that "to determine whether a transaction involved is a 'security' the real nature of the transaction is the controlling element. * * * that what was designated as a sale of foxes, was nothing more or less than an investment * * * and that the contracts between the so-called seller and the so-called buyer were and are securities as defined by the Act." [35 F. Supp. 877]

The Bailey case arose out of selling small tracts of 2½, 5 or 10 acres of land in Florida to be planted in tung trees for the production of oil. The selling corporation and the farming corporation had interlocking directorates. "The overwhelming percentage of purchasers are persons wholly inexperienced in tung tree cultivation, who live at a great distance from these lands, and who have no intention of occupying the same * * * but who are attracted thereto solely by the income to be derived * * *." Therefore, concluded the court, "these transactions constitute 'investment contracts' within the meaning of the Securities Act." [41 F.Supp. 650]

In the Yant case it was represented to investors in small tracts of land that the entire tract would be leased by Yant's corporation for a monthly rental and that the investor could join in a community lease and receive a pro rata share in the oil production. It was found from the evidence that the purpose of the vendor was to sell an interest in oil that might be produced upon the land, that no profits were ever to be received by the investors on account of anything done by them but only from the work of those who took a community lease, and that therefore the transactions were in violation of the Corporate Securities Act. The case demonstrates how the substance and not merely the form of a transaction constitutes the proper test for determining its real character. The Jackson case is equally illuminative. While the offenders sold and conveyed parcels of land the "mineral deeds" issued were in reality "certificates of interest in oil titles." [24 Cal.App.2d 182, 74 P.2d 1089]

The Proof Supports the Findings

[2] The court's findings are abundantly fortified by the evidence. Mr. Carson testified that the salesman who contacted him stated that the payment of $1600 should be made in cash, the balance to be paid by returning a pair of chinchillas when his pair should have quadrupled; that the Breeders and the Company had complete control of the industry; that they worked cooperatively and jointly in the control of the price, in the registry of the chinchillas and in making all sales through the Company. Whenever he should have any for sale the Company would purchase them for $1600, sell them for $3200 and disburse the profit in the manner indicated by the "Chinchilla Dollar" which he then exhibited. The salesman displayed a folder provided by the Company by which it was demonstrated that, based upon past experience in the increase of the rodents, the sales value of the progeny of three pairs would amount to $100,000 at the end of seven years. He explained that they had ranches where chinchillas would be kept in pools one of which a buyer must join and at the same time subscribe to a ranching agreement. When Carlson explained that he was a practicing lawyer and could not care for chinchillas, the salesman assured him that his animals would all be taken care of by the Breeders, the sales company and the various ranches for the service fee of $5.00 a month per pair. Before Carlson signed the contract of purchase it was explained that it was necessary to become a member of the Breeders because the two corporations had control of the industry, which was necessary to maintain the price. Also, the salesman had him sign a pooling agreement of which pool the same salesman, W. E. Wright, was manager.

Mr. Wright testified that he had received instructions at the Company's office from Mr. Prestwich, the general sales manager, and had used the forms for sales contracts, for application for membership in Breeders, pooling contracts and other materials furnished by the Company in his sales talks. Mr. Wright in general confirmed all of the testimony of Mr. Carlson and emphasized that he did not wish anyone to invest unless he would be protected by the Breeders which had authorized the Company exclusively to make the sales of the animals.

Substantially the same testimony as that of Carlson and Wright was given by respondents Wilde and Edwards and by Eugene Dent the salesman who made the contracts with them; also by Harold Koonz, who established that Prestwich confessed it to be the policy of the Company to take back animals. Besides the testimony numerous documents published by the Company were introduced showing that the policy and plans of the Company were to issue a security contrary to the cited statutes.

Respondents Justified

[3] The authorities cited by appellant, People v. Davenport, 13 Cal.2d 681, 91 P.2d 892; People v. Anderson, 35 Cal.App.2d 23, 94 P.2d 627; People v. Steele, 2 Cal.App.2d 370, 36 P.2d 40, do not present a state of facts at all akin to the chinchilla epic. It confesses that if the Company had sold the animals under agreement to keep them on ranches which it controlled for the purpose of making profits from the sale of offspring to be shared in by respondents and the Company "there is no question but that a sale of securities would have taken place." This is exactly what the court found the evidence to signify. The fact that much testimony was received which might reasonably have warranted findings favorable to appellant is of no avail now. On proof that was unfavorable to appellant the court below chose to determine that the contracts assigned to appellant are securities, and since it is substantial and sufficient the finding will prevail. Bellman v. San Francisco High School District, 11 Cal.2d 576, 81 P.2d 894.

In the light of the authorities and of the evidence the trial court could not felicitously or comfortably have derived findings that the statutes were complied with by the Company in obtaining the contracts or by the subsequent assignments. Every piece of literature published by the Company, every application for purchase and for membership in Breeders and all of the arguments presented by the salesmen under the tutelage of the officials of the two interlocked corporations lead to but one conclusion, namely, that the corporations operated a unified scheme; that in ostensibly selling chinchillas they actually sold an organized service; that it was clearly intended that the investors were not to convey the rodents to secluded localities, there to embark upon careers of growing and marketing the animals or their pelts, any more than the purchasers of the Florida acres were expected to engage in producing tung oil upon the ten-acre tracts which they acquired from Mr. Bailey. Respondents were neither furriers nor growers of furbearing animals. Their investments having caused the issuance and assignment of non-negotiable instruments contrary to law, the latter were void and recovery thereon is forbidden by law.

Parol Proof Was Properly Admitted

Appellant next contends that it was prejudicial error to allow parol proof of the representations of the Company made at the time of and prior to the execution of the contracts. This contention is based upon the presence in those instruments of the following passages:

"It is agreed that this instrument contains the entire agreement between the parties hereto, and that no warranty, statement, promise, or inducement made by any party hereto, employee or agent of either party hereto, which is not contained in this written contract, shall be binding or valid as to the parties hereto. This agreement shall be binding on the heirs, successors, executors and assigns of the parties hereto. No change, amendment, alteration or addition in or to this contract shall be binding upon the seller unless such change, amendment, alteration or addition is signed by its duly authorized General Manager."

[4-7] It is urged most earnestly that the quoted language is so explicit in fortifying the Company and its successors in interest against defenses based upon contemporaneous oral declarations that the writings lose their contractual force if they may be so readily ignored, contrary to such express stipulation to be bound by the writing in any event. In support of its argument it cites the cases of Pacific States Securities Co. v. Steiner, 192 Cal. 376, 220 P. 304, and Cobbs v. Cobbs, 53 Cal.App.2d 780, 784, 128 P.2d 373. These authorities are not pertinent. They merely declare the general statutory rule (Civil Code, sec. 1625) that a written contract supersedes all previous negotiations or stipulations concerning its matter. The Code of Civil Procedure (sec. 1856) provides two exceptions to the general rule that "no evidence of the terms of the agreement other than the contents of the writing" may be received, namely "1. Where a mistake or imperfection of the writing is put in issue * * * 2. Where the validity of the agreement is the fact in dispute." It is commonplace to say that a written contract cannot be modified by a contemporaneous oral agreement in direct conflict with the writing. Civil Code, § 1625. But that does not meet the situation where facts are pleaded showing the illegality of the contract. When the evidence reveals that the relations of the parties to a transaction are illegal and against public policy the court will deny relief based upon their contract. American National Bank v. A. G. Sommerville, Inc., 191 Cal. 364, 365, 216 P. 376; Bank of Orland v. Harlan, 188 Cal. 413, 206 P. 75. Because of the public concern with illegal agreements courts are in duty bound to be on guard lest by virtue of the innocent guise with which such transactions may be camouflaged they should triumph under the eyes of the chancellor. So pronounced is this rule that a party may not "by stipulation at the time of the execution thereof or afterward, waive his right to urge the illegality in any action thereon instituted by the other party thereto." Thus the parties to such instrument cannot give a quasi validity to such illegal writing by waiver of a defense against a claim of its illegality. American National Bank v. Sommerville, Inc., supra. The parol evidence rule does not preclude evidence showing that the consideration for the contract was vicious or illegal. If it could do so the parties to an unlawful agreement might readily defeat the rule by reciting a legal consideration on the face of the instrument. Lebal Company of America, Ltd., v. Mastrup, 51 Cal.App.2d 232, 124 P.2d 348. The exceptions to the parol evidence rule are as wholesome as the rule itself. Without their application the courts would be handicapped in the performance of their duty to preserve an orderly society in which the public policy as ordained by statute is not to be overridden.

The Contracts of Sale Are Not Negotiable Instruments

Appellant's final assignment is that error was committed in denying the bank recovery upon the contracts in view of the stipulation on the face of the writings that they contained the entire agreement and that no representations other than as set forth were made, the bank having accepted the contracts without knowledge of their infirmities. In other words, it contends that the contracts are negotiable instruments and are subject to no defenses in the hands of an innocent purchaser. In support of this contention appellant cites the conclusive presumptions (1) that facts recited in a written instrument are true as between the parties or their successors in interest; and (2) that a party who has by his own declaration deliberately led another to believe a particular thing to be true, cannot in subsequent litigation be permitted to falsify such declaration. Code Civil Procedure, 1962, Subd. 2 and 3. Also, it invokes the rule that if one of two innocent persons must suffer by the act of a third, the sufferer must be he by whose negligence the act occurred. Civil Code, sec. 3543. But the contracts in question were non-negotiable instruments. Civil Code, § 3086. Consequently the transferee thereof took them subject to all their vices.

[8, 9] The authors of such writings may not impart negotiability thereto under the general law merchant or by statutes. The character of negotiability must appear not by force of the stipulation of the parties that it shall be negotiable "but must be implied by law as the result of the form and effect of the instrument itself." American National Bank v. Sommerville, Inc. supra [191 Cal. 364, 216 P. 378]. It is statutory that while a non-negotiable written contract for the payment of money may be transferred by endorsement conveying thereby all rights of the assignor thereunder, yet it is "subject to all equities and defenses existing in favor of the maker at the time of the endorsement." Civil Code, § 1459. From that section it must follow that there can be no estoppel by contract unless the contract is itself valid. American National v. Sommerville, Inc., supra. The contracts being void by virtue of having been executed and assigned contrary to public policy and statute, all attempts to validate and vitalize them by inserting a waiver of such defense are likewise voidable for the same reason. Coppell v. Hall, 7 Wall. 542, 74 U.S. 542, 558, 19 L.Ed. 244; Ornbaun v. First National Bank of Cloverdale, 215 Cal. 72, 77, 8 P.2d 470, 81 A.L.R. 1146; C. I. T. Corporation v. Panac, 25 Cal.2d 547, 154 P.2d 710. The last cited case holds that the title of him who negotiates an instrument is defective within the meaning of section 3136, Civil Code, when he obtains it for an illegal consideration.

In none of the authorities cited by appellant under the contention here under discussion was there an illegal contract. In Baillarge v. Clark, 145 Cal. 589, 79 P. 268, 104 Am.St.Rep. 75, plaintiff's husband abstracted from her trunk a deed she had executed but had not delivered. After an innocent purchaser from the husband's vendee had with the wife's knowledge made permanent improvements on the property and paid the taxes she was estopped to assert her ownership in an action filed three years subsequently. In Green v. Caribou Oil Mining Co., 179 Cal. 787, 178 P. 950, one Lewis while secretary of defendant fraudulently procured the issuance of a certificate of 3500 shares of its stock which he pledged to Green as collateral for a loan, representing himself to be the owner thereof. The company was estopped to deny Lewis' ownership by reason of the negligence of its officers for a long time prior to the issuance of his stock to examine the certificate books and stock transfers which would have disclosed that numerous other certificates had been similarly issued by Lewis, and because the vice president had signed them without investigating or attempting to ascertain the legality of their issue. In Butler v. Woodburn, 19 Cal.2d 420, 122 P.2d 17, nothing more was decided than that in accordance with a long line of decisions the vendee of land under an executory contract of purchase "cannot remain in possession of the land under the contract and successfully resist either the vendor's action for the purchase price or an action to recover possession of the land upon the ground that the vendors' title is defective." 19 Cal.2d at page 423, 122 P.2d 19.

[10] When appellant was approached as a potential assignee of the contracts of respondents, if it purposed to place itself in a secure position against respondents its duty was to ascertain the meaning of the numerous clauses and conditions of the instruments or to obtain the assurance from respondents that the circumstances of their execution furnished them no valid defense. It would have learned upon inquiry the nature of the obligation to be assumed by the investor in becoming a member of the Breeders and that such obligation became a

part of each contract. The peculiar phraseology of the covenants of the writings was a sufficient warning that they were not negotiable instruments. But aside from what the contracts could have disclosed to appellant, it was fully aware of the nature of the business conducted by the two corporations, viz., that the Company operated throughout the United States in interstate commerce. It knew, of course, that all offspring of the rodents sold should "be registered with a breeders or pedigree association" and that upon the buyer's failure to do so the seller might register them for a charge to become due and payable at once and if unpaid to be added to the balance due under the contract.

For the reasons recited the consolidated judgment is affirmed.

W. J. WOOD and McCOMB, JJ., concur.

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70 Cal.App.2d 115

TETZE v. TETZE.

Civ. 14800.

District Court of Appeal, Second District, Division 2, California.

July 10, 1945.

Hearing Denied Aug. 30, 1945.

1. Appeal and error 🔑931(1)

On plaintiff's appeal from a judgment for defendant, the evidence was viewed most favorable to defendant.

2. Gifts 🔑49(1)

In mother's action after son's death, against son's widow to quiet title to furniture, widow's testimony that mother had given the furniture to widow and son as a wedding gift sustained finding that the furniture belonged to widow who was son's sole devisee.

3. Gifts 🔑82(2)

In mother's action after son's death, against son's widow to quiet title to a service station, evidence that, when son gave mother a bill of sale to the station before son's marriage, son stated "If anything happens to me, this station will be yours", mother was never in possession of the station, and son acted as if he were the exclusive owner of it until his death, supported finding that the bill of sale was intended as a gift causa mortis which son did not intend to take effect until after his death, and that the transaction was ineffective.

4. Gifts 🔑57

A gift causa mortis must be absolute and intended by donor to take effect immediately.

5. Gifts 🔑82(2)

In mother's action after son's death against son's widow to quiet title to a service station, where son's bill of sale to station to mother before son's marriage was inoperative as a gift causa mortis and son willed station to widow and acted as if he were the owner of the station until his death, evidence supported findings that widow and not mother was the owner of the service station.

6. Gifts 🔑81

In mother's action after son's death against son's widow to quiet title to a service station which son had willed to widow after giving mother an inoperative bill of sale to the station, evidence, showing that son had purchased stations other than the one described in complaint, and whether any of widow's money was invested in the service station, was properly excluded.

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Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Lillian A. Tetze against Joan Tetze, individually and as administratrix with will annexed of the estate of Alexander Tetze, deceased, to quiet title to personalty. From a judgment for defendant after trial before the court without a jury, plaintiff appeals.

Judgment affirmed.

William C. Ring, of Los Angeles, for appellant.

Musgrove and Cannon, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendants after trial before the court without jury, in an action to quiet title to personal property, plaintiff appeals.

[1] The evidence being viewed in the light most favorable to defendants (re-

spondents), and pursuant to the rules set forth in Re Estate of Isenberg, 63 Cal.App.2d 214, 216 et seq., 146 P.2d 424, the essential facts are:

Plaintiff was the mother and defendant Joan Tetze (hereinafter referred to as defendant) was the wife of Alexander Tetze, who died on March 23, 1942. In October or November of 1936, plaintiff gave to her son and defendant certain household furniture described in count one of the complaint. Plaintiff asserts ownership to these moveables and alleges a loan thereof to decedent.

In May, 1927, Mr. Tetze purchased a service station described in count two of the complaint. Decedent never parted with title to such property but in May, 1927, he gave plaintiff a bill of sale covering the service station above mentioned telling plaintiff to put the paper away among her "private papers" and stated to her, "If anything happens to me this station will be yours."

July 29, 1934, Mr. Tetze married defendant.

In 1941, Mr. Tetze placed a chattel mortgage on the service station, which mortgage was signed by defendant. Plaintiff did not at any time have possession of the service station, nor did defendant know until her husband's death that he had given plaintiff a bill of sale to the service station. The service station was operated at all times from the time defendant married Mr. Tetze until his death as the property of Mr. Tetze.

Defendant is the administratrix of the estate of her deceased husband and the sole devisee under his will.

Plaintiff relies for reversal of the judgment on three propositions which will be stated and answered hereunder seriatim:

First: *There is not any substantial evidence to sustain the trial court's findings that (a) defendant is the owner and entitled to the possession of the personal property described in count one of the complaint; (b) plaintiff is not the owner of the service station described in count two of the complaint; and (c) defendant is the owner of the service station described in count two of the complaint.*

This proposition is untenable.

[2] a) The property described in count one of the complaint consisted of furniture which defendant testified* plaintiff had given to her and her husband as a wedding

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* The defendant, Joan Tetze, testified in part as follows:

"The Witness: The furniture was in storage and had been in storage for some time. My husband had been paying the storage bill, and his mother finally said that there wasn't any sense in paying the storage bill; and seeing that she hadn't given us a wedding present, she might as well do that, because she knew it had cost us quite a sum to build the house in the first place, and we had a heavy mortgage that we had to pay off on the home, and she said she thought it was a very fine idea that she do something to help us have a start; and said it was much too heavy, and she was ill, and she could never take care of that furniture again, and if it was in storage, we might as well take it as a wedding present.

"Q. By Mr. Ring: What storage house was it in? A. I wouldn't be able to say. I could find out. I believe Bekins. I think that Mrs. Tetze, the plaintiff, could tell you, though.

"Q. How soon after that did you receive the furniture? A. How soon after what?

"Q. How soon after this conversation that you are referring to did you receive the furniture? A. Well, the conversation occurred during the time we were building the house, towards the close of building the house—when I began to talk about what we were going to use to sit on—besides the floor.

"Q. And then when your house was completed, why, you moved the furniture in? A. That's right.

"Q. Was there anybody else present besides you and the plaintiff when this conversation took place? A. I believe not.

"Q. Her son was not there? A. Oh, yes, he was there; but he is not a witness here.

"Q. You did not give her any payment or any money or anything of that sort at the time? A. No.

"Q. Nor transfer any other property to her at that time? A. No, sir.

"The Court: Did she ever ask you to give it back to her? A. No, she never did. She took some pieces back when she moved finally; she was living in a furnished apartment for a time. Finally she got so she couldn't stand the furniture in the furnished apartment and she decided she wanted to have her own furniture again; and at that time she bought new furniture which my husband paid for, and she also took a few pieces of what was originally sent up to the home that we had built."

gift. This testimony, though in conflict with other testimony, under the rules stated in Estate of Isenberg, supra, constituted substantial evidence to sustain the trial court's findings that the furniture described in count one belonged to defendant.

b & c) The evidence discloses that in May, 1927, Mr. Tetze purchased the service station described in count two of the complaint and that in July, 1934 he married defendant. Plaintiff testified that in May, 1927 Mr. Tetze gave her a bill of sale to the service station described in count two of the complaint. She also gave testimony relative to the bill of sale in response to questions of counsel as follows:

"Q. And when he came over to the house and gave you this paper, and you put it away among your private papers— A. Yes.

"Q. At that time he stated to you, '*If anything happens to me this station will be yours?*' A. He did." (Italics added.)

The evidence also discloses that plaintiff was never in possession of the service station and that during Mr. Tetze's lifetime, he at all times remained in possession of the service station and acted and conducted himself as if he were the sole and exclusive owner of it.

[3, 4] The foregoing testimony supports the implied finding of the trial judge that the bill of sale was intended as a gift causa mortis which the donor did not intend to take effect until after his death. Hence, since the law is established in California that a gift causa mortis must be absolute and intended by the donor to take effect immediately, the transaction under discussion was not a valid gift causa mortis and was ineffective. Stout v. McNab, 157 Cal. 356, 360, 107 P. 1005; Knight v. Tripp, 121 Cal. 674, 678, 54 P. 267; Hart v. Ketchum, 121 Cal. 426, 429, 53 P. 931; Mutual Ben. Life Ins. Co. v. Clark, 81 Cal.App. 546, 550 et seq., 254 P. 306.

[5] Therefore since the bill of sale to plaintiff was inoperative as a gift causa mortis and decedent remained the owner of the property until his death which property he willed to defendant, the trial court's findings under paragraph (b & c) above were fully supported by substantial evidence.

Second: *The trial court committed prejudicial error in its rulings upon objections to evidence.*

This proposition is likewise untenable.

[6] 1) The trial court excluded evidence tending to show that decedent had purchased stations other than the one described in the complaint. This ruling was correct since it had no bearing upon any issue pending before the court.

2) The trial court excluded evidence relative to whether or not any of defendant's money was invested in the service station. This ruling was correct since it was immaterial whether decedent's money or money of his wife was invested in the station.

Third: *The trial court was biased and prejudiced and therefore did not afford plaintiff a fair trial.*

This proposition is also untenable. Plaintiff has not directed our attention to any remark or conduct of the trial judge, nor does the record disclose any, which shows bias and prejudice against plaintiff.

In view of our conclusions it is unnecessary to discuss other propositions urged by counsel.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

Hearing denied; EDMONDS, J., dissenting.

70 Cal.App.2d 207

PEOPLE v. McDANIELS.

Cr. 568.

District Court of Appeal, Fourth District, California.

July 16, 1945.

1. Homicide 🔑250, 276, 282

In prosecution for murder, self-defense and shooting under heat of passion were questions of fact for the jury whose finding of murder was sustained by the evidence.

2. Homicide 🔑188(1)

In prosecution for murder arising over controversy between gamblers where defendant testified that he did not know that deceased used a "shiner" on the occasion in question and it was not contended that defendant had been told that the deceased had operated in such manner or that he ever pretended to reach for a gun when accused of cheating, evidence concerning the deceased's method of operating or of pretending to reach for a gun when accused of cheating was properly excluded.

3. **Witnesses** ⚷390

Any difference between questions put in laying foundation for impeachment by prior statements inconsistent with testimony and questions put to and answers given by impeaching witness goes to the weight of the evidence and not to its admissibility.

4. **Criminal law** ⚷706, 1170½(1), 1171(1)
Witnesses ⚷277(6)

Where no attempt was made to use paper which district attorney held in hand while laying foundation for impeachment of defendant by proof of prior statements inconsistent with testimony, and impeaching witness was later put on stand and testified, there was neither error nor prejudice, though district attorney refused to show paper to counsel for defendant or to witness, and court refused to instruct jury to disregard answers so elicited from defendant.

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Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Ed McDaniels was convicted of murder, and from such judgment and an order denying his motion for a new trial, he appeals.

Judgment and order affirmed.

Jackson Mahon, of Bakersfield, for appellant.

Robert W. Kenny, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with the murder of one Lenon Morris. A jury found him guilty with a recommendation of life imprisonment, and he has appealed from the judgment and from an order denying his motion for a new trial.

On the evening of October 9, 1944, the appellant and Morris, both negroes, were gambling in a small cabin located about 60 feet to the rear of a saloon in East Bakersfield. They were seated at a small round table and were playing a game known as "Cotch", in which the dealer was supposed to deal the cards from the bottom of the deck. It appears that in the last game played Morris, who was the dealer, claimed the pot and that the appellant accused him of having dealt himself a card from the top of the deck instead of the bottom. The appellant stood up and drew a pistol from his pocket, and Morris also arose, moved to his left around the table toward the door, and went out through the door. While this was going on the appellant fired four shots at Morris, three of which struck him. Morris ran or stumbled some 60 feet to the rear steps of the main building, where he fell dead. Two of the bullets which struck Morris entered from the front, one going through his right arm and into his chest and the other entering near the joint between the breast bone and the collar bone. The third bullet, which caused his death, entered from the back and severed the major blood vessels of the neck. It was apparently fired when the deceased was in a stooping position.

The appellant remained on the premises until he was arrested. He admits firing these shots and that he took the money in the last pot from the table. He claimed that he was entitled to this as the deceased had "fouled his hand" by dealing the last card from the top of the deck, and that he shot only in self-defense. He now contends that the evidence is not sufficient to support a verdict of first degree murder and that, in any event, this shooting arose out of a sudden quarrel or heat of passion and that the judgment should be reduced to one of conviction of voluntary manslaughter.

Appellant's claim of self-defense is based upon his testimony that he saw the deceased deal the last card from the top; that he accused the deceased of so doing and claimed the pot; that an argument ensued which grew hotter and hotter; that while he was standing up and demanding the pot the deceased shoved the table over against him "with his left hand and that his right hand went beneath the table toward his lap or right pants pocket"; that seeing this motion he believed that the deceased was armed and was attempting to draw a weapon; and that in fear of his life he drew his pistol and fired four shots at the deceased as fast as he could fire them. It is then argued that the fact that one shot struck the deceased in the back might have a reasonable explanation in that the deceased, in trying to get out of the door, would necessarily have to first move around the table until he came to a point where he could turn toward the door, and that he received the bullet in the back during the fraction of a second while he was making this turn.

[1] Assuming that this explanation was a reasonable one, the evidence as a whole, including the appellant's testimony, justifies other inferences and suggests another explanation which is equally, or more, reasonable. From all of the circumstances, and in light of all of the testimony, an inference could well be drawn that when the appellant drew his pistol the deceased started for the door, that he was stooping over in a natural effort to avoid the bullets being fired at him, and that the fatal shot struck him in the back as he was going out the door or soon thereafter. No gun was found on the deceased. Another witness, who was seated at the table when the trouble started, testified that when she first saw the gun in the appellant's hand the deceased was seated just where he had been playing, that he had not moved, and that his hands were "up on the table, spreading his money out, you know, putting it together, just greenbacks and had some change there, but he was fumbling with the greenbacks" with both hands. The appellant had previously stated to the officers that when he fired the first shot the deceased was sitting down or in the act of rising, and that when he fired the second shot the deceased's hands were at his side. The appellant also made a statement at the time he was arrested, which need not be repeated here, which indicates that he had considerable animosity toward the deceased. The matters of self-defense and shooting under heat of passion presented questions of fact for the jury and the evidence is entirely sufficient to support its findings.

It is further contended that the court erred in excluding certain evidence which was offered for the purpose of showing that the deceased was the aggressor. A witness called by the appellant was asked whether, in another card game the preceding afternoon, he had seen the deceased "go for his pocket as if he had a gun"; how often he had played in a gambling game with the deceased; whether it was not a fact that in every game he had played with him the deceased had used a "shiner" (mirror); and whether it was not a fact that whenever he was caught using a "shiner" the deceased had "made a bluff for his pocket as if he had a gun." Objections to these questions were sustained and appellant's counsel made an offer of proof offering to prove these things by this witness. The court refused to admit such evidence. It is argued that in many cases the prosecution is permitted to introduce evidence of other instances of similar conduct on the part of a defendant for the purpose of proving intent, motive or common plan or system, even though such evidence discloses a prior commission of other offenses; that a similar rule should be applied in favor of a defendant; and that a new rule should now be established to the effect that in homicide cases involving the question as to who was the aggressor the defendant should be permitted to prove that the deceased had been in the habit of operating in accordance with a general method, scheme or system, being the one he was using at the time of the killing. It is further argued that this rule should apply whether or not the defendant had any knowledge of the deceased's prior conduct or plan of operation.

[2] The appellant had testified that he did not know that the deceased used a "shiner" on this occasion, and it is not contended that the appellant had ever been told that the deceased had operated in that manner, or that he had ever pretended to reach for a gun when accused of cheating. We are unable to see how any such prior acts and conduct on the part of the deceased in connection with gambling games, if unknown to this appellant, could have affected the question as to who was the aggressor in this instance. The material thing here was not the deceased's custom or method of operation on prior occasions, but what he did immediately or shortly before this shooting took place. The facts in that regard were fully developed, insofar as the witnesses thereto were still alive, and we find no error in the court's ruling in this connection.

[3] The only other point raised is that the district attorney was guilty of prejudicial misconduct in his cross-examination of the appellant. During his cross-examination the appellant testified, in response to a question, "Well, I suppose he rose out of his chair before the shot, the first time, I don't know, I shot as fast as I could shoot." He was then asked whether he saw both of the deceased's hands when the deceased rose up out of the chair, and he replied: "No, I didn't, I couldn't see his right hand." The district attorney, with some typewritten document in his hand, then asked the appellant whether, on the next morning at the jail, a Mr. Woodruff

had not asked him where the deceased's hands were when the deceased arose and whether he did not then say to Mr. Woodruff that the deceased's hands were at his side. The appellant replied that he had not said this. Counsel for the appellant asked to be permitted to see the paper the district attorney was holding in his hand and demanded that it be shown to the witness, which requests were refused. Counsel for appellant then asked the district attorney if he had fairly read from the transcript and the district attorney replied that he had fairly questioned the witness as to a statement made by him. Counsel for the appellant then objected to the district attorney's asking a question "Wherein he purports to read from a record" which had not been shown to counsel or to the witness, assigned this as misconduct and asked the court to instruct the jury to disregard it, which the court refused to do. Later, the Woodruff referred to was called as a witness and the district attorney asked him whether at that time he had asked the appellant where the deceased was sitting when he fired his first shot and whether the appellant had said he was sitting down or in the act of rising. The witness replied "Yes". The district attorney then asked the witness whether he had asked the appellant where the deceased's hands were when he fired the second shot and whether the appellant had replied the deceased's hands were at his side. The witness replied: "Yes, he did." It is contended that these questions and answers were not identically the same as those indicated in the questions as originally asked of the appellant. Any such possible difference goes to the weight of the evidence and not to its admissibility. The main contention in this regard is that the district attorney was reading from a transcript and that this could not be done without first showing it to the witness and asking him whether he had so testified. It is further argued that this use of the transcript was a subterfuge to get before the jury evidence which was otherwise inadmissible.

[4] There is nothing in the record to show that the paper thus used by the district attorney was a transcript, and it cannot certainly be said that the district attorney read anything from that instrument, whatever it was. No attempt was made to use the paper as evidence or to get the contents of the paper before the jury without introducing it in evidence. While he may have used the paper to refresh his memory, all that appears is that he asked certain questions of the appellant with respect to what the appellant had said the morning after the shooting, and later attempted to impeach the appellant by calling another witness to give his version of the statements then made by the appellant. Neither error nor prejudice appears in this connection. Moreover, the record indicates that the district attorney was in good faith attempting to impeach the witness and, even if it be assumed that he was in error, no such prejudicial misconduct appears as would justify a reversal.

The judgment and order appealed from are affirmed.

MARKS, J., concurs.

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70 Cal.App.2d 158

PEOPLE v. MOORE.

Cr. 3879.

District Court of Appeal, Second District,
Division 3, California.
July 12, 1945.

1. Criminal law 🔑**1144(13)**

A reviewing court must view evidence most favorably in support of verdict and ensuing judgment of conviction.

2. Criminal law 🔑**680(1)**

The statutory rule as to order of proof in criminal cases is not mandatory. Pen. Code, § 1093, subd. 4; § 1094.

3. Criminal law 🔑**686(2)**

Where accused was under direct examination when court adjourned for the day, permitting the people to reopen their case the next morning to call witness who was available only until noon was discretionary, especially where accused did not object until after testimony had been introduced. Pen. Code, § 1093, subd. 4; § 1094.

4. Criminal law 🔑**351(1)**

Evidence of any conduct of accused subsequent to commission of offense that indicates consciousness of guilt is admissible against him.

5. Criminal law 🔑351(8, 10)

Evidence of accused's efforts to reimburse prosecuting witness or suppress testimony is admissible.

6. Criminal law 🔑351(8)

Generally, evidence of third person's attempts to suppress testimony is inadmissible against accused unless such conduct occurs in his presence.

7. Criminal law 🔑351(8)

Evidence of third person's attempts to suppress testimony is admissible if such conduct is authorized by accused.

8. Criminal law 🔑338(2)

Accused's authorization of third person's attempts to reimburse prosecuting witness or suppress his testimony may be proved by circumstantial evidence.

9. Criminal law 🔑351(8)

Evidence that accused's cousin partially reimbursed prosecuting witness for money stolen to induce him to "ease up" on his testimony was admissible, in view of evidence that prosecuting witness, accused, accused's cousin, and another accused were talking together during trial, and that at such time the other accused gave money to prosecuting witness.

10. Criminal law 🔑1166½(12)

Trial court's comment exonerating accused's counsel of connection with reimbursement of prosecuting witness was not prejudicial.

11. Witnesses 🔑361(1)

Evidence as to details and circumstances surrounding accused's prior conviction of a felony was not admissible on accused's behalf.

12. Criminal law 🔑655(5)

Reprimand to accused's counsel for pursuing certain line of questioning after court had ruled that such evidence was inadmissible was not erroneous.

13. Criminal law 🔑457

In prosecution for grand theft from victim allegedly under influence of narcotics, police officers' testimony that victim was not intoxicated on morning of theft was admissible, where officers testified as to victim's condition and appearance as they observed it, and that they had seen many intoxicated people.

14. Criminal law 🔑455

In prosecution for grand theft, police officer's testimony that, on morning of theft, victim was under influence of narcotics was admissible, where officer testified that he had seen people under such influence on numerous occasions.

15. Criminal law 🔑785(7)

In prosecution for grand theft from victim allegedly under influence of narcotics, police officers' testimony as to victim's sobriety on morning of theft did not require statutory instruction on expert testimony. Pen.Code, § 1127b.

16. Criminal law 🔑457

Drunkenness need not be proved by expert testimony.

17. Criminal law 🔑785(7), 1186(4)

A police officer's testimony that victim was under influence of narcotics on morning of theft required statutory instruction on expert testimony, but failure to give instruction did not require reversal. Pen. Code, § 1127b; Const. art. 6, § 4½.

◆

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Mary Dolores Moore was convicted of grand theft, and she appeals.

Affirmed.

William G. Kenney, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

FOX, Justice pro tem.

This is an appeal by the defendant Moore from a judgment of conviction for grand theft and from the order denying her motion for a new trial.

On April 20, 1944, shortly after 10:30 p. m., the complaining witness, Jeffcott, and his companion, Metcalf, were passing on foot the Yacht Club Cafe in San Pedro, California. At that time appellant and the other defendant, Thiele (who has not appealed), drove up in an automobile, parked it in front of the cafe, and got out. Jeffcott asked the girls to come in and have a cup of coffee with them. The invitation was accepted. They left the cafe in about half an hour, got in the appellant's automobile, drove around talking for a while and left Metcalf at his hotel. Jeffcott and the girls then went to the Admiral Cafe. There they occupied a booth and ordered coffee. While they were waiting for the coffee to be served, Jeffcott and appellant played a game which involved his catching a dollar bill which she held. Jeffcott lost a dollar, took out his wallet and paid her a dollar bill therefrom. While his wallet was out, he showed the defendants a $100 bill, which was among the more than $400 in hundred, fifty, twenty and ten dollar bills, which he had therein. Defendant Thiele complained of a headache and the appellant passed her a box containing some pills. Appellant asked Jeffcott if there were any Bing Crosby records in the Nickelodeon, so he left the girls in the booth and went over to the Nickelodeon, leaving his coffee, which had been served, on the table in the booth. Appellant joined him at the Nickelodeon and then they went back to the booth and drank their coffee. Shortly after he drank his coffee Jeffcott began to feel sleepy and groggy. They left the Admiral Cafe, got in the car, drove to a hill overlooking the city, and parked. Jeffcott fell asleep for a short time. They left this point after a time and drove to Jeffcott's hotel. When they got there the appellant said she was sleepy and asked him to go to Los Angeles with her to take defendant Thiele to her husband. Jeffcott agreed to ride to Long Beach with them and to take a Pacific Electric train from Long Beach back to San Pedro. They left the hotel and went for another ride. They stopped at a night club for cigarettes and coffee. They then went to another night club where they had sandwiches, and Jeffcott had a coca cola. He tried to dance but could not. Defendant Thiele in the meantime had telephoned her husband, and she told Jeffcott and appellant that he was very annoyed with her, and that she was not going home. She said, "Let's go some place, and we will just stay all night." Appellant suggested that they go to a certain motel. They drove to the motel, arriving there about 5:00 a. m. Jeffcott went into the office of the motel and registered for all of them. They were assigned two apartments, a double and a single. He paid the rental in advance with a twenty dollar bill which he took from his wallet. After another trip to down town Long Beach they returned to their apartments at the motel. Jeffcott undressed and got in bed. He put his wallet under the pillow and placed his trousers over a chair. Appellant got in bed with Jeffcott with her clothes on. After they had been in bed a short time, there was a knock on the front door which defendant Thiele answered. She went into the bedroom and said she was going to have to go to Los Angeles to see her husband and asked them to take her. They agreed to do so. Appellant told Jeffcott to take a shower and "snap out of it." When he came one of the shower he found the girls were gone. He looked out of the window and saw their car leaving. He looked for his wallet and it was gone. He started to get dressed and discovered that his trousers were missing. He wrapped himself in a sheet, went to the motel office and reported the incident to the manager who called the police. It was then about 6:00 a. m. From the time the party left the Admiral Cafe, and for several days thereafter, Jeffcott was groggy and sleepy. The grogginess got worse as the night in question wore on. It descended upon him in waves. He had had only two or three beers during the afternoon preceding that night and had no intoxicating liquors during the time he spent with the girls.

[1] The foregoing evidence is contradicted in some particulars, either directly or by inference. On appeal, however, we must view the evidence most favorably in support of the jury's verdict and the ensuing judgment.

[2] Appellant's first point is that the court committed error in granting the People's motion to reopen their case without a proper foundation being laid. This argument is based on subdivision 4 of section 1093, Penal Code. This section deals with the order of the proceedings at the trial of criminal cases. After providing, among other things, that the district attorney must open the case and offer the evidence in support of the charge and that the defendant may then open the defense and offer his evidence in support thereof, it is provided in subdivision 4 that: "The parties may then respectively offer rebutting testimony only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case." The rule contained in this section with respect to the order of proof is not mandatory. In People v. Willard, 1907, 150 Cal. 543, at page 551, 89 P. 124, 127, it is said: "A court is warranted in departing from the order of proof prescribed by section 1093 of the Penal Code under proper circumstances. Whether it shall permit such departure is a matter committed to its sound discretion,

and its action in that regard is not ground upon which error may be predicated, unless the discretion appears to have been grossly abused, and this abuse must affirmatively appear." See, also, Penal Code, sec. 1094; People v. Beatty, 1933, 132 Cal.App. 376, 378, 22 P.2d 757.

[3] In the instant case the People rested during the afternoon session of the first day. The defense immediately opened its case. When court adjourned for the day appellant was on the stand under direct examination. When court resumed the next morning the deputy district attorney made a motion to reopen the People's case. He said: "We have one witness who has to be back on the job at 12:00 o'clock." No objection was then made and the motion was granted. It was not until a number of questions had been asked and answered that appellant's counsel suggested the impropriety of reopening the People's case. He had previously objected unsuccessfully to certain testimony of the witness "because it has no bearing on the case." It is thus apparent that appellant's objection to reopening the People's case was not timely made. Furthermore, there is no showing of any abuse of discretion in granting the motion.

Appellant's second point is that the testimony offered and received after the case was reopened was not relevant and was hearsay as to her and therefor inadmissible. This testimony was to the effect that one Zengri, who was a cousin of appellant, had approached Jeffcott, the complaining witness, during the morning of the first day of the trial and had told him that if he, Jeffcott, "would ease up a little" on some of his testimony, he would get his money back. Jeffcott testified that Zengri gave him $95 that afternoon in the wash room and $60 at dinner that night, and promised that he would receive the balance next morning. Jeffcott further testified that he had eased up on his testimony, pursuant to his agreement with Zengri, by failing to tell all of the truth while he was on the witness stand. He also testified that he, the two defendants, and Zengri, had met in the parking lot before court convened on the second day of the trial, which was the day on which this testimony was given, and had a conversation. He testified they said it did not look so good for them, and defendant Thiele gave him $155, stating she had everything to gain and nothing to lose any more by giving him the money. The bailiff of the court testified that during the afternoon recess on the first day of the trial he had seen Zengri give Jeffcott money in the wash room, and had seen Zengri, the two defendants, and Jeffcott, in the hall together at various times.

[4] Any conduct of a defendant subsequent to the commission of the offense with which he is charged that indicates a consciousness of guilt is relevant and admissible against him. People v. Jones, 1911, 160 Cal. 358, 366, 117 P. 176; People v. Singh, 1934, 136 Cal.App. 233, 242, 28 P.2d 416.

[5] Efforts to reimburse the prosecuting witness, or to suppress testimony against himself, indicates a consciousness of guilt on the part of a defendant, and evidence thereof is admissible against him. People v. Davenport, 1910, 13 Cal.App. 632, 639, 110 P. 318; People v. Dempsey, 1923, 63 Cal.App. 751, 755, 219 P. 1041.

[6-8] Generally, evidence as to the conduct of third persons in attempting to suppress testimony is inadmissible against a defendant where such conduct did not occur in his presence. People v. Dixon, 1892, 94 Cal. 255, 258, 29 P. 504; People v. Gilliland, 1940, 39 Cal.App.2d 250, 256, 103 P.2d 179. However, if the defendant authorized the conduct of such third person in attempting to suppress testimony, evidence as to such conduct is admissible against such defendant. People v. Burke, 1912, 18 Cal. App. 72, 91–93, 122 P. 435. Of course, it may be, and ordinarily must be, proved by circumstantial evidence that the third person who approached the prosecuting witness and attempted to reimburse him or suppress his testimony, was acting on behalf of the defendant in so doing, and was authorized by him to do so. People v. Burke, supra.

[9] In the instant case, it was shown that Zengri was the cousin of appellant, and had talked with her about the case. There was nothing to indicate that he and Jeffcott were friends, nor was there any reason stated or suggested as to why he should be handing Jeffcott money and promising to get him the balance of the $400 other than to have Jeffcott "ease up" on his testimony. Zengri, Jeffcott and the two defendants were together in the parking lot talking on the morning of the second day of the trial, at which time defendant Thiele gave the complaining witness an additional $155. From this evidence the jury was entitled to draw the inference that Zengri was

authorized by the defendants to approach the complaining witness and attempt to get him to "ease up" on his testimony by reimbursing him. Therefore, the evidence of the conduct of Zengri was admissible against the appellant because it tended to show consciousness of guilt, and was not within the hearsay rule. People v. Burke, supra.

[10] Appellant's next contention is that the comments and rulings of the trial judge indicated an opinion of her guilt which could not help but impress the jury. The first incident complained of is the court's comment expressing confidence in appellant's then counsel and exonerating him of any connection with the transaction by which the complaining witness was partially reimbursed for the money defendants were alleged to have stolen from him. This comment was unnecessary because no one had either accused or even intimated that counsel was in any way involved in the transaction. It does not appear, however, that the comment was prejudicial.

[11, 12] Another instance where it is claimed the trial court showed bias and prejudice against the appellant was in refusing to permit her counsel to go into the details and circumstances surrounding her prior conviction of a felony and in reprimanding counsel in pursuing that line of questioning after the court had ruled that such evidence was immaterial. Such evidence was not admissible. People v. Stevens, 1935, 5 Cal.2d 92, 100, 53 P.2d 133; People v. David, 1939, 12 Cal.2d 639, 646, 86 P.2d 811. The reprimand was mild and not out of place in view of the court's previous ruling that such evidence was immaterial. Other complaints with respect to the comments and attitude of the trial judge are too trivial to justify specific mention.

[13] Appellant also contends the court erred in permitting two police officers to testify that, on the morning of the theft, the complaining witness, Jeffcott, was not intoxicated. The officers testified as to his condition and appearance as they observed it, that they had seen many people under the influence of liquor, and that, in their opinion, he was not intoxicated. Such testimony was clearly admissible. People v. Sehorn, 1897, 116 Cal. 503, 511, 48 P. 495; Finn v. Sullivan, 1930, 110 Cal.App. 38, 40, 293 P. 639; 10 Cal.Jur., sec. 236, pp. 978, 979.

[14] One of these police officers who testified he had seen people under the influence of narcotics "on numerous occasions" was permitted to express the opinion that Jeffcott was, on the morning in question, under the influence of narcotics. Sufficient foundation was laid for this testimony and it was admissible. 32 C.J.S., Evidence, § 513, pp. 200, 201; 20 Am.Jur., sec. 876, p. 737; Miller v. Hamilton Brown Shoe Co., 1911, 89 S.C. 530, 72 S.E. 397, 398, Ann.Cas.1913B, 106; see, also, People v. James, 1944, 65 Cal.App.2d 709, 151 P.2d 572.

[15-17] Appellant further complains that the trial court committed prejudicial error in failing to instruct the jury on opinion evidence. This argument is based on the provisions of section 1127b, Penal Code, which provides, in general, that when, in a criminal case, the opinion of an expert witness is received in evidence, the court shall instruct the jury substantially as therein set forth. The testimony of the police officers with respect to the sobriety of the complaining witness did not require the giving of such an instruction. It has long been the rule in this state that "drunkenness * * * does not require an expert to pronounce upon it." People v. Monteith, 1887, 73 Cal. 7, 9, 14 P. 373, 374; People v. Sprague, 1921, 52 Cal.App. 363, 365, 198 P. 820; Finn v. Sullivan, supra, 110 Cal.App. 38, 40, 293 P. 639. It would seem, however, that testimony that Jeffcott was under the influence of narcotics would come within the purview of section 1127b, Penal Code, supra, and that the court should have given an appropriate instruction with reference to expert witnesses as required by said section. The failure to give such an instruction does not, however, require a reversal of the judgment, for after an examination of the entire record, including the evidence, we are of the opinion that such failure had no effect on the jury's verdict in the instant case, and that the same result would have obtained if such an instruction had in fact been given. People v. Williamson, 1933, 134 Cal.App. 775, 781, 26 P.2d 681; People v. Sheridan, 1934, 136 Cal.App. 675, 686, 29 P.2d 464; People v. Fellows, 1934, 139 Cal.App. 337, 342, 34 P.2d 177; Section 4½ of Art. VI, California Constitution.

The judgment and order are affirmed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

70 Cal.App.2d 202

NESLEN v. BOARD OF HEALTH et al.

Civ. 14824.

District Court of Appeal, Second District, Division 3, California.

July 13, 1945.

1. Constitutional law ⚷42

One may challenge the validity of a statute only insofar as the statute is injurious to him.

2. Constitutional law ⚷46(2)

Complaint, in action to enjoin State Department of Health and city attorney and others from prosecuting seller of medicinal preparation under statutes declaring that advertising concerning certain drugs and devices as having effect upon enumerated diseases shall be deemed false and prohibiting false advertising, which failed to allege that plaintiff's advertising was truthful, failed to state a cause of action. St.1939, p. 973, § 26273; St.1941, p. 727, § 17500; p. 3002, § 26271.

3. Constitutional law ⚷46(2)

Seller of a medicinal preparation, before he can complain of statutes barring truthful advertising of drugs and devices as having effect upon enumerated diseases as discriminatory because only false or misleading advertising is prohibited in other cases, must allege and prove that his product has a beneficial effect upon enumerated diseases and that advertising is true. St. 1939, p. 973, § 26273; St.1941, p. 727, § 17500; p. 3002, § 26271.

4. Fraud ⚷68

The statutes barring advertising of drugs or devices as having an effect on enumerated diseases, when read in connection with statute relating to advertising of drugs found to be safe for self-medication, do not bar all advertising with reference to such drugs or devices but permit truthful advertising under such conditions as appear necessary in interest of public health. St.1939, p. 973, § 26273; St.1941, p. 727, § 17500; p. 3002, § 26271.

◆

Appeal from Superior Court, Los Angeles County; Hartley Shaw, W. Turney Fox, and Clarence L. Kincaid, Judges.

Action by H. D. Neslen against the Board of Health of the State of California and others to enjoin defendants from prosecuting plaintiff for advertising for sale a medicinal preparation. From a judgment for defendants after demurrer to the complaint was sustained without leave to amend, plaintiff appeals.

Affirmed.

Wm. J. Clark and Lorrin Andrews, both of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Donald M. Redwine, Asst. City Atty., John L. Bland, Deputy City Atty., and Lester L. Lev, in pro. per., all of Los Angeles, Robert W. Kenny, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondents.

SHINN, Justice.

Plaintiff is in the business of manufacturing and selling a medicinal preparation known as Miacene tablets. He brought this action to enjoin the State Department of Public Health, the City Attorney of Los Angeles, and others from prosecuting him for advertising his product for sale. He appeals from a judgment for defendants after demurrer sustained without leave to amend.

The complaint alleged that the defendants are about to prosecute plaintiff for violation of section 26271 of the Health and Safety Code, St.1941, p. 3002, which forbids the advertising of any drug or device as having an effect upon any of some 48 specified diseases, and that such prosecutions would destroy his established business and render it impossible for him to earn a livelihood. Plaintiff challenges the constitutionality of the section, which reads as follows: "The advertisement of a drug or device shall be deemed to be false if the drug or device is represented to have any effect in albuminuria, appendicitis, arteriosclerosis, blood poison, bone disease, Bright's disease, cancer, carbuncles, cholecystitis, diabetes, cataracts, diphtheria, dropsy, erysipelas, gallstones, heart and vascular diseases, high blood pressure, mastoiditis, measles, meningitis, dental caries, mumps, nephritis, otitis media, paralysis, pneumonia, poliomyelitis (infantile paralysis), prostate gland disorders, pyelitis, alcoholism, erosion, periodontal diseases, epilepsy, goiter, scarlet fever, sexual impotence, sinus infection, smallpox, encephalitis, tumors, typhoid, uremia, venereal disease, whooping cough, tuberculosis, ulcers of the stomach and varicose ulcers."

While the section does not in terms make it unlawful to advertise drugs and devices as effective in the named diseases, this result is accomplished by the provision that such advertising shall be deemed to be false. Plaintiff contends that in a prosecution for untrue or misleading advertising, which is made an offense by section 17500 of the Business and Professions Code, St.1941, p. 727, proof of the advertising of a drug or device in the manner specified in section 26271, supra, would be sufficient, under the latter section, to establish the commission of an offense, without proof that the advertising was untrue or misleading in fact. He fears that he is about to be prosecuted for advertising that his product has an effect upon one or more of the diseases specified in section 26271, and that under this section his statements will be conclusively presumed to be false, even though they are true, in fact. His contention is, in brief, that his constitutional rights will be violated, in that he may be convicted of an offense even though his published statements are true in fact, while others who advertise remedies as effective in diseases other than those specified in section 26271 are not subject to prosecution unless their statements are untrue or misleading in fact.

The first question for decision is whether plaintiff has alleged facts which entitle him to complain of the alleged discrimination, that is to say, whether it appears from the complaint that he is about to be prosecuted for advertising his product truthfully, and is thus hurt by the discriminatory feature of the law.

[1] It is well established that one may complain of a statute only insofar as it is injurious to him. It was stated, with citation of many authorities, in A. F. Estabrook Co. v. Industrial Acc. Comm., 1918, 177 Cal. 767, at page 769, 177 P. 848: "Generally speaking, the courts will not consider the constitutionality of a statute attacked by one whose rights are not affected by the operation of the statute. * * * More specifically, a contention that a statute denies equal rights and privileges by discriminating between persons and classes of persons 'may not be raised by one not belonging to the class alleged to be discriminated against.'" See also cases collected in 5 Cal.Jur. pp. 622, et seq. and 10-Year Supplement. The complaint does not allege that plaintiff's advertising has been truthful, nor what facts he proposes to advertise respecting his product, nor whether his advertising will be truthful, nor does he allege that he is about to be prosecuted for advertising the product truthfully. The pleading appears to have been drawn with much care in order to avoid placing in issue the merits of plaintiff's alleged remedy, and the truthfulness of his advertising. It alleges that plaintiff has been advertising the product "as a normalizer which can be safely used continuously, from childhood to old age with gratifying results, being of the same materials of which the human body is made, and the excessive use of which will not harm anyone, but may keep one healthy or may be used to regain health, and to protect the human body from certain diseases, some of which diseases are set forth in Article IV, Section 26271 of the California Pure Drugs Act, an act of the California Legislature, effective January 1, 1940, which is now in full force and effect; and that plaintiff is selling and disposing of said tablets and advertising the same as of benefit to the human body as he has ascertained from clients and exhaustive examination and research concerning the effects and results of the use of said tablets."

It appears from the complaint that the State Board of Health submitted to plaintiff for his signature a declaration that he would forthwith cease and desist from advertising Miacene tablets by making statements, among which are the following: That "* * * they seem to clean the bloodstream so that anemic people come back to feeling fine * * * they supply the necessary minerals so that constipation is eliminated * * * heavy people become normal in weight—thin people gain their normal weight * * * tumors have been dissolved * * * arthritis corrected * * * it has cured (or will have an effect in) cancer * * *" that "* * * 99 per cent of the American people are deficient in the minerals represented in Miacene tablets, so 99 per cent of all Americans should use them * * * your good looks and disposition are dependent on them * * * with Miacene minerals you will find that your appetite changes to other foods that you most need and then you will be on a balanced diet * * *" that "* * * 'Modern Medical Men' is a government publication * * * that the demineralized foods form a factor in the development of cancer * * * children using these tablets were found to be healthier, better behaved, more energetic, learned better, and were ahead of others starting with the same mentality * * *" that "* * * Miacene Tablets have been present in 'Nature's Laboratories' for thousands of years * * * each tablet contains an amount in excess of what is actually present"; and "that the product will have an effect in such ailments as stomach, liver, kidney, heart, gastric, ulcers, glands, bladder, ovarian tumor, pain, loss of weight, cases of albumin, neuritis, irregularity of the functioning of the thyroid gland, nerve energy, nervous spells and energy, or any other diseases of a similar nature." It further appears that plaintiff offered to delete from his advertising certain of the statements objected to by the State Department of Health, but that he refused to desist from advertising that his product would have an effect in diseases of the stomach, liver, heart, gastric, ulcers, glands, ovarian tumors, pain, loss of weight, cases of albumin, irregularity of the functioning of the thyroid gland, nerve energy, nervous spells and energy or other diseases of a similar nature.

[2, 3] It is quite clear that the facts alleged are not sufficient to entitle plaintiff to an injunction. It is true that section 26271 bars truthful advertising of drugs and devices as having effect upon the enumerated diseases and that untrue or misleading advertising only is prohibited in all other cases, but before plaintiff can complain of unjust and unfair discrimination in the operation of the law, he must allege and prove that his product has a beneficial effect in one or more of said diseases and that he is about to be prosecuted for advertising that fact. If an injunction should be granted upon the facts alleged in the complaint, it would have the effect of protecting plaintiff from prosecution for advertising that his drug has a beneficial effect in such cases, even though his statements were false. In this respect the complaint was insufficient to state a cause of action.

[4] There is another section of the Health and Safety Code which plaintiff does not mention. Section 26273, St.1939, p. 973, reads as follows: "Whenever the board determines that an advance in medical science has made any type of self-medication safe as to any of the diseases named in this article, the board shall by regulation authorize the advertisement of drugs having curative or therapeutic effect for such disease, subject to such conditions and restrictions as the board may deem necessary in the interests of public health." It appears from this section that a drug having curative or therapeutic effects upon the diseases enumerated in section 26271 may be advertised under conditions and restrictions imposed by the Board if the Board determines that it constitutes an advance in medical science and may be safely used in self-medication. Plaintiff is not necessarily barred altogether from advertising his drug as an effective remedy or preventive in the named diseases. If he has achieved an advance in medical science within the meaning of section 26273, and we would judge that he thinks he has, he should make application to the Board for permission to advertise the truth about it. It could well be understood from his advertisements that he claims to have made a new and revolutionary discovery in medical science but he does not allege that he has accomplished anything of the sort. Nor does he allege that he has ever made application to the Board and been refused permission to advertise the truth concerning his product. The Board has sought to obtain his consent to discontinue certain statements as to the merits of Miacene tablets, but it is not to be inferred from this fact that plaintiff has sought to take advantage of the privileges offered by section 26273. If he should do so he would have to prove that his drug has a curative or therapeutic effect upon one or more of the enumerated diseases. It is to be presumed that the Board would allow him to advertise what it determined to be the facts with reference to such curative or therapeutic effects. But if from the vague allegations of the complaint it might be inferred that the Board has determined that plaintiff's tablets possess no curative or therapeutic value in the named diseases, there is not in the complaint a semblance of an allegation that the determination was not based upon sufficient evidence or was without foundation in fact.

We are not deciding that plaintiff could not under any circumstances attack the constitutionality of section 26271 until he had applied to the Board for, and been refused, permission to advertise that his tablets have a curative or therapeutic effect in one or more of the mentioned diseases. We are only pointing out that in order to escape from the severe provisions of section 26271, through action of the Board or judgment of the court, plaintiff must inevitably place in issue and prove the truth of his representations to the public. In other words, plaintiff's entire case, as presented by his complaint, is out of balance; he does not allege facts showing that he has a right to do that which he seeks protection in doing. The facts he alleges would not at all justify the relief which he demands. He will not have a meritorious complaint of interference with his business until his representations to the court and those to the public concerning the merits of his tablets are equally bold or equally modest.

The judgment is affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.

70 Cal.App.2d 166

CONWAY et al. v. MOORE.

Civ. 12798.

District Court of Appeal, First District,
Division 1, California.

July 13, 1945.

1. Frauds, statute of 🔑131(1)

Where balance of purchase price, paid by daughter of one of purchasers, was considered by oral agreement as an advance payment of rent for premises thereafter occupied by daughter, there was no violation of statute of frauds because of modification of method of payment provided in original written contract, since a written contract may be altered not only by contract in writing but by an executed oral agreement. Civ.Code, § 1698.

2. Mortgages 🔑32(1)

Where it was agreed between purchasers and daughter of one of them that daughter should pay balance of purchase price and then be permitted to occupy premises rent free for 19 months, and daughter took deed in her name, deed in legal effect constituted a mortgage given as security for the advance made by her.

3. Mortgages 🔑37(2)

It may be shown by parol by clear and convincing evidence that a deed absolute is a mortgage given to secure an obligation to grantee.

4. Trusts 🔑72

Where conveyance is executed from vendor direct to lender to secure loan of purchase money made by lender to purchaser, legal title is held not only for lender as security but in trust for borrower for purpose of having title go to him.

5. Trusts 🔑72

Where, upon purchase of realty, purchase money is paid by one person and conveyance is made to another, a resulting trust arises in favor of one by whom purchase money is paid.

6. Limitation of actions 🔑103(3)

Where daughter of one of purchasers paid balance of purchase price of property, received deed thereto, and was reimbursed by being permitted to occupy premises rent free for 19 months, after which she was permitted to continue in possession of property for many years until her death, action by purchasers to obtain property from her administratrix, if considered an action for specific performance, was not barred by limitations, since there was no repudiation of the trust in favor of purchasers until after daughter's death.

7. Vendor and purchaser 🔑54

A vendee who has fully performed his part of contract is beneficiary of a trust in the legal title which is held for him by the vendor.

8. Limitation of actions 🔑103(3)

Where daughter of one of purchasers paid balance of purchase price of property, received deed thereto, and was reimbursed by being permitted to occupy premises rent free for 19 months, and then remained in possession for many years until her death, action by purchasers against her administratrix to obtain property, if considered an action to enforce a resulting trust, was not barred by limitations, since there was no repudiation of trust until daughter's death.

9. Limitation of actions 🔑103(4)

In case of a resulting trust, period of limitations commences to run from time beneficiary acquires knowledge of trustee's repudiation of trust.

10. Appeal and error 🔑1008(1)

Where daughter of one of purchasers paid balance of purchase price, received deed, and was reimbursed by being permitted to occupy premises rent free for 19 months, and then remained in possession for many years until her death, whether purchasers who then sought to obtain property from daughter's administratrix were guilty of laches was question of fact for trial court.

11. Specific performance 🔑114(2)

In action for specific performance, it is not sufficient simply to allege generally that contract is just and reasonable and consideration is adequate, but complaint should allege facts showing contract is fair and consideration adequate.

12. Specific performance 🔑114(2)

In action for specific performance, where facts showing contract is fair and consideration adequate are sufficiently pleaded, there is no necessity of alleging in so many words that contract was supported by adequate consideration and is, as to defendant, fair and just.

13. Specific performance 🔑114(2), 121(8)

In action for specific performance, complaint alleging that agreement between daughter and purchasers was that daughter should occupy premises for 19 months rent free in consideration of her payment of balance of purchase price of $190, and evidence showing that property purchased for $510 had an assessed value of $1,500 and had been appraised in daughter's estate at $2,500, sufficiently showed adequate consideration and a fair contract.

14. Specific performance 🔑114(2)

Fairness and adequacy of consideration need not be alleged in action for specific performance where an agreed upon consideration has been accepted, since acceptance constitutes a waiver of any claim of inadequacy.

15. Specific performance 🔑117
Trusts 🔑371(8)

Where daughter of one of purchasers paid balance of purchase price of property, received deed thereto, and was reimbursed by being permitted to occupy premises rent free for 19 months, and thereafter remained in possession for many years until her death, purchasers, in action to obtain possession of property from daughter's administratrix, were not required to allege and prove promise by daughter to convey to purchasers, since, if action was considered one for specific performance of contract to convey land the title to which daughter secured with notice, promise was unnecessary, and if transaction was considered a loan by daughter to purchasers, promise arose by operation of law.

◆

Appeal from Superior Court, San Mateo County; Aylett R. Cotton, Judge.

Suit for specific performance by William Conway and another against Myrl Moore, administratrix of the estate of Faye Love, also known as Faye Warren, deceased. Judgment for the plaintiffs, and the defendant appeals.

Judgment affirmed.

Waldo F. Postel, of San Francisco, for appellant.

John Langer, of San Francisco, for respondents.

PETERS, Presiding Justice.

The judgment appealed from determines that plaintiffs William Conway and R. C. Conway own a certain parcel of improved real property in San Mateo County, in the town of Montara, and orders the defendant, the administratrix of the estate of Faye Love or Faye Warren, to convey the same to plaintiffs. Defendant appeals.

The complaint is entitled "Complaint for Specific Performance." It alleges that the decedent was the daughter of plaintiff R. C. Conway, but not the daughter of plaintiff William Conway (being her daughter by a previous marriage); that on February 15, 1924, the plaintiffs entered into a written contract with Clara Belle Hoskinson to purchase the real property in question for a total purchase price of $510, $100 of which was paid down, the balance to be paid at the rate of $20 a month until $250 had been paid, the then balance to be paid at the rate of $10 a month; that interest was to be charged only on deferred payments; that until February 8, 1928, plaintiffs were husband and wife; that on that date a final decree of divorce was entered; that during their married life the plaintiffs paid Clara Belle Hoskinson the sum of $320 on the purchase price of the property; that on October 19, 1925, Faye Warren, also known as Faye Love, daughter of plaintiff R. C. Conway, paid Clara Belle Hoskinson the balance of the purchase price of $190 and received a deed to the property which deed was recorded on November 27, 1925; that the deed attached as an exhibit named Faye Warren as grantee "Subject to agreement of sale made and entered into on the 15th day of February, 1924, between Clara Belle Hoskinson and Wm. Conway, and R. C. Conway, his wife, of San Francisco, Calif." The circumstances under which Faye paid the $190 are set forth as follows: "That it was mutually and orally agreed by and between plaintiffs and deceased on or about the 19th day of October, 1925 that the sum of $190.00 so paid by the deceased to said Clara Belle Hoskinson as aforesaid to apply as an advance on rent to be paid by deceased to plaintiffs at the rate of $10.00 per month; that after nineteen months of occupancy of said real property by deceased, deceased was to pay plaintiffs the sum of $10.00 per month as long as she occupied said premises; that in accordance with said oral agreement, deceased entered into possession of said premises on or about the 19th day of October, 1925 and remained in occupancy thereof for a period of nineteen months to on or about the 19th day of May, 1926, at which time it was further mutually and orally agreed by and between deceased and plaintiffs for and in consideration of the love and affection which plaintiffs bore to deceased, that deceased could reside in said premises thereafter on a month to month basis without payment of rent provided deceased paid all taxes, assessments, insurance, repairs, upkeep, improvements and all expenses in connection with said premises during occupancy by deceased; that pursuant to said latter agreement, deceased occupied said premises until the date of her death, on December 25, 1942, and paid all taxes, assessments, insurance, repairs, upkeep, improvements and all expenses in connection with said premises; that during the entire occupancy of the premises by deceased, she was the tenant of plaintiffs."

The prayer is that the administratrix be directed to convey the property to plaintiffs. The judgment grants that relief in addition to quieting title in the plaintiffs.

The evidence substantiated all of the main allegations of the complaint. It shows that the Conways had rented the real property involved from Mrs. Hoskinson for several years prior to February of 1924 when the formal agreement of purchase was executed. The property was improved with a small cottage and the Conways used it as a week end and summer place. Mrs. Conway's daughter, the decedent herein, lived with the Conways. She married and had a son. She separated from her husband, and prior to October, 1925, she and her child again went to live with the Conways at their home in San Francisco. The child was not well and Mrs. Conway and her daughter came to the conclusion it would be best for the child's health if Faye took him to Montara in San Mateo County. Faye had received $500 from her husband upon her separation. It was under these circumstances that Faye and her child took up their residence on the property and the oral arrangement of October, 1925, was entered into. Faye paid Mrs. Hoskinson the $190 and for this was to occupy the premises rent free for 19 months, the parties having agreed that $10 a month was a fair rental. At the end of the 19 month period Faye was unable to pay the $10 a month rental except for a short period of about three months when she was married to Mr. Love. This marriage was of short duration, and, after separating from Love, Faye and her son continued to occupy the premises.

In the meantime, the Conways were having marital difficulties. They separated sometime in 1925, an interlocutory decree of divorce was secured in 1926, and the final decree of divorce was entered in 1928. The divorce decree did not make provision for a division of property, the parties by agreement having divided their property. They owned two parcels of San Francisco property, and Mrs. Conway took one parcel and Mr. Conway the other. They agreed they would continue to hold their interests in the San Mateo property in common. Mrs. Conway continued to go to the cottage on many week ends, and Mr. Conway, and his daughter by a former marriage, also visited the place on many week ends. The decedent and her son lived at the house continuously after 1925, until her death in 1942. The plaintiffs then went into possession.

After the 19 months had expired, for which, according to the Conways, the $190 had been paid as advance rent, decedent was unable to pay the agreed upon $10 a month rent. Under such circumstances the Conways agreed with decedent that she and her son could remain in the premises if Faye would pay the taxes, keep the house insured and in repair. After the 1925 deed to Faye was recorded, the property was assessed to her, and thereafter the insurance policies were either in R. C. Conway's name or hers and Faye's. The Conways apparently paid the taxes. There is ample evidence that the Conways, particularly Mrs. Conway, claimed the property after 1925 and that Faye was looked upon as a tenant.

Under such a factual situation what are the legal rights of the parties? It is apparent that the persons involved, until after Faye's death, did not analyze the situation or consider in detail their legal rights. They entered into a friendly family arrangement. They wanted to help out Faye and her son. Faye was hard pressed for money, and her son needed sunshine. Under such circumstances, the agreement of 1925 and the subsequent modification were entered into. The evidence amply supports the finding that the $190 paid by Faye was paid as advance rent, and that at all times she occupied the premises with the consent of the Conways and as their tenant. There is no evidence that she ever claimed any interest in the property adverse to the Conways.

[1] The complaint, as noted above, is called a "Complaint for Specific Performance." The defendant contends that the complaint is deficient in that it is not alleged (nor is it found) that there was an adequate consideration, or that the contract was just and reasonable. It is also pointed out that the terms of the supposed contract are not certain; that it cannot be ascertained whether plaintiffs seek specific performance of the contract with Mrs. Hoskinson or the oral contract with Faye; that plaintiffs do not allege that Faye ever agreed to convey to them. It must be conceded that the complaint is by no means a model pleading. The exact theory upon which it proceeds is not as clear as might be desired. It seems to be based on the theory that Faye purchased the property subject to the Conway contract of sale of which she had notice, and to which her deed was made subject. The purchaser with notice of an outstanding contract of sale is, of course, made to recognize it without the necessity of an express promise on his part to convey. Thus the complaint is apparently drawn on the theory of specific performance of the original Hoskinson contract against a grantee of the legal title with notice. Faye, under this theory, paid Mrs. Hoskinson the balance of $190 and became, in effect, the assignee of the Conway-Hoskinson agreement. The Conways then paid her the $190 in free rent for 19 months, this constituting an oral modification of the method of payment provided for in the Hoskinson agreement. A contract in writing may be altered by a contract in writing, or by an executed oral agreement. Civil Code, § 1698. This is a complete answer to the contention that the oral agreement violates the statute of frauds.

[2-5] This theory, while supported by the evidence, does not seem to adequately describe the legal relations of the parties. The facts alleged in the complaint and shown by the evidence support another and perhaps more realistic theory. Under this theory the payment of the $190 by Faye was made in satisfaction and discharge of the Conway-Hoskinson contract. The payment by Faye was an advance or loan to the plaintiffs. This loan, it was agreed, was not to be repaid in cash but by permitting Faye to occupy the premises rent free for 19 months. As security for the advance, Faye took the deed in her name subject to the Conway-Hoskinson contract. In legal effect this deed constituted a mortgage given as security for the advance. It may always be shown by parol by clear and convincing evidence that a deed absolute is a mortgage given to secure an obligation to the grantee. Beeler v. American Trust Co., 24 Cal.2d 1, 147 P.2d 583. Under this conception of the facts Faye held a double relation to the Conways—as mortgagee for the money advanced, and as trustee for the legal title for the Conways. Under such circumstances the following rule, stated in 17 Cal.Jur. p. 752, § 54, and amply supported by authority, is applicable: "Where a conveyance is executed from the vendor direct to the lender, to secure a loan of the purchase money made by the lender to the purchaser, the legal title is held not only for the lender as security but in trust for the borrower for the purpose of finally having the title go to him. The rule that when upon a purchase of real property the purchase money is paid by one person and the conveyance is made to another, a resulting trust immediately arises in favor of the one by whom the purchase money is paid, applies; and the grantee holds a double relation to the purchaser, being trustee of the legal title and mortgagee for the money advanced for its purchase. The resulting trust arises by operation of law and the facts creating it may be shown by parol."

[6, 7] Appellant urges that the action is barred by the statute of limitations or by plaintiffs' laches. Whether the action be viewed as one for specific performance of an outstanding contract of sale, or to obtain a conveyance upon satisfaction of an obligation for which the land was held as security, it is clear that the statute of limitations has not run. If the action is for specific performance, the rule is that a vendee who has fully performed his part of the contract is the beneficiary of a trust in the legal title which is held for him by the vendor. The statute of limitations does not run until such trust is clearly and unequivocally repudiated by the vendor. See cases collected 16 Cal.Jur. p. 458, § 61; 23 Cal.Jur. p. 427, § 10. In the instant case the evidence is clear that there was no repudiation until after the death of Faye and until shortly before this action was filed.

[8-10] The result is the same if the proceeding be considered as an action to secure a conveyance upon satisfaction of an obligation for which the land was held by Faye as security. Under this theory Faye was a resulting trustee and the action one to enforce a resulting trust. The rule as to such trusts is that the period of limitations commences to run from the time the trustee repudiates the trust, or, more accurately, from the time the beneficiary acquires knowledge or notice of the repudiation. Mere lapse of time, without repudiation does not affect the rights of the beneficiary. See many cases collected and commented upon 25 Cal.Jur. p. 271, § 133. Whether plaintiffs were guilty of laches, under the circumstances here involved, was a question of fact for the trial court.

[11-14] Defendant contends that if the action is one to specifically enforce the contract of sale, the complaint is insufficient to state a cause of action in that it is not alleged that the consideration was adequate or the contract was just and reasonable. Such allegations are usually indispensable; in fact, it is not sufficient simply to allege generally that the contract is just and reasonable and the consideration is adequate, but the complaint should allege the facts which show that the contract is fair and the consideration adequate. Cases collected 23 Cal.Jur. p. 495, § 53. However, where the facts are sufficiently pleaded there is no necessity of alleging in so many words that the contract was supported by adequate consideration and is, as to the defendant, fair and just. Many cases cited 23 Cal.Jur. p. 496, f.n. 1. This complaint alleges that the agreement between Faye and plaintiffs was that Faye was to occupy the house for 19 months rent free in consideration of the $190 payment made by her. Such agreement appears to be fair and reasonable and upon adequate consideration. The contract between the plaintiffs and Hoskinson was also fair. This contract, attached to the complaint, states a purchase price of $510. The evidence shows an assessed value of $1,500, and that the property was appraised in Faye's estate at $2,500. Moreover, and in any event, fairness and adequacy of consideration need not be alleged where an agreed upon consideration has been accepted, the acceptance constituting a waiver of any claim of inadequacy. Peters v. Binnard, 219 Cal. 141, 25 P.2d 834; Fleishman v. Woods, 135 Cal. 256, 67 P. 276; Nicholson v. Tarpey, 70 Cal. 608, 12 P. 778; Meridian Oil Co. v. Dunham, 5 Cal.App. 367, 90 P. 469. It should be pointed out that the absence of more specific allegations of fairness and adequacy were not made a ground of special demurrer.

[15] Defendant strenuously objects that both the complaint and the evidence are insufficient in that it was not alleged or proved that Faye promised to convey to plaintiffs. If the action be considered one for specific performance of the outstanding contract to convey land the title to which Faye secured with notice, no such promise was necessary. If the action is considered to be one as arising from a loan made by Faye to plaintiffs, and as security Faye took title, such a promise arises by necessary implication and by operation of law.

The judgment appealed from is affirmed.

WARD, J., and BRAY, Justice pro tem., concur.

70 Cal.App.2d 186

In re CREELY.

CREELY v. OLVERA.

Civ. 12844.

District Court of Appeal, First District, Division 2, California.

July 13, 1945.

1. Appeal and error 🔑994(3), 1012(1)

It is province of trial judge to pass on weight to be given evidence and credibility of witnesses.

2. Infants 🔑16

Evidence that father, though he knew child had been left with another by mother after their separation, did not contribute to support of child for more than one year and made no effort to regain custody of child during that period, supported finding that child was an abandoned child, within meaning of statute, so as to authorize juvenile court to declare child free from parental custody and control. St.1943, p. 1333, § 701.

3. Appeal and error 🔑1046(5)

Remarks made by trial judge which are not part of findings, and which in themselves are not prejudicial, do not constitute a basis for reversal of judgment.

4. Constitutional law 🔑306

Due process of law in proceedings to have child decreed to be an abandoned child free from parental custody and control requires sufficient notice to parents with an opportunity for them to be heard. St.1943, p. 1333, § 701(a); U.S.C.A.Const. Amend. 14.

5. Constitutional law 🔑306
Infants 🔑12

The statute declaring child, left in another's custody without any provision for support or without communication for period of one year with intent on part of parent to abandon such child, to be an abandoned child, and making failure of parent to provide for child or to communicate for period of one year presumptive evidence of intent to abandon, as applied to father who knew child had been left by mother with another, did not deny due process of law, where sufficient notice was given to father with opportunity to rebut such presumption. St.1943, p. 1333, § 701(a); U.S. C.A.Const. Amend. 14.

6. Infants 🔑16

Under statute declaring child, left in another's custody without any provision for support or without communication for period of one year with intent on part of parent to abandon such child, to be an abandoned child, and making failure of parent to provide for child or to communicate for period of one year presumptive evidence of intent to abandon, the presumption of intent to abandon could be overcome by opposing evidence, and existence for a year of the intent to abandon is a question of fact for trial court. St. 1943, p. 1333, § 701(a); U.S.C.A.Const. Amend. 14.

Appeal from Superior Court, City and County of San Francisco; Theresa Meikle, Judge.

Proceeding in the matter of George Vincent Creely, minor, wherein Maberyl B. Olvera filed a petition to have the minor decreed to be an abandoned child free from parental custody and control, which petition was opposed by George Creely. From order decreeing minor to be an abandoned child free from parental custody and control, George Creely appeals.

Affirmed.

Morris Lavine and John Van Aalst, both of Los Angeles, and A. Lawson Crawford, of San Francisco, for appellant.

John D. Harloe, of San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an appeal from an order of the Juvenile Department of the Superior Court of San Francisco County decreeing George Vincent Creely to be an abandoned child free from parental custody and control. After appellant's brief was filed the respondent failed to file his brief within the time prescribed by the Rules on Appeal. Notice was duly given in accord with Rule 17 b, and the case was thereafter submitted upon appellant's opening brief.

Appellant and his wife separated on or about December 30, 1927, when their child, George Vincent Creely, was one year of age. He is now over eighteen and is about to be inducted into the military service. Mrs. Creely moved from their Los Angeles home to San Francisco and in the early part of 1928 went with her son to live with Maberyl B. Olvera, the petitioner herein.

She filed a divorce action in that year but the decree was never obtained. On January 7, 1931, Mrs. Creely signed a written consent to the adoption of the boy by Mrs. Olvera and shortly thereafter disappeared. Petitioner has had sole custody of the minor since 1929, and has raised and supported him during this period. On January 6, 1944, Mrs. Olvera filed her petition to have George Vincent Creely declared an abandoned child. George J. Creely, the father, appeared and contested the action. After hearing the matter and the testimony on both sides the court entered its findings and order in accordance with the petition.

Proceedings to declare a minor free from parental control are governed by section 701 of the Welfare and Institutions Code, St.1943, p. 1333, which reads in part as follows:

"The jurisdiction of the juvenile court extends also to any person who should be declared free from the custody and control of either or both of his parents. The words 'person who should be declared free from the custody and control of either or both of his parents' shall include any person under the age of 21 years who comes within any of the following descriptions:

"(a) (Minor left in another's custody.) Who has been left by either or both of his parents in the care and custody of another without any provision for his support or without communication from either or both of his parents, for the period of one year with the intent on the part of such parent or parents to abandon such person. Such failure to provide, or such failure to communicate for the period of one year, shall be presumptive evidence of the intent to abandon. Such person shall be deemed and called a person abandoned by the parent or parents abandoning him."

It is appellant's main contention that the evidence is insufficient to show that he left his son in the custody of petitioner but indicates to the contrary that he did not intend to abandon the boy within the meaning of the code section. His testimony in the trial court was mainly to the effect that during all of the years since the separation he continually attempted to locate his son and did not know that the boy was with Mrs. Olvera.

The court found to the contrary:

"(2) That said child George Vincent Creely, left in the care and custody of another by his parent for a period of more than one year next prior to the filing of the petition herein, without any provision for the support of said child and with the intent to abandon said child."

The evidence presented to the trial court is sufficient to uphold this finding and the decree entered. It was shown that Mrs. Olvera has had complete control and custody of the boy since 1929, that she has supported him, clothed him and sent him to school during this period. It is undisputed that neither the boy's father nor mother has contributed anything to his support in these years.

The only question, therefore, is whether or not the appellant had intended to abandon the boy within the meaning of Section 701 of the Welfare and Institutions Code. The petitioner testified that although appellant had come to her house on various occasions he never at any time offered to support the child. The appellant testified that he knew where the boy was living for the first year or two but that he did not know after that time. The petitioner, however, testified that Mr. Creely knew that his son was living with her during all of this period and actually told her that he did not want the boy. Her testimony was that the appellant came frequently to her home, refused to have anything to do with the boy unless his wife returned to live with him in Los Angeles, and frequently made trouble for petitioner because of his wife's desertion. There is a strong inference from all the testimony that appellant's only interest in the boy was to use him as an instrument to induce his wife to return to him and that he refused to support the boy unless a reconciliation was accomplished. The minor testified that his father had never communicated with him and that the first time he could ever remember having seen his father was in court during the instant case.

[1, 2] The reasoning of In re Peterson, 56 Cal.App.2d 791, at page 794, 133 P.2d 831, at page 833, applies to the case before us. "It is the province of the trial judge to pass on the weight to be given the evidence and the credibility of the witnesses." Here, as in that case, the court was privileged to accept the testimony of petitioner as true to the effect that the father had not contributed to the support of his son for a period of more than one year and showed no desire to regain custody of the son during the past years. The same conclusion follows, therefore, that the evidence sup-

ports the decision of the trial court that George Vincent Creely was an abandoned child within the meaning of section 701 of the Welfare and Institutions Code.

[3] Appellant cites certain remarks made by the trial judge to show prejudice and to indicate that the decision was based upon improper considerations. This case was tried by the court in accordance with the provisions of the Welfare and Institutions Code, sections 775 to 786 inclusive, St.1937, pp. 1041–1043. The proceeding was conducted in an orderly and fair method and the decision of the court was based upon substantial evidence, as hereinbefore indicated. There is no showing that the court misconceived the law on the subject. As was said by this court in Farmer v. Matsutani, 48 Cal.App.2d 332, at page 337, 119 P.2d 740, 742: "Remarks made by the trial judge which are not part of the findings, and which in themselves are not prejudicial, do not constitute a basis for reversal of the judgment. Gilmore v. Paris Inn, 10 Cal.App.2d 353, 355, 51 P.2d 1103."

[4-6] Appellant finally urges that section 701(a) of the Welfare and Institutions Code as applied to this case violates due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. There is no merit in this contention. Due process of law requires sufficient notice to the parents with an opportunity for them to be heard. Matter of Guardianship of Michels, 170 Cal. 339, 149 P. 587; In re Estate of Hampton, 55 Cal.App.2d 543, 560, 131 P.2d 565. This procedure is provided for by sections 775 to 786 inclusive of the Welfare and Institutions Code and in the instant case the record shows that such requirements were fulfilled. Appellant's argument that section 701(a) operates to take a child from its parent under an arbitrary presumption is unfounded. The failure to provide for or to communicate with the child for a period of one year is only "presumptive evidence of the intent to abandon." This presumption could be overcome by opposing evidence and the existence for a year of the "intent to abandon" is a question of fact for the determination of the trial court. Moch v. Superior Court, 39 Cal.App. 471, 477, 179 P. 440, 442.

The order appealed from is affirmed.

STURTEVANT, J., and DOOLING, Justice pro tem., concur.

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70 Cal.App.2d 449

PEOPLE v. PHILLIPS.

Cr. 1903.

District Court of Appeal, Third District, California.

Aug. 6, 1945.

1. Criminal law ⚷824(5)

Where first count of information charging offense of deriving support from earnings of a prostitute was dismissed at conclusion of trial and only second count charging soliciting for a prostitute was submitted to jury, trial court, in absence of request for such instruction or motion to strike out allegedly irrelevant or incompetent testimony, did not err in failing to instruct jury to disregard all testimony relating to first count, particularly testimony showing receipt by accused of compensation for soliciting. Gen. Laws 1937, Act 1907.

2. Prostitution ⚷4

Evidence of soliciting was sufficient to sustain conviction of offense of soliciting for a prostitute. Gen. Laws 1937, Act 1907.

3. Prostitution ⚷1

A "prostitute" is a woman given to indiscriminate lewdness, or one who offers herself indiscriminately to sexual intercourse for hire.

See Words and Phrases, Permanent Edition, for all other definitions of "Prostitute".

◆

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Troy Phillips was convicted of the offense of soliciting for a prostitute, his motion for new trial was denied and he appeals.

Judgment and order denying a new trial affirmed.

S. W. Green, of Sacramento, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener and Jas. O. Reavis, Deputy Attys. Gen., for respondent.

ADAMS, Presiding Justice.

In an information filed by the District Attorney of Sacramento County defendant was charged in count one of deriving support and maintenance, in whole or in part, from the earnings and proceeds of a prostitute, knowing that such earnings and proceeds were derived from acts of prostitution; and, in count two, of soliciting for a prostitute.

At the conclusion of the trial the first count was dismissed. Defendant was convicted on the second count.

On this appeal it is contended first that the trial court should have instructed the jury to disregard all testimony relating to the first count, particularly the evidence tending to prove receipt by defendant of compensation for soliciting; and, second, that the evidence is insufficient to prove "soliciting" by defendant for a "prostitute."

The evidence shows that one Evelyn Fulford, who previously had been a waitress in Pasadena, had been living with defendant in Sacramento for a month or so prior to the 14th day of October, 1944. On the evening of October 14th she and defendant were driving about in Sacramento in defendant's car. Two soldiers stationed at Mather Field, who had started to "hitch hike" back to the Field from Sacramento, saw defendant's car stop a block ahead of them. As they approached this car Mrs. Fulford got out of it and appeared to be searching for something. She asked the two soldiers to help her find the heel of her shoe. They engaged in the search without results, and in the meantime told Mrs. Fulford and defendant that they were trying to get to Mather Field, whereupon the latter offered to take them there. After they had entered the car and driven a few blocks Mrs. Fulford told the soldiers that she would have sexual intercourse with them for $5 each. One of them remarked that "that would be a good deal," whereupon defendant Phillips stated that they "would not regret it, that she was a good clean girl." The car was then parked and one of the soldiers, a sergeant, first had intercourse with Mrs. Fulford in the back seat of the car, while the other soldier, a private, stood with defendant outside and at the back of the automobile. The sergeant gave Mrs. Fulford some money, amounting to three or four dollars, which she gave to defendant, stating that he was her banker. The private then entered the car with Mrs. Fulford, where they had intercourse, while the sergeant and defendant stood outside and talked. During this conversation defendant stated that he had met Mrs. Fulford some three weeks previously; that she had been in "some sort of a jamb," and that he had helped her out of it; that she had told him she wanted to make a little quick money and he was helping her. After the other soldier got out of the car, the four of them reentered it and drove to a cafe where they picked up two sailors to whom the same proposition was made. The six of them then returned in defendant's car to the same spot where the previous acts had been committed. They had been there but a few minutes, and one of the sailors was about to have intercourse with Mrs. Fulford, when two members of the military police drove up. One of these men testified that when he arrived at the scene Mrs. Fulford was lying in the back seat of defendant's car and defendant was at the wheel; that defendant started to drive off, but was stopped within two or three blocks, whereupon the whole party, excepting the sergeant, who had run away, was taken to the police station. There the private demanded of defendant the return of his five dollars, and after some argument defendant returned it to him. There was also testimony that defendant, when arrested, had on his person something less than $10; also that a towel was found in defendant's car which the sergeant testified he had used after his act of intercourse, which towel was subsequently given to and accepted by defendant.

[1] Regarding appellant's contention that the court should have instructed the jury to disregard all testimony relating to the first count in the information, particularly testimony tending to show receipt by defendant of compensation for soliciting, we find no merit in same. Any such general instruction could only have confused the jury, since obviously some of the evidence bearing upon the first count was relevant to the charge in the second count. Defendant's counsel made no motion to strike out any testimony which he claims is irrelevant, or incompetent, and he has not pointed out to this court the evidence which he thinks should have been stricken; he made no request for such an instruction. People v. Wright, 26 Cal.App.2d 197, 209, 210, 79 P.2d 102. On the contrary, the record shows that he did request an instruction (which the court declined to give) which is entirely inconsistent with his present claim of error, and which reads:

"You are further instructed that it is the duty of the People to prove beyond a reasonable doubt and to a moral certainty that

Evelyn Fulford was a common prostitute and that Troy Phillips knowing Evelyn Fulford to be a prostitute derived his earnings, wholly or in part from the proceeds of her prostitution, and, if they fail to prove this as to the degree required by law it is your duty to acquit the defendant Troy Phillips."

[2] As for appellant's contention that the evidence is insufficient to support the verdict on the second count in that it fails to show "soliciting" on the part of defendant or that Mrs. Fulford was a "common prostitute," we find same also to be without merit.

The applicable portion of the statute under which defendant was charged, Stats. 1921, p. 96, Deering's Gen. Laws, Act 1907, provides:

"Any male person who, knowing a female person to be a prostitute, * * * shall solicit * * * for such prostitute, shall be guilty of a felony, to wit: pimping, and upon conviction for an offense under this act shall be punished by imprisonment in the state prison for a period of not less than one year nor more than ten years."

The words "common prostitute" are not used in the statute.

[3] A prostitute is defined variously, as "A woman given to indiscriminate lewdness; now, specif., a woman who offers herself indiscriminately to sexual intercourse for hire." Webster's New International Dictionary, 2d Ed. Also see Wilson v. State, 17 Ala.App. 307, 84 So. 783; Commonwealth v. Lavery, 247 Pa. 139, 93 A. 276, 277; Schutte v. Schutte, 90 W.Va. 787, 111 S.E. 840, 842; People v. Berger, Gen. Sess., 169 N.Y.S. 319, 321; Carpenter v. People, 8 Barb., N.Y., 603, 611; State v. Stoyell, 54 Me. 24, 27, 89 Am.Dec. 716; Cole v. State, 156 Ark. 9, 245 S.W. 303, 305. The evidence sufficiently establishes that the Fulford woman was a prostitute within the meaning of the statute.

As to whether there is sufficient evidence of solicitation by defendant, "solicit" is defined as: "To tempt (a person); to lure on, esp. into evil; * * * to bring about, forth, on, etc., by gentle or natural operations; to seek to induce or elicit; * * *." Webster's New International Dictionary, 2d Ed. "To appeal to (for something); to apply to for obtaining something; to ask earnestly; to ask for the purpose of receiving; to endeavor to obtain by asking or pleading; to entreat, implore, or importune; to make petition to; to plead for; to try to obtain. * * * While it does imply a serious request, it requires no particular degree of importunity, entreaty, imploration or supplication. * * *" 58 C. J. 804, 805.

In State v. Render, 203 Iowa 329, 210 N. W. 911, the court said that a solicitation which might bring a defendant's acts within the terms of a statute which made it unlawful for any person to ask, request or solicit another to have carnal knowledge with any male or female for a consideration or otherwise, need not be in any particular form of words, and that it might well be that solicitation, within the meaning of the statute, could be accomplished by gesture and any other indication quite as effectively as by the use of any set or particular formula of language.

In People v. Murray, 307 Ill. 349, 138 N. E. 649, 655, where the meaning to be given to the word "solicit" as used in a statute prohibiting the solicitation of political contributions from city officers and employees was under consideration, the court said that to solicit meant "to importune; entreat; implore," but that it did not require any great degree of earnestness or persistence in preferring the request; that "It may be by action which the relation of the parties justifies in construing into a request." And there the conduct of the defendant was held such as to justify a conclusion that he solicited contributions in violation of the act.

Also see State v. Shiffrin, 92 Conn. 583, 103 A. 899, 890; State v. Huckelberry, 195 Iowa 13, 188 N.W. 587, 588; Broadway Auto Livery v. State Board of Public Roads, 52 R.I. 109, 158 A. 375, 376.

We think that defendant's words and actions under the circumstances of this case justified the jury in concluding that he solicited for a prostitute; and its conclusion will not be disturbed on appeal.

The judgment and order denying new trial are affirmed.

PEEK and THOMPSON, JJ., concur.

70 Cal.App.2d 362

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. KUMLE et al.

Civ. 7125.

District Court of Appeal, Third District, California.

July 27, 1945.

Rehearing Denied Aug. 27, 1945.

1. Partnership ⚷217(1)

A note is presumed to be the paper of the individual partner whose name is signed to it, and the burden of proof is upon the holder to show affirmatively that the signature was intended for the signature of the firm. Civ.Code, § 2403 (1, 2).

2. Partnership ⚷217(3)

Evidence sustained finding that note sued upon was the note of the individual partner whose name was signed thereto and not the note of the partnership of which the signer was a member. Civ.Code, § 2403(1, 2).

◆

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Action by Bank of America National Trust & Savings Association against Hubert G. Kumle, Donald P. Kumle, Leon Brier and Charles F. Vanciel, doing business under the firm name and style of Battle Mountain Placers, a copartnership; Battle Mountain Placers, a copartnership; Hubert G. Kumle, Donald P. Kumle, Leon Brier, doing business under the firm name and style of Placer Properties Company, a copartnership; Placer Properties Company, a copartnership, and Charles F. Vanciel, on promissory note. From a judgment for plaintiff against Battle Mountain Placers in the sum of $2964.95 and in favor of all the other defendants, except Charles F. Vanciel, the plaintiff appeals.

Affirmed.

T. B. Scott, of Modesto, and G. D. Schilling and Kenneth M. Johnson, both of San Francisco, for appellant.

Bush & Ackley, of Oakdale, and H. A. Savage, of Fresno, for respondent.

PEEK, Justice.

Plaintiff, Bank of America National Trust and Savings Association, which we will hereinafter refer to as the bank, brought this action against Hubert G. Kumle, Donald P. Kumle, Leon Brier and Charles F. Vanciel, doing business under the firm name and style of Battle Mountain Placers, a copartnership, and the partnership itself. Also included as parties defendant were the same individuals with the exception of Vanciel, doing business under the firm name and style of Placer Properties Co., a partnership, and the partnership. The complaint was predicated upon six promissory notes all executed by Vanciel individually and amounting in the aggregate to $30,000. $25,000 of the total sum was loaned in installments of $5000 each between the period of January 24, 1940 and April 9, 1940. The remaining amount of $5000 was loaned by the bank shortly thereafter. Ultimately the notes were consolidated in one note in the sum of $27,909.60, representing the balance then owing and unpaid, which note likewise was executed solely by defendant Vanciel. The judgment of the court was against the defendant Battle Mountain Placers in the sum of $2964.95, being the balance then remaining upon the last note of $5000, and on which the said partnership admitted liability. In all other respects the judgment was in favor of the two partnerships and the individual members thereof with the exception of Vanciel against whom the judgment was entered individually for the total amount then remaining due together with interest, attorney fees and costs.

The transcript on appeal consists of a lengthy settled statement of facts under Rule 7 (b), Rules on Appeal, and may be summarized as follows: Prior to the negotiations which finally resulted in the present controversy the defendants Hubert G. Kumle, Donald P. Kumle and Leon Brier were engaged in gold dredging under the name of Placer Properties Co., a partnership. The defendant Vanciel and his wife were the owners of certain land near Oakdale, California, which had been leased to the Placer Properties Co. The Kumles and Brier contemplated additional dredging operations at Battle Mountain, Nevada. Vanciel had evidenced an interest in joining with them in a partnership to mine the Nevada property. During the course of their discussions regarding the proposed association it was determined that the amount of Vanciel's contribution would be the sum of $25,000 or $30,000. The other parties on their part would contribute certain of their dredging machinery and equipment as was available as well as their discovery of the land and their skill and experience as miners. Their discussions began during the month of August 1939, and during the same period Vanciel instituted negotiations with the appellant bank at its Oakdale branch for a loan of $30,000. On December 18, 1939, a copy of the proposed articles of copartnership between Vanciel, the Kumles and Brier was delivered by Vanciel to the appellant bank. Thereafter on January 2, 1940, after numerous communications between the manager of the Oakdale branch, Mr. T. C. Smethers, and officers at San Francisco branches, as well as personal inspections of the Nevada properties by a mining engineer on behalf of the bank, and discussions with the parties, the bank approved Vanciel's application for a loan of $25,000. On January 10, 1940, the articles of copartnership were executed by all of the parties. On January 29, 1940, the first $5000 was advanced by the bank, and during the first part of February operations were commenced. Unfortunately difficulties were encountered, and in July of the same year the work was abandoned.

The only issue herein presented by plaintiff pertains to the question as to whether or not the money was loaned to Vanciel as an individual or to Battle Mountain Placers as a copartnership. It is disclosed by the record that prior to the consummation of the loan the plaintiff was well acquainted with the individual members and the activities of the Placer Properties Co. The commercial account of the partnership as well as the accounts of the individual members thereof had been maintained at the Oakdale branch. Also during this period the bank had made a personal loan to one of the members and had made frequent loans to the partnership. According to the branch manager these loans always had been carried in the name of the partnership. Plaintiff likewise was well acquainted with Vanciel who had been a member of the advisory board of the branch bank at least from 1938 to the date of trial, and who had obtained loans from the bank from time to time since 1926.

The testimony of the Oakdale manager and Vanciel is in sharp conflict with that of the Kumles and Brier upon practically all of the pertinent facts relative to the loan negotiations. However, it is undisputed that the money when loaned to Vanciel was solely upon his individual signature and was carried on the "Loan Liability Ledger" of the bank in the names of Vanciel and his wife. Before any transfer was made of such funds to the partnership account, express instructions to that effect were obtained by the bank from the Vanciels. It is also undisputed that prior to the acceptance by the bank of Vanciel's application for a loan of $25,000 the bank had in its possession a copy of the proposed articles of copartnership, which recited in part that Vanciel was to contribute $25,000 to the partnership as his capital contribution, which contribution would be repaid to him with interest prior to the repayment of the capital contributions of the other partners. The articles contained a further provision which prohibited any partner from incurring indebtedness for the partnership in excess of $5000 without first obtaining the written consent of all of the parties. It is to be noted that pursuant to a letter from E. J. Wait, vice president of the bank, the Oakdale branch took an assignment of Vanciel's landowner's royalty under his lease with Placer Properties Co. as security for the loan, which assignment recited in part that it was to be made "for the purpose of securing payment to Bank of America * * * of the sum of $25,000.00 loaned to the above named lessors [Charles F. Vanciel and Velma A. Vanciel] by said bank * * * according to the terms and provisions of a certain promissory note made, executed and delivered by Charles F. Vanciel and Velma A. Vanciel * * *." Thereafter the Kumles and Brier accepted said assignment and agreed to pay the royalties and rents to the bank. In addition, an assignment of Vanciel's interest in the Battle Mountain Placers likewise was taken by the bank but was subsequently waived for the reason that its attorney was of the opinion that it might thereby become directly involved in the partnership. Although, as stated, the loans were carried by the bank as the personal obligations of Vanciel and his wife when the Battle Mountain Placers were set up by an accountant secured by Vanciel, said loans were entered as a liability of the partnership. The record also discloses, and the court found, that prior to the execution of the note for $27,909.60 by Vanciel he had, from time to time, renewed in his own name some of the notes which were executed prior to the signing of the articles of copartnership.

The final $5000 was loaned after the partnership had been in existence for several months. It was borrowed for partnership purposes and was in accordance with the previously quoted provision of the articles of copartnership. The partial payment thereon was made out of partnership funds and therefore presented an entirely different situation than that respecting the original $25,000, and was so recognized by the trial court in its findings.

It is appellant's contention that the partnership was liable directly on the notes, and in support thereof the case of First National Bank of Dixon v. Spangler, 1920, 49 Cal.App. 133, 192 P. 874, is cited as the leading case on this question. That case is easily distinguishable on the facts. There the defendants were partners in a butcher business, and during the course of the partnership certain loans were made to the firm upon notes signed only by N. R. Spangler. The conclusion of this court upon the question so raised was predicated upon section 2429 of the Civil Code, which then provided that every general partner was an agent for the partnership in the transaction of its business and had authority to do whatever was necessary to carry on such business in the ordinary manner, and for this purpose could bind his copartners by an agreement in writing. Since the decision in the Spangler case this state enacted the Uniform Partnership Act which, in Civil Code section 2403, provides in part:

"(1) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

"(2) (Unusual acts.) An act of a partner which is not apparently for carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners."

It is readily apparent that the notes in question herein are governed by the provisions of said section 2403 and not by the provisions of section 2429 as they existed at the time of the Spangler case. Said notes were not executed "in the partnership name" but in the individual name of Vanciel, nor were they executed for the purpose of the partnership business, for at that time there was no partnership business; neither can it be said the money was borrowed for the partnership for the apparent carrying on in "the usual way the business of the partnership" for the reason that at the time the original loan was made the partnership was not "carrying on" any kind of business; and certainly, therefore, the transaction must be considered as an "Unusual act" as defined in said subdivision (2).

Likewise the letters and reports of the bank officials and the assignment by Vanciel of his lease to the bank, as previously mentioned, refute the claim now being made that the notes were obligations of the partnership and all the members thereof.

In addition, the articles of copartnership were not executed until several days after the bank had approved the loan to Vanciel. The articles, however, did provide that the "said co-partnership shall commence as of December 18, 1939", but the Kumles and Brier testified the articles were not executed until January 10th because they did not want to commit themselves until they knew definitely that Vanciel could furnish the money.

Appellant's extensive citations from California Jurisprudence are inapplicable for the reason they are founded upon facts different than those involved in the case under review. Equally inapplicable is the citation of appellant, Stauffer v. Ti Hang Lung & Co., 29 Cal.App.2d 121, 84 P.2d 209, relating to the liability of a partnership by virtue of the fact that the proceeds of the notes were placed in the partnership account. It is true that in the instant case the funds of the loan were ultimately placed in the partnership account, but "the firm is not liable upon paper executed in the name of a partner merely because the consideration of the note was applied to partnership purposes." 47 Corpus Juris, Partnership, p. 872, § 345. In addition the record discloses, without contradiction, that the money was so deposited only after specific authority to that effect was obtained by the bank from the Vanciels. Nor is the issue raised by appellant relative to the liability of a partnership upon a book account which had been kept entirely in the name of one of the partners, and the citation in support thereof (Furlow Pressed Brick Co. v. Balboa Land & Water Co., 1921, 186 Cal. 754, 200 P. 625 of any value to the issues herein presented, for, as the court therein stated, the only question was the effect of the statute of limitations upon the account. The opinion in that case discloses that no issue was raised concerning the authority of the partner in whose name the account was carried to bind the partnership. The court found that not only did he have such express authority but that the law expressly authorized him to act for and bind the partnership in the operation of its business by an agreement in writing under the provisions of sections 2428 and 2429 of the Civil Code, the same sections as were at issue in the Spangler case, both of which cases arose prior to the enactment of said section 2403.

[1] Appellant also cites Daniel on Negotiable Instruments, 6th Ed., Vol. 1, section 336 at page 457. However, that text is further authority for the conclusion reached herein that "prima facie, it [the note] is to be presumed to be the paper of the individual partner whose name is signed to it and the burden of proof is upon the holder to show affirmatively that the signature was intended for the signature of the firm." This is likewise the rule in this state. Kayser v. Gorman, 3 Cal.2d 478, 44 P.2d 1041. In that case this same appellant made a similar claim, namely, that the endorsement of a note by one Gorman was the act of Gorman, Kayser & Co., a partnership, of which Gorman was a member. The note was endorsed by Gorman to make possible the conversion of a corporation into a copartnership, and at the time of the endorsement the partnership had not yet started to function. There, as here, the trial court found against appellant, and 3 Cal.2d at page 486, 44 P.2d 1044, the court said: "In support of the finding of the trial court that the guaranty of Gorman was his individual act, and not the act of the partnership, the respondent relies upon the written instrument signed by Gorman in his individual name. It contains his individual promise, 'I hereby guarantee the payment of the within obligation,' and is signed 'A. W. Gorman.' The presumption is that a written instrument deliberately executed expresses the intention of the parties. (Cases) This presumption should prevail unless the evidence offered to show a contrary contention is clear and convincing. * * * It is for the trial court to determine if this presumption has been overcome. 2 Cal.Jur. 933, 934. Evidently the trial court was not of the opinion that this presumption had been overcome by the evidence of the appellant, and as this question was for the determination of the trial court, its decision must be considered final." See also Meyer v. Hegler, 121 Cal. 682, 53 P. 800.

[2] Paraphrasing the quoted portion of the case last cited it is equally evident that the trial court herein was not of the opinion that the evidence introduced by appellant to overcome the presumption that the notes in question were the personal obligation of Vanciel, was clear and convincing, and the determination by that court upon such conflicting questions of fact likewise must be considered as final.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

70 Cal.App.2d 155

PEDERSON et al. v. GOLDSTEIN et al.

Civ. 14794.

District Court of Appeal, Second District, Division 3, California.

July 12, 1945.

Sales 🔑441(3)

Evidence supported finding awarding buyers of Christmas trees damages against seller for breach of warranty to deliver a truckload of trees of same quality as sample trees shown. Civ.Code, §§ 1732, 1735.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by W. Pederson and another against Benjamin Goldstein and others for breach of warranty. From an adverse judgment, named defendant appeals.

Affirmed.

Marcus C. Clark, of Los Angeles, for appellant.

Russell H. Pray and Samuel J. Nordorf, both of Long Beach, for respondents.

DESMOND, Presiding Justice.

Defendant Goldstein appeals from a judgment in the sum of $2,697.90 assessed against him in an action based upon a breach of warranty. He contends that the evidence is insufficient to sustain the judgment, but having examined the record we find that it is insufficient to sustain the appellant's contention.

In the month of November, 1943, appellant advertised Christmas trees at wholesale. Plaintiffs Pederson and Lawless, desiring to acquire some for sale in Long Beach, called upon him at his place of business, a furniture store in Los Angeles, and acquainted him with their intention. He directed them to go to a store across the street where he had Christmas trees on display and where plaintiffs could examine them. After completing their inspection they returned to the furniture store and according to Lawless: "We told him we would like to have some trees if he could furnish them just like he had on display over there and he said, 'Well, I can get you a truckload in the next day or two.' He gave us a price on a truckload of trees and we told him if he could furnish the same trees, we would take a whole truckload. * * * He said, 'When the trees come down, we will send them by truck to your place and you pay us when they arrive.'" On November 27th the trees, 3,130 in number and tied in bundles, were delivered on a truck to a storeroom in Long Beach designated by plaintiffs. Goldstein was personally present at the time and while the trees were being unloaded by his helpers with the assistance of Pederson, Lawless went with him to a Long Beach bank, cashed a check for $3200 and paid him that amount in cash as the agreed purchase price for the truckload of trees. Approximately a week later when plaintiffs undertook to put the trees on display and opened up the bundles the great majority were found to be branches or laterals. A landscape gardener testified that possibly 10 or 12 per cent of them were symmetrical in shape but the rest were "laterals, suitable for some kind of decorations for the church or a big building to put alongside the wall. They would have been very good for that, if they had been in better condition." Lawless testified that: "The trees I saw in the storeroom were full, symmetrical trees. The ones that were delivered were lopsided. Looked more like branches or shoots. The majority. Some, a few, were good trees." Plaintiff Pederson testified that on December 6th he complained to appellant as to the quality of the trees, describing them as branches of very poor quality and: "He said that he would see we didn't lose any money on them, that we would return 500 trees. Call him up every third or fourth day, that he would help us dispose of the trees until we got rid of them all." Accordingly, plaintiffs next day delivered to appellant 532 unsatisfactory trees and took his receipt therefor, but when, on December 13, they brought to him 551 trees or "laterals" he marked upon the receipt which he gave them "on consignment." Thereafter, on or about December 16th, plaintiffs loaded 1562 trees on a truck and took them to appellant's place of business where Lawless handed him a letter reading as follows:

"With further reference to the 3130 Christmas trees purchased from you November 27, 1943, I am by motor truck tendering for return to you 1562 of the trees of said purchase, in addition to the 1083 trees previously returned to you, by reason of the fact that I find these trees are unsalable and unmerchantable.

"I have had experts examine these trees and they tell me that they are nothing more or less than lateral shoots or branches.

"These trees have been properly kept by me and I am, therefore, returning these trees to you for full credit at the purchase price.

"Upon your failure to accept them in return, please be advised that I shall place them on the market immediately for sale for whatever price they will bring and will look to you for damages for the difference in price, from what I have paid for them to you and whatever may be salvaged from the immediate sale of them.

"Very truly yours,
"10:1e [signed] F. W. Pederson
"[signed] F. M. Lawless"

Pederson testified that after appellant read this letter, "He said, 'Go ahead and sue.' He says, 'I'll pay a third. I'll pay a third of the attorney's fees.' He said, 'That is so I can sue Mr. Leichtag. It will help me win my case.'" It appeared at the trial that Mr. Leichtag of San Francisco had shipped the trees handled by appellant from Upper Lake in northern California and that appellant had reported to him the complaints made not only by the plaintiffs in this case, but by other customers of his. As to this last load of trees

Pederson testified that "when we went back and asked him if we could put them back over across the street where these other trees were on the boulevard, he said, 'Yes, go ahead and put them over there.'" Later, upon notice from the Los Angeles Fire Department that the trees should be removed as a fire hazard, appellant took them to the dump.

The following inquiry was made of the appellant during the trial:

"Did you at any time tell them the truckload that they would receive would be the same as the trees in your store on Glendale Boulevard? A. All comes from the same place.

"The Court: Answer the question. Did you tell them that? (Answer read.) A. Yes."

The various quotations which we have made from the record and the provisions of the Uniform Sales Act, embodied in our law, particularly sections 1732 and 1735 of the Civil Code relating to warranties, furnished a sufficient basis for the court's decision in favor of the plaintiffs.

The trial court in fixing damages gave appellant credit in the sum of $502.10 for approximately 485 trees which plaintiffs sold or failed to return.

Judgment affirmed.

SHINN and PARKER WOOD, JJ., concur.

* * *

70 Cal.App.2d 300

In re MURRAY'S ESTATE.

SECURITY FIRST NAT. BANK OF LOS ANGELES v. SIMPSON et al.

Civ. 14874.

District Court of Appeal, Second District, Division 1, California.

July 26, 1945.

1. Wills 🔑439

The intention of testatrix was controlling in construing her will. Probate Code, §§ 101–126.

2. Wills 🔑435

The Probate Code provisions laying down rules for construction of wills are not hard and fast rules of law, but guideposts to be used in attempting to arrive at testator's intention. Probate Code, §§ 101–126.

3. Wills 🔑472

Courts are loath to cut down an absolute estate created in one clause of a will by reason of subsequent words found in the instrument.

4. Wills 🔑472

The Probate Code provision that, where several parts of a will are absolutely irreconcilable, latter must prevail, should not be so strained as to apply it to irreconcilable provisions not only in same will, but in same article thereof, where to do so would result in cutting down an absolute estate created in preceding clause of will. Probate Code, § 103.

5. Wills 🔑472

A later provision in will does not control where it is inconsistent with previous irreconcilable provision where it clearly appears that the subsequent statement, standing alone, does not represent testatrix' manifest intention, which, if ascertainable, must govern. Probate Code, § 103.

6. Wills 🔑472

Where will gives an estate in clear language, subsequent words merely raising a doubt or suggesting an inference contrary to such language will not affect estate thus conveyed, and any such doubt must be resolved in favor of estate first conveyed. Probate Code, §§ 101–126.

7. Wills 🔑686(1)

Under will giving property in trust with directions to pay monthly installments to designated life annuitants "during the life of each annuitant" and subsequently providing that trust should terminate at expiration of five years from testatrix' death and that trust estate and accumulations thereof should be distributed to 12 named persons, finding that testatrix intended that monthly installments were to be payable to annuitants for life, and that trust should not terminate until after death of last annuitant, was warranted, as against claim that testatrix intended to share her bounty not only with annuitants but also with residuary beneficiaries; the quoted words not being used as mere descriptive matter, but in usual sense to create a life annuity. Probate Code, §§ 101–126, 161(4).

See Words and Phrases, Permanent Edition, for all other definitions of "During the Life of Each Annuitant".

8. Wills ⚷587(1)

Under statutory definition of "residuary legacy" as embracing only that which remains after all bequests are discharged, only possible right that residuary legatees possess is to share in residue of estate, if there is a residue, and fact that because of longevity of life annuitants of testamentary trust residuary legatees may receive little or nothing has no bearing on proper construction of will. Probate Code, § 161(4).

9. Appeal and error ⚷1008(3)

Where construction given to an instrument, such as a will, by trial court is reasonable and appears to be consistent with intent of party making it, appellate court will not substitute another interpretation though it may seem equally tenable.

◆

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Proceeding in the matter of the estate of Bessie A. Murray, deceased, between Security First National Bank of Los Angeles and Charles S. Simpson and others, legatees, and James Murray and others, contestants. From an order settling an account in the estate of said deceased, instructing the executor, and for a final distribution, Charles S. Simpson and others appeal on question of construction of the will.

Affirmed.

Leo E. Sievert, Howard F. Shepherd, and Harry B. Ellison, all of Los Angeles, for appellants.

W. P. Smith, of Los Angeles, and Glenn H. Cutler, of Pasadena, for respondents.

DORAN, Justice.

This is an appeal from an order settling an account in the estate of Bessie A. Murray, deceased, instructing the executor, and for a final distribution. The error claimed by appellants relates to the interpretation of the decedent's will—no objection being made to the accounting and other matters referred to in the petition. The question involved, as framed in appellants' brief, is as follows: "Where a testatrix creates a trust and provides for monthly payments to be made to certain beneficiaries during their lives, and later in the Will provides without equivocation that the trust should terminate five years from the date of her death and the property be distributed to certain named beneficiaries, which of the inconsistent provisions of the Will should govern?"

Bessie A. Murray died September 15, 1942, leaving a will which, after making certain specific bequests not here in question, contained the following provisions:

"Fifth: I give, devise and bequeath the residue of my estate, real and personal, wherever situated, including all failed and lapsed gifts, hereinafter termed the 'trust estate', to Security-First National Bank of Los Angeles, a national banking association, in trust, to hold, manage and distribute as follows:

"A. From the net income from the trust estate, and if not sufficient, then from the principal thereof, there shall be paid in monthly installments the following annuities *during the life of each annuitant:*

"(1) Six Hundred Dollars ($600.00) per month to my husband, James Murray, of Altadena, California." (Italics added)

Following the above quoted language, the testatrix names eight other annuitants: An uncle, $150 a month; another uncle, $100 a month; a friend, $100 a month; $50 a month to each of four cousins, and $100 a month to a brother-in-law. The total monthly payments so provided for amount to $1250 a month, or $15,000 per year. The will further provides that: "If at the end of any month there shall not be sufficient assets to pay all of said annuitants in full, said monthly sums shall be paid in full in the order in which the annuitants are listed in this paragraph 'A'." Paragraph "B" of the will provided that upon the death of any of said annuitants, "the right of said person to receive any part of his or her annuity shall cease." In Paragraph "C" the following statement occurs: "This trust is a trust for maintenance, and I direct that the annuities provided in paragraph 'A' of this Article Fifth shall be paid by my Executor beginning from the date of my death and continuing until distribution of the trust estate to the Trustee."

The question at issue, whether the annuities are to be paid during the life of each annuitant as provided in paragraph A of Article Fifth of testatrix' will, or shall cease at the end of five years from the death of the testatrix, is raised by the following paragraph, to-wit:

"D. *This trust shall terminate at the expiration of five (5) years from the date of my death,* and the trust estate, and all accumulations thereon, shall be distributed as follows:" (Italics added) Then follow the names of 12 persons, mostly cousins of the testatrix, including appellants, and the share of the trust estate to be distributed to each. One of these cousins, Amelia Hetzel, is named both as an annuitant in Paragraph A(8), Article Fifth of the will, and as a residuary legatee.

It appears from the evidence that the husband of testatrix was, at the time of the trial, of the age of 64 years, and that the other annuitants were all of advanced age. Three of the named annuitants were deceased at the time of the final account and distribution. The amount of the estate at the time of this account and before distribution to the trustee, is given as $112,063.35, but as pointed out by respondents, the appraisal was based on stock market values of September 15, 1942, since which time market values have materially increased.

The trial court was of the opinion, and made its order to that effect, that it was the intention of testatrix that the monthly installments specified in the will should be paid "during the life of each annuitant" as provided in Paragraph A of the Fifth Article in the will; and that the trust should "terminate on the decease of the last survivor of the annuitants", except that if the decease of the last surviving annuitant should occur before five years from the date of death of deceased that the trust should not terminate but should continue until September 15, 1947, and be accumulated until such date and then distributed to the appellants herein or other persons of the same classification in the will.

It is contended by the appellants that, "notwithstanding the clear provision 'this trust shall terminate at the expiration of five years from the date of my death,' the lower court wrote into the will a provision," to the effect that the trust should not terminate at the expiration of five years unless all the annuitants should have died within five years. In this connection appellants maintain that "It would seem reasonable that the testatrix intended to share her bounty, not only with the so called annuitants, but also with the residuary beneficiaries (some of whom are of the same relationship as the annuitants) to whom she ordered the remainder of her estate distributed at the end of five years," and state that "it is very apparent that if the beneficiaries (annuitants) lived it would not be ten years before the entire trust estate was exhausted, with the result that the residuary beneficiaries would get nothing."

On the other hand, respondents argue that the clear and distinct bequest of annuities "during the life of each annuitant" cannot be affected by the later statement in the will that the trust "shall terminate at the expiration of five (5) years" from the date of Mrs. Murray's death. It thus appears that each party to this appeal is relying upon a different and apparently inconsistent clause in the will. No proof was offered by either party in reference to the affections or intentions of testatrix, and the only evidence in the record is that of Dr. James Murray, the husband of the testatrix, in respect to the ages of the various beneficiaries.

[1] There is no apparent controversy concerning the general rules of construction and interpretation of wills, as set out in Sections 101–126 of the Probate Code and elsewhere. Nor can there be any doubt that in this case as in all cases, the intention of the testatrix is the controlling and paramount factor. It may be incidentally noted that, although apparently drawn by an experienced scrivener, the will, at least with reference to the controversial clauses here involved, is loosely drawn, and by reason of the inconsistencies already noticed, cannot in all its parts represent the intent of the testatrix. In other words, an ambiguity exists as to the date at which the trust shall terminate.

Reliance is placed by appellants upon the latter and underlined portion of that rule of construction found in Section 103 of the Probate Code, which reads as follows: "All parts of a will are to be construed, in relation to each other, and so as, if possible, to form one consistent whole; *but where several parts are absolutely irreconcilable, the latter must prevail.*" The provision in the will here under consideration, stating that the trust "shall terminate at the expiration of five (5) years" from testatrix' death, occurs subsequent to the bequest of annuities "during the life of each annuitant," hence appellants contend that "the latter (provision) must prevail."

[2-4] The above statement, it may be noted, is merely a portion of the rule set forth in Section 103, and the rule itself merely one of many tenets of construction devised to give possible assistance to the courts. They are not hard and fast rules of law but guide posts to be used in attempting to arrive at a testator's intention. They may not be blindly followed. The following quotation from Schouler on Wills, 5th Ed., Sec. 478, is, as respondents urge, especially apt: "This doctrine appears to be deduced from the principle, fair enough in the comparison of expressions of different date, that the testator's latest expression should be preferred to all previous ones; a principle, however, which must be somewhat strained when applied to the various consecutive parts of what has been obviously shaped to stand as the one full and contemporaneous expression." The two provisions here under discussion not only occur in the same instrument but in the same part of the will, namely, Article Fifth which is that portion of the testament dealing with the trust estate. And as will be noted from the California cases hereinafter cited, notably in Estate of Shirley, 107 Cal.App. 267, 290 P. 302, and Estate of Marti, 132 Cal. 666, 61 P. 964, 64 P. 1071, the courts are loath to cut down an absolute estate created in one clause of a will by reason of subsequent words found in the instrument.

[5] Obviously, no one would seriously contend that the latter statement in testatrix' will must govern where it appears clear that such statement, standing alone, does not represent her manifest intention, for such intention, if ascertainable, must always govern. Moreover, the rule of construction argued by appellants is no more important that the other rules prescribed by the Probate Code; for example, Section 104 sets forth a principle particularly applicable to the present case, namely that "A clear and distinct devise or bequest cannot be affected * * * by any other words not equally clear and distinct, or by inference or argument from other parts of the will." In the present will, the words "during the life of each annuitant" are, as respondents say, "definite, explicit and plain." Nowhere else in the will, save for the clause specifying that the trust should terminate after five years, is there any statement or intimation that the testatrix did not mean exactly what the will had said in the earlier clause, namely that the monthly payments specified were to be made "during the life of each annuitant."

Furthermore, in Subdivision C of Paragraph Fifth the will states that "This trust is a trust for maintenance." It does not say "maintenance for a period of five years," and without such a qualification must, in connection with the previous phraseology "during the life of each annuitant," mean exactly that—namely, maintenance of the annuitants for life. The correctness of this view is strengthened when it is considered that the chief annuitant, entitled to $600 per month, is the surviving spouse, a man 64 years of age, to whom testatrix had been married "Approximately 19 or 20 years," according to the testimony. While it is quite true, as stated in appellants' brief, that "There was no evidence of the feeling of affection which the deceased had for the respective beneficiaries," offered at the trial, it is nevertheless a legitimate inference from the terms of the will itself, that as mentioned by the respondents, "The first (annuitant) was her husband, James Murray, the one closest to her in relationship and evidently the first object of her bounty, her love and affection."

There are yet other indications in the will which, although in no way controlling, nevertheless point in the same direction—for example, the provision contained in G of Paragraph Fifth that *"so long as my husband, James Murray, shall live* I request said Trustee to consult with and carefully consider the advice of my said husband as to any sales or purchases of trust property." The same paragraph vests the trustee with the additional power "At its option and as long as it may deem advisable, to retain any property which it may receive hereunder" for the purpose of carrying out the "express purposes of this trust and in aid of its execution and the proper administration, management and disposition of the Trust estate." As said in respondents' brief, "If there is to be no trust and no trust property after five years from the date of her death, why should she request the bank (trustee) to consult him for a longer period than five years?"

[6] In Estate of Shirley, 107 Cal.App. 267, 270, 290 P. 302, a will provided that property was to be distributed to testator's "son and daughter of their children, share and share alike." A codicil executed after the daughter's death stated that the daughter's husband "and his heirs and assigns

are disinherited and their portion is hereby devised to" a nephew. The appellate court resolved the doubt in favor of the estate conveyed by the will provision, holding that the daughter's child was entitled to take under the will. Quoting from Estate of Marti, 132 Cal. 666, 61 P. 964, 64 P. 1071, the court said: "The authorities all agree that, when an absolute estate has been conveyed in one clause of a will, it will not be cut down or limited by subsequent words, except such as indicate as clear an intention therefor as was shown by the words creating the estate. Words which merely raise a doubt or suggest an inference will not affect the estate thus conveyed, and any doubt which may be suggested by reason of such subsequent words must be resolved in favor of the estate first conveyed. This rule of construction controls the rule that an interest given in one clause of a will may be qualified or limited by a subsequent clause." To the same effect and again quoting from the Estate of Marti, is the case of Estate of Mallon, 34 Cal.App.2d 147, 155, 93 P.2d 245. In the Estate of Marti, 132 Cal. 666, 61 P. 964, 64 P. 1071, the will devised the residue of the estate, consisting of community property, to testatrix' wife with full power of disposition and it was held that such absolute devise was not qualified by a subsequent, independent statement, "Upon the death of my wife, I desire that one-half of the property bequeathed to her shall be devised by her to my relatives."

In this connection may be noted the following statement contained in 33 Am. Jur. page 481, Section 318: "The question has arisen as to the duration of an interest which is given to one for life, where there is a gift over to another person upon the happening of an event which occurs during the life of the first taker. The few decisions which have had occasion to deal with this problem are sharply in conflict. (See Annotation, 96 A.L.R. 1347.) On the whole the tendency has been to favor the taker of the life estate in cases where the testator's language can be construed to protect such taker and does not compel a different construction." The annotation in 96 A.L.R. 1347 just referred to, follows the case of Odescalchi v. Martin, 96 Colo. 156, 40 P.2d 241, 96 A.L.R. 1344, where it was held that under a will creating a trust estate and directing payment of the income to one during her lifetime, upon her death to another during his lifetime, and upon the latter's death to his daughter until she attained the age of 25 years at which time she was to be paid the principal of the trust fund, the daughter was not entitled to the corpus of the estate on attaining the age of 25 years during the lifetime of the first life tenant. While it is true, as commented on in appellants' closing brief, that the facts in the cited cases are not precisely paralleled in the case at bar, the principles enunciated in the cases, texts and annotations hereinbefore mentioned, seem directly applicable to the present controversy and authority in support of the trial court's finding.

[7] It is admitted in appellants' brief that the words "during the life of each annuitant," as used in the will, would be "sufficient, in the absence of anything else in the Will indicating a different intention, to create a life estate," but it is argued, "it is also equally apparent that the words 'during the life,' in view of other language in the will, might well have been intended and, the appellants contend, were intended to describe the state or condition of the annuitant, that is, the state of being alive as conditional upon the income being paid to such annuitant for the whole five years for which the trust was to be in effect." It is therefore contended that, "since there are the two senses in which the words may have been used by the testatrix there comes into play the cardinal rule of interpretation which governs over everything, and that is, the intention of the testatrix as disclosed by the will as a whole." Unfortunately for appellants' contention, the "other language in the will," hereinbefore referred to, would seem to indicate that testatrix used the words "during the life of each annuitant", not as mere descriptive matter, as argued by appellants, but in the usual sense and for the purpose of creating a life annuity.

[8] Appellants further maintain: "It would seem reasonable that the testatrix intended to share her bounty, not only with the so-called annuitants, but also with the residuary beneficiaries (some of whom are of the same relationship as the annuitants) to whom she ordered the remainder of her estate distributed at the end of five years." In reference to this matter and in refutation of the respondents' claim that the deceased was evidently solicitous about the future support of her husband, aged 64 years, appellants call attention to the fact that in addition to the annuity pro-

vided in the will, testatrix also bequeathed to the husband a considerable amount of other property including certain mining stocks, and that the husband at testatrix' death, received other funds by way of life insurance and joint tenancy property. However, the facts mentioned in no way force a conclusion that testatrix intended the annuities to the husband and the other recipients to cease at the end of five years in contradiction to an express statement that they were to continue "during the life of each annuitant." Moreover, this theory that testatrix "intended to share her bounty" with the residuary legatees as well as with the annuitants, completely loses sight of the nature of a residuary legatee. In the language of Probate Code, Section 161(4): "A residuary legacy embraces only that which remains after all the bequests of the will are discharged." In other words, the argument that appellants have some right to "share" the testatrix' bounty is entirely inconsistent with the code definition of a residuary legacy. The only possible right which appellants possess is to share in the residue of the estate—if there is a residue. The fact that, because of the longevity of the life annuitants, such residuary legatees may receive little or nothing, can have no bearing on the present decision.

[9] Finally, as was said in Estate of Northcutt, 16 Cal.2d 683, 690, 107 P.2d 607, 611, "the construction placed by the probate court on the terms of the will is not unreasonable. And the rule is well settled that where the construction given to an instrument by a trial court is reasonable and appears to be consistent with the intent of the party making it, courts of appellate jurisdiction will not substitute another interpretation, even though it may seem equally tenable with that accorded by the trial court."

Appellants' answer to this rule of law is that the decision of the lower court is unreasonable in that it "disregarded the unequivocal language of the deceased providing for the trust to terminate five years from and after her death." Yet in the same breath appellants seek to disregard and annul the earlier provision of the will, likewise in unequivocal language, stating that the specified monthly payments shall be made "during the life of each annuitant." As already noted herein, the tendency of the courts seems to favor the taker of a life estate in cases of doubt, but regardless of such tendency an intention to create designated life annuities seems manifest in the instant case. In view of the various other provisions of the will hereinbefore referred to and all of the surrounding circumstances it cannot be said that the decision of the trial court was unreasonable or that it did not reflect the intention of the testatrix.

It therefore follows that the order appealed from should be, and the same is hereby, affirmed.

YORK, P. J., and WHITE, J., concur.

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70 Cal.App.2d 199

COKER v. SUPERIOR COURT IN AND FOR SANTA BARBARA COUNTY.

Civ. 15004.

District Court of Appeal, Second District, Division 2, California.

July 13, 1945.

Hearing Denied Aug. 30, 1945.

1. Statutes ⟹147

Generally, an intent to change the law is inferred from an amendment.

2. Courts ⟹74

The subsequently enacted provisions of Code of Civil Procedure permitting sessions of the superior court at cities distant from county seat, signifying no purpose to narrow the avenues of court's activities, while sitting in a city other than county seat, in dealing with any matter of which it may have jurisdiction has modified effect of previously enacted Penal Code section requiring that writs of habeas corpus be heard and determined at county seat, and superior court, even though not sitting at county seat, may hear and determine a habeas corpus proceeding. Pen.Code, § 1504; Code Civ.Proc. §§ 73, 142.

3. Statutes ⟹225, 225½

Where two statutes are not antagonistic they should be so reconciled as to give effect to both, but, if one must yield, statute last enacted should control, particularly if it is a special act applicable to a particular subject, on the theory that it is the latest utterance of the Legislature.

4. Courts ⟹74

Superior court of Santa Barbara county had jurisdiction to determine a habeas corpus proceeding in its courtroom in the city of Santa Maria notwithstanding that city of Santa Barbara is county seat. Pen.Code, § 1504; Code Civ.Proc. §§ 73, 142.

◆

Original proceedings on the petition of Thomas Coker for a writ of prohibition directed against the Superior Court of the state of California, in and for the county of Santa Barbara, to prohibit the Honorable Ernest D. Wagner, judge of such court, from taking further steps in connection with a writ of habeas corpus directing petitioner to appear before such judge with the body of Temple Charles Farquhar, Jr., a minor child, wherein an alternative writ was issued.

Alternative writ of prohibition discharged.

Fred A. Shaeffer, of Santa Maria, for petitioner.

Arden T. Jensen, of Lompoc, for respondent.

W. J. WOOD, Justice.

A writ of habeas corpus was issued by order of the presiding judge of the superior court at Santa Barbara, Honorable Ernest D. Wagner, on May 22, 1934, whereby the petitioner herein, Thomas Coker, was ordered to appear before said judge on May 24, 1945, with the body of Temple Charles Farquhar, Jr., a minor child, at court room No. 3 of the superior court of Santa Barbara County, located in the City of Santa Maria. Petitioner seeks a writ of prohibition from this court to prohibit judge Wagner from taking any further steps in connection with the writ of habeas corpus, claiming that the court is without jurisdiction to pass upon the matter involved at any place other than the city of Santa Barbara, the county seat of Santa Barbara. He relies upon section 1504 of the Penal Code, which provides that writs of habeas corpus must be heard and determined at the county seat.

Section 1504 of the Penal Code has been in force since 1872. Since that time many changes in population have taken place and the legislature in amending section 73 of the Code of Civil Procedure has authorized the judges to order sessions of the superior court in cities located at a distance from the county seat. Pursuant to section 73 of the Code of Civil Procedure the judges of the superior court of Santa Barbara county adopted Rule XI of the rules of said court, providing that "this court shall order a session at the City of Santa Maria, California, not to exceed two weeks in each month hereafter". Rule I of the said court provides: "The westerly courtroom in the courthouse in the City of Santa Barbara, California, shall hereafter be known as Superior Court Room Number One. The easterly courtroom in said courthouse shall hereafter be known as Superior Court Room Number Two, and the Courtroom in the City of Santa Maria, State of California, shall hereafter be known as Superior Court Room Number Three." Rule XII provides for the transfer of actions and proceedings to be heard in court room No. 3 at the city of Santa Maria, and gives discretion to the judge in the matter of making transfers to Santa Maria.

[1-4] Whether respondent may hear and determine a writ of habeas corpus while sitting at Santa Maria is to be resolved according to familiar rules of statutory construction. If sections 73 and 142, Code of Civil Procedure, had been enacted as an amendment to section 1504, Penal Code, it would have been a fair interpretation to hold that such amendment was intended to release the court from the limitation theretofore existing requiring such writs to be heard at the county seat. Lundquist v. Lundstrom, 94 Cal.App. 109, 270 P. 696. Usually, by an amendment, an intent to change the law is inferred. People v. Weitzel, 201 Cal. 116, 255 P. 792, 52 A.L.R. 811. However, because the provisions in the code sections 73 and 142, regulatory of the places at which sessions of the superior court may be held, were incorporated long after the enactment of section 1504, and made a part of the Code of Civil Procedure, does not signify that the court might hold sessions and transact all business at cities other than the county seat except the hearing of writs of habeas corpus. To deny it the power to determine such writs at another city would lead to an absurd construction. Since the two statutes (1504, Penal Code and 73, Code Civil Procedure) are not antagonistic they should be so reconciled as to give effect to both, but if one must yield the statute last enacted

should control, "particularly if it be a special act applicable to a particular subject * * * on the theory that it is the latest utterance of the Legislature." Pierce v. Riley, 21 Cal.App.2d 513, 514, 519, 70 P.2d 206, 209. Nothing appears in the language of the Code of Civil Procedure signifying a purpose to narrow the avenues of the court's activities in dealing with any matter at Santa Maria of which the court has jurisdiction.

The alternative writ of prohibition is discharged.

MOORE, P. J., concurs.

McCOMB, Justice.

I concur in the order solely on the ground that a writ of prohibition will not issue to arrest proceedings of a tribunal exercising judicial functions within its jurisdiction.

In the instant case the Superior Court of Santa Barbara County had jurisdiction of writs of habeas corpus. Any error which it may have made was not in excess of its jurisdiction but while exercising its jurisdiction. (See Fels v. Justice's Court, 28 Cal.App.2d 739, at page 740 et seq., 83 P.2d 721.)

70 Cal.App.2d 224

BREAKSTONE v. GIANNINI et al.

Civ. 14790.

District Court of Appeal, Second District, Division 3, California.

July 19, 1945.

1. Army and navy 🔑24

Where plaintiff in stockholders' derivative action was not in military service and no member of the military service had in fact intervened or was a party to the action, fact that there might be stockholders in military service who might want to intervene in action did not preclude dismissal for failure to bring action to trial within five years. Code Civ.Proc. § 583; Soldiers' and Sailors' Civil Relief Act of 1940, §§ 1 et seq., 201, 203, 205, 50 U.S.C.A.Appendix, §§ 521, 523, 525.

2. Dismissal and nonsuit 🔑60(2)

The Code section providing for dismissal of an action not brought to trial within five years unless parties have stipulated in writing that time may be extended does not contemplate that time consumed by court in considering and passing upon demurrers and consumed by extensions granted to defendant be excluded from a computation of the five year period. Code Civ.Proc. § 583.

3. Dismissal and nonsuit 🔑60(2)

Under the Code section providing for dismissal of an action unless brought to trial within five years, burden is on plaintiff to draft a complaint good against demurrer and to bring case to trial within five years after action is filed. Code Civ.Proc. § 583.

4. Trial 🔑5

Where, notwithstanding delays in bringing case to issue, there was a full year between the filing of defendant's answer and the running of five-year period in which case was required to be brought to trial, plaintiff had ample time to bring case to trial after it was at issue and could not complain of time consumed by courts in ruling on demurrers to the various pleadings. Code Civ.Proc. § 583.

5. Dismissal and nonsuit 🔑60(2)

A determination of issues of law raised by defendant's demurrer to plaintiff's fourth amended complaint, the argument of which demurrer consumed four days, did not constitute a "trial" within meaning of Code section providing for dismissal of action unless brought to trial within five years from time when filed. Code Civ.Proc. § 583.

See Words and Phrases, Permanent Edition, for all other definitions of "Trial".

6. Dismissal and nonsuit 🔑71

Affidavit of plaintiff's counsel filed in opposition to defendant's motion to dismiss action for failure to bring it to trial within five years, relating to various alleged representations by representatives of defendant in collateral cases but failing to show any representation by defendant in instant case of intent to waive or extend five-year period, was insufficient to establish that defendant was estopped to seek dismissal. Code Civ.Proc. § 583.

Appeal from a Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Rose Breakstone, suing on behalf of herself and all other stockholders of Transamerica Corporation, against Amadeo P. Giannini and others and Transamerica Corporation. From a judgment of dismissal upon the motion of defendant Giannini, plaintiff appeals.

Affirmed.

Joseph D. Taylor, of Los Angeles, for appellant.

Cosgrove & O'Neil, T. B. Cosgrove and John N. Cramer, all of Los Angeles, for respondent.

FOX, Justice pro tem.

This is an appeal from a judgment dismissing the action upon motion of the defendant A. P. Giannini under section 583 of the Code of Civil Procedure because the case had not been brought to trial within five years after the filing of the complaint.

Appellant is the owner of ten shares of the capital stock of the defendant, Transamerica Corporation. As such stockholder, she brought this action on behalf of herself and all other stockholders of said corporation. She seeks to recover from the respondent, Giannini, for the benefit of Transamerica, the sum of $778,470.42. (Nineteen other directors of Transamerica Corporation were eliminated as defendants during the early stages of the case.) This amount is alleged to have been paid to Giannini during the years 1932-1938, inclusive. During this period (and for some time prior thereto) Giannini had an arrangement, approved by the board of directors of Transamerica (and its predecessor, Bancitaly Corporation), by which he was paid for his services as president five per cent of the net profits of said corporation with a guaranteed minimum of $100,000 per year, in lieu of salary. The amount herein sought to be recovered, appellant alleges, represents payments made to Giannini by Transamerica in excess of five per cent of the profits earned by said corporation during the aforesaid period.

Plaintiff filed her original complaint on December 29, 1938. Thereafter, by reason of the successful interposition of demurrers by respondent, it was necessary for plaintiff to file five amended complaints. The answer of respondent to the fifth amended complaint was filed on December 29, 1942. The answer of the defendant Transamerica Corporation, the only other remaining defendant, was filed the day before that of respondent.

On March 6, 1944, respondent filed his motion to dismiss upon the ground that the case had not been brought to trial within five years after the commencement of the action. This motion was granted on March 28, 1944. The affidavit in support of said motion stated that plaintiff had not brought said action to trial within five years after December 29, 1938, and that the parties had not stipulated in writing that the time for bringing said action to trial might be extended beyond the five-year period. These statements were not denied.

Counsel for appellant made an affidavit in opposition to the motion to dismiss in which it was averred that many stockholders of Transamerica (not parties) were in the armed forces. The affidavit also stated that nine months and twenty-six days out of the time subsequent to filing of the action was accounted for by extensions of time in which to plead requested by respondent, Giannini, and granted to him; and that ten months and thirteen days were consumed by the court in considering and passing upon the various demurrers. This affidavit also stated that, at a hearing in the Federal Court in Los Angeles in another action which was being prosecuted by a different plaintiff against respondent and other defendant directors and Transamerica for the same purpose as the within action, Louis Ferrari, an attorney of San Francisco, who appeared in that action as attorney for "certain defendants," whose names, however, are not given, "Advised affiant that Transamerica Corporation also represented by him, would have no objection to making available any records which affiant desired to inspect in the preparation of the trial of the issues here involved." In January, 1943, according to the affidavit, arrangements were made by correspondence, by which the desired records or photostats thereof were sent by Mr. Ferrari to Edmund Nelson in Los Angeles, who was the attorney of record for Transamerica, so that he "could make them available" to appellant's counsel. Thereafter, Mr. Nelson informed counsel for appellant by telephone that he had received the requested records from Mr. Ferrari. The affidavit then says that "thereafter Edmund Nelson suffered a serious injury as the result of an explosion and was unable to attend to his business, and asked affiant (counsel for appellant) to wait for the records until his recovery and postponed showing them to affiant", although affiant repeatedly requested of Mr. Nelson an opportunity to inspect said records and Mr. Nelson promised affiant an opportunity for such inspection. It is then alleged in the affidavit, on information and belief, that Mr. Ferrari is an attorney for respondent, Giannini, as well as one of the attorneys for Transamerica, and that the failure to furnish counsel for appellant with an opportunity to inspect said records was in order that the five-year period might expire so that a motion to dismiss the action could be made. Mr. Ferrari does not appear in this action as an attorney of record for either respondent Giannini or defendant Transamerica Corporation. Mr. Nelson appears in this action as attorney of record for Transamerica Corporation, only. No other affidavit was filed. No subpoena duces tecum or written demand to produce said records was issued or served. No depositions were taken. Appellant did not file her request to have the case set for trial until December 2, 1943. This was 27 days before the expiration of the five-year period. The case was regularly set for trial for June 7, 1944, which was more than five months beyond the five-year period.

[1] Appellant's first contention is that the dismissal of this action was in violation of the Soldiers' and Sailors' Relief Act of 1940, 50 U.S.C.A.Appendix, § 501 et seq. She particularly relies on sections 201, 203, and 205 of said Act, 50 U.S.C.A.Appendix, §§ 521, 523, 525. Her theory is that there may be stockholders of Transamerica in the military service who might want to intervene in this action and that said Act automatically suspended section 583 of the California Code of Civil Procedure. There is no claim that any member of the military service had in fact intervened or was a party to the action. Section 201 of said Act provides that any action "in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service." Since none of the stockholders referred to were "involved, either as plaintiff or defendant," it is obvious that section 201 has no application to the case.

Section 203 of the Soldiers' and Sailors' Act provides for a stay or vacation of execution of judgments, attachments and garnishments "in any action or proceeding commenced in any court *against* a person in military service * * *." (Italics added.) This section is plainly inapplicable for no person in the military service was a defendant in this action.

Section 205 of said Act excluding the period of military service from the time limited "for the *bringing of any action* or proceeding * * *" has reference only to actions not then commenced. (Emphasis added.) This action was filed in 1938—nearly two years prior to the passage by Congress of the Soldiers' and Sailors' Relief Act in 1940. This section of the Act, like the others relied on by appellant, has no application to this case.

[2] Appellant's second contention is that section 583, Code of Civil Procedure, was not applicable to this case when the motion to dismiss was granted. In support of this contention she emphasizes that ten months and thirteen days were consumed by the court in considering and passing upon the demurrers to the complaint and various amended complaints, and that extensions of time were granted respondent for an additional nine months and twenty-five days and that the case was not at issue until December 29, 1942. It seems to be appellant's view that some or all of this time should be excluded in determining the five-year period under section 583, Code of Civil Procedure. The pertinent portion of that section reads as follows: "Any action * * * shall be dismissed * * * on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have stipulated in writing that the time may be extended." It will be noted that the quoted language does not by its terms exclude from the five-year period time consumed by the court in settling the pleadings or time granted the adverse party by stipulation within which to plead. Consideration of the legislative his-

tory of section 583, Code of Civil Procedure, demonstrates that it was not intended that such periods of time should be excluded from the five-year period. Prior to the amendment of said section in 1933 the five year period ran from the time "the *defendant* has *filed* his *answer*." The only change in the section effected by the 1933 amendment was to make the five-year period begin to run when "the *plaintiff* has *filed* his *action*." The Code extends to defendants the right to demur to the complaint and to the amended complaints. It is quite usual for defendants to demur and for the court to consume time in deciding the legal questions thus presented. It is also quite customary for counsel to stipulate that additional time may be allowed one side or the other within which to prepare, serve and file their respective pleadings. These practices must have been in the mind of the Legislature when it enacted the 1933 amendment to section 583, Code of Civil Procedure. The Legislature by that amendment has said, in effect, that time consumed in connection with demurrers and other ordinary steps before issue is joined is to be charged against the five-year period—that such time is *not* to be excluded from said period. For this court to hold that the time consumed by the trial court or the defendants in connection with demurrers or that the time extended by stipulation to an adversary within which to plead should be excluded from the five-year period "would not be a construction of the statute, but a revision thereof, in direct conflict with its present meaning." Rosefield Packing Co. v. Superior Ct., 1935, 4 Cal.2d 120, 125, 47 P.2d 716, 718.

[3] In considering the long period of time that was required to get this case at issue the fact should not be lost sight of that appellant filed six successive complaints before one was framed which the court held stated a cause of action. Under the said Code section, as amended, the Legislature placed the burden on the plaintiff of drafting a complaint good against demurrer and of bringing the case to trial within five years after the action is filed.

[4] Finally, on this point, it should be noted that there was a full year between the filing of respondent's answer and the running of the five-year period. This gave appellant ample time within said period to bring this case to trial after it was at issue. In Rosefield Packing Co. v. Superior Ct., supra, it was held that since the 1933 amendment was applicable to pending cases no constitutional right of the plaintiff was violated in applying the section as amended to said action because the plaintiff had "practically an entire year to bring his case to trial, after the enactment of the amendment." Said the court, "There can be no doubt but that this was a reasonable time * * *. Much shorter periods have been upheld." 4 Cal.2d at page 123, 47 P.2d 717. See, also, Murphy v. Murphy, 1936, 5 Cal. 2d 640, 55 P.2d 1169.

Appellant relies on Christin v. Superior Ct., 1937, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153. In this case the petitioners (defendants below) sought a writ of prohibition to prevent the trial court from proceeding with the action of Story v. Christin. Defendants made a motion for a change of venue from Los Angeles to San Francisco. This motion was denied. Thereafter, they made a second such motion based upon the same grounds as the first. This motion was granted. Plaintiff appealed from this later order, but did not obtain a *supersedeas*. The papers in the case were transmitted to San Francisco and more than three years elapsed before the order was reversed by the District Court of Appeal, the remittitur filed and the papers returned to Los Angeles. The court points out, 9 Cal.2d at page 530, 71 P.2d at page 207, 112 A.L.R. 1153, that "despite the mandatory language of the statute [Code Civ.Proc. § 583], *implied exceptions* have been recognized where it was *not possible* to bring the cause to trial." It would have been practically impossible to try the case in Los Angeles since the papers have been sent to San Francisco. To have tried it in San Francisco would have been futile since, as it was held, the order changing the venue to the superior court there was void. Hence the time the appeal was pending was excluded from the five-year period although the trial court technically had jurisdiction during this time since no supersedeas had been granted. The decision was based upon the proposition that "for all practical purposes, going to trial would be impossible" because it would be "both impracticable and futile." Since one entire year of the five-year period remained after the present case was at issue, during which time it would have been neither impracticable nor futile for appellant to bring it to trial, it is clear that the decision in the Christin case is not here applicable.

[5] Appellant's third point is that the determination of the issues of law raised by respondent's demurrer to appellant's fourth amended complaint constituted a trial of the action within the meaning of section 583, Code of Civil Procedure. It seems that four days were spent in arguing the legal questions thus raised, with the result that respondent's demurrer was sustained, but with leave to the appellant to amend, which she did. Appellant admits that the decision in Superior Oil Co. v. Superior Court, 1936, 6 Cal.2d 113, 56 P.2d 950, is contrary to her contention. She urges, however, that this decision should be reconsidered because it was based on Perrin v. Miller, 1917, 35 Cal. App. 129, 169 P. 426, and that the reasons there advanced are insufficient to sustain the decision. Our examination of these decisions discloses ample reasons for their support. Furthermore, the Supreme Court in City of Los Angeles v. Superior Ct., 1940, 15 Cal.2d 16, 98 P.2d 207, had occasion to advert to the Superior Oil Company decision. In so doing it did not recede in any degree from said decision. The court simply pointed out its inapplicability to the case then under consideration since there had been a *partial* trial of the later action on the merits. See 15 Cal.2d at page 20, 98 P.2d 207. For a more recent application of the principle of Perrin v. Miller, supra, and Superior Oil Co. v. Superior Ct., supra, see Meier v. Superior Ct., 1942, 55 Cal.App. 2d 675, 131 P.2d 554.

[6] Appellant's final contention is that respondent was estopped to seek a dismissal. She bases this upon the statements and allegations of her counsel's affidavit which was filed in opposition to the motion to dismiss. It will be noted, however, that there is no charge in said affidavit that any attorney of record for respondent made any promises to counsel for appellant. Also, there is no averment in said affidavit that the attorneys of record for respondent, or Mr. Nelson, who was attorney of record for Transamerica, or Mr. Ferrari, who does not appear to be attorney of record for any of the parties in this action, represented that respondent or his attorneys would extend the five-year period or would waive the right to make a motion to dismiss the action under section 583, Code of Civil Procedure. Accepting as true the averments of fact in the affidavit of counsel for appellant, we must nevertheless say with the court in City of Los Angeles v. Superior Ct., 1921, 185 Cal. 405, at page 414, 197 P. 79, at page 83, that "we fail to find any intimation by word or conduct that suggests a concession on the part of defendant [respondent] or an understanding on the part of plaintiff [appellant] that defendant [respondent] might not avail itself [himself] of the provisions of section 583."

In Christin v. Superior Ct., supra, it was suggested that the conduct of the petitioners in delaying the action by the proceedings instituted for change of venue, and also by their acts inducing the plaintiff to allow the case to go off calendar pending negotiations for settlement, justified the application of the doctine of estoppel. "But," said the court, 9 Cal.2d at pages 529, 530, 71 P.2d, 205, 207, 112 A.L.R. 1153, "estoppel resulting from such conduct does not appear to be a proper ground for creating an exception to the terms of the statute." To the same effect, see Elmhurst Packers v. Superior Ct., 1941, 46 Cal.App.2d 648, 116 P.2d 487, and Bank of America v. Moore & Harrah, 1942, 54 Cal.App.2d 37, 128 P.2d 623. In the latter case it is said that, 54 Cal.App.2d at page 43, 128 P.2d at page 626, "The statute [sec. 583, C.C.P.] has the very salutary purpose of expediting trials. Its language is clear and definite and the integrity of its meaning has generally been upheld by the courts in a plenitude of decisions. In the several legislative amendments to which it has been subjected the legislature has not seen fit to temper the rigor of the language or its forthright construction and support by the courts; the tendency, rather, has been to extend and make more certain its operation. With respect to the invoked doctrine of estoppel we observe that the Supreme Court in Miller & Lux, Inc., v. Superior Court, 1923, supra, 192 Cal. 333, at page 339, 219 P. 1006, at page 1008, said 'While there is language in several of the cases construing section 583 which seems to recognize the possibility of a waiver by estoppel, it is to be noted that without exception these cases hold that a written stipulation is required. * * * The statute provides that the time for trial may be extended by *written stipulation*. It does not provide that it may be extended by a written stipulation "or its equivalent."'" See, also, Booth v. Co. of Los Angeles, 1945, 69 Cal.App.2d 173, 158 P.2d 401, and Smith v. Bear Valley Milling & Lumber Co., 1945, 26 Cal.2d 590, 160 P.2d 1.

In view of the authorities we fail to find in the facts sufficient foundation for the application of the doctrine of estoppel so as to deprive respondent of the right to have this action dismissed under the provisions of section 583, Code of Civil Procedure.

The judgment is affirmed.

We concur:

DESMOND, P. J., and SHINN, J., concur.

70 Cal.App.2d 126

McMAHON v. McMAHON.

Civ. 14888.

District Court of Appeal, Second District, Division 2, California.

July 10, 1945.

1. Judgment 🔑**138(1)**

The policy of the law is to encourage the trial of litigated matters upon the merits.

2. Appeal and error 🔑**957(1)**

Appellate courts do not interfere with a decision refusing to set aside a default unless it appears that trial court abused its discretion in making the judgment or order.

3. Army and navy 🔑**34**

Where husband who was intelligent, mature and a college graduate voluntarily entered his appearance in divorce action instituted by wife, stipulated that action might be heard as a default and waived all rights under Soldiers' and Sailors' Civil Relief Act with full knowledge of the purpose of such appearance and waiver, his rights under the act and contents of decree to be entered, trial court did not abuse its discretion in refusing to vacate waiver and set aside default on ground of mistaken, inadvertent, and excusable neglect. Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A.Appendix § 501 et seq.

Appeal from Superior Court, Los Angeles County; Leslie E. Still and Fred Miller, Judges.

Action for divorce by Mary Elizabeth McMahon against Leo Charles McMahon, also known as Chauncey Leo McMahon. From an order denying defendant's motion to vacate waiver of his rights under the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A.Appendix § 501 et seq., and set aside his default and from the judgment entered pursuant thereto, defendant appeals.

Order and judgment affirmed.

Chris Wilson, of Long Beach, for appellant.

Leo Friedman, of Long Beach, for respondent.

MOORE, Presiding Justice.

The sole question for decision is whether the court abused its discretion in denying defendant's motion to set aside the order of his default.

On October 18, 1944, defendant was served with the summons and copy of the complaint in this action for divorce and on the same day filed his voluntary appearance, stipulated that the action might be heard as a default and waived all of his rights under the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A.Appendix, § 501 et seq. Immediately thereafter he departed from the state of California for the city of Minneapolis to visit his parents. The default of the defendant was duly entered on October 30 and the interlocutory decree was filed on November 22, 1944, whereby plaintiff was awarded custody of the two minor children and the defendant was ordered to continue "the present allotment to plaintiff for the support of the minor children."

On November 3, basing his motion upon the grounds of "mistake, inadvertence and excusable neglect," defendant moved the court to vacate defendant's default and to allow the filing of his answer which was attached to the motion. "From the order denying defendant's motion to vacate waiver and set aside default and from the judgment entered pursuant thereto," comes this appeal.

[1-3] While it is the policy of the law to encourage the trial of litigated matters upon the merits (Waite v. Southern Pacific Co., 192 Cal. 467, 221 P. 204), at the same time the appellate courts do not interfere with a decision unless it appears that the court has abused its discretion in making the judgment or order. There is no indication that the motion to vacate the default herein was not seriously consid-

ered. Impliedly the court found upon substantial evidence that defendant suffered no mistake, inadvertence, surprise, or excusable neglect. He is a sound, healthy, intelligent, mature person and a college graduate. He was not suffering from any form of hypnosis or oppression. The purpose of his executing the voluntary appearance and waiver was fully explained to him at the time he was served with the summons and the complaint was fully read to him. At the time of his conference with plaintiff and her counsel and of his receipt of service he was intelligibly apprised of the contents of the decree to be entered. He was told that a decree of divorce would be demanded by plaintiff and he then and there consented that the custody of the minor children should be awarded to their mother. He waived his right to a delay under the cited federal statute after hearing an explanation of his rights thereunder. In view of such proof we are unable to discern any vice in the exercise of a sound discretion by the trial court. Scheibe v. Scheibe, 57 Cal.App.2d 336, 134 P.2d 835; Rilcoff v. Rilcoff, 57 Cal.App.2d 888, 135 P.2d 687; Lent v. H. C. Morris Co., 25 Cal.App.2d 305, 77 P.2d 301.

The order and the judgment are affirmed.

W. J. WOOD and McCOMB, JJ., concur.

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70 Cal.App.2d 317

HOLWAY v. MALLOY et ux.

Civ. 14712.

District Court of Appeal, Second District, Division 3, California.

July 26, 1945.

Rehearing Denied Aug. 22, 1945.

Hearing Denied Sept. 20, 1945.

1. Brokers 🔑94

Writings giving broker exclusive right to sell two apartment houses and furniture therein within specified time conferred no authority on broker to enter into sale contract on owners' behalf, but merely authorized broker to find purchasers of properties.

2. Brokers 🔑94

Authority given broker to sell realty in listing thereof for sale authorizes him only to find purchaser and does not make him owner's agent to enter into sale contract.

3. Specific performance 🔑114(2)

A complaint, alleging no agreement between plaintiff and defendants, nor writing signed by defendants, other than agreement listing their apartment houses and furniture therein with broker, given exclusive right thereby to sell such properties on commission, stated no cause of action for specific performance of contract, executed by broker and plaintiff, for sale of properties to plaintiff.

4. Frauds, statute of 🔑116(5)

One entering into contract with broker to purchase apartment houses and furniture therein was not entitled to specific performance of contract, in absence of written sale agreement or note or memorandum thereof subscribed by owner or agent authorized by owners in writing to sell such properties. Civ.Code, § 1624.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by A. T. C. Holway against John Malloy and wife for specific performance of a contract to sell and convey to plaintiff two apartment houses with the furniture therein. Judgment for plaintiff, and defendants appeal.

Reversed, with directions.

George J. Tapper, of Los Angeles, for appellant John Malloy.

Louis P. Pink, of Los Angeles, for appellant Dorothy G. Malloy.

George W. Burch, Jr., of Los Angeles, for respondent.

SHINN, Justice.

Plaintiff had judgment for the specific performance of two separate writings, which were construed by the court as agreements of defendant John Malloy to sell and convey to plaintiff two apartment houses, with the furniture contained therein. The court found that the furniture was community property, the real estate the separate property of the husband. John Malloy and Dorothy G. Malloy, his wife, appeal. John Malloy will be referred to as the defendant.

On April 7, 1943, defendant listed with one Alfred J. Dixon, a realtor, upon separate forms, the apartment houses in question. The listings described the properties by street number, stated the price of each as "net 30,000," the size of the lot, encumbrance of $12,000 on one property, $13,000 on the other, at 5% interest, and recited, "the above listing is to include the furniture & Carpeting as per in*va*tory schedule." One of the listings read further as follows: "In consideration of services to be rendered, I hereby give to Alfred J. Dixon of 2140 Hillhurst Ave the Exclusive right to sell my property as listed above, for a period of 30 days from the date. If a sale or exchange is effected by myself, during their agency for the above described property, I agree to pay them 5%. Five per cent of the selling price, as commission for their services, and to furnish satisfactory title to said property Owner J. Malloy." The other listing contained the same provisions, although not in identical language, the word "ourselves" being used instead of the word "myself" in the second listing. These listings were signed by defendant but not by Dorothy G. Malloy.

The property was shown to plaintiff, Holway, who on May 2, 1943, gave the broker two checks for $500 each, payable to the broker, whereupon two writings were prepared and signed by the broker and plaintiff, reading as follows: "Deposit Receipt Los Angeles, California May 2/43 Received from A T C Holway 19061 Wells Dr Tarzana Calif, the sum of Five Hundred Dollars ($500.00) Dollars as a deposit on account of purchase price of following described property, situate in the City and County of Los Angeles State of Calif, to-wit: Lot 55 Tract 3907, Map book 42 pages 38/39 in the Los Angeles County Records. Also known as 1915 No Vermont subject to conditions, restrictions, reservations, and rights-of-way now of record. Purchase price to be $30,000.00. Plus 5% Commission Dollars. Balance of purchase price to be paid as follows: All cash to present loan of record approximately $13,000.00 and including all furniture, as per inventory, agreed on by buyer & seller. Commission to be paid out of Escrow, by buyer. And it is hereby agreed: That in the event said purchaser shall fail to pay the balance of said purchase price or complete the purchase as herein provided, the amount paid hereon shall, at the option of the Agent be retained as liquidated and agreed damages. That the current taxes, insurance, rents and interest of said property shall be pro-rated. That the evidence of title is to be in form of policy of title insurance issued by a responsible title company and to be furnished and paid for by the Seller. That any monies received are subject to owner's approval. That this offer expires 30 days from date hereof. Time can be extended by purchaser. Alfred J. Dixon. Lic, #16340 Broker. By (Signed) Alfred J Dixon I agree to purchase the above described property on the terms and conditions herein stated. (Signed) A.T.C. Holway Purchaser. I agree to sell the above described property on the terms and conditions herein stated, and agree to pay the above signed agent as commission the sum of ——— dollars, or one-half of the deposit in case same is forfeited, provided same shall not exceed full amount of the commission. ——— Seller. ——— Seller."

The deposit receipts were identical except as to the descriptions of the properties and the amounts of the encumbrances. Neither receipt was signed by John Malloy or his wife. Mr. Dixon notified defendants of Holway's willingness to buy the property. On May 5, 1943, Holway opened an escrow with the Title Insurance and Trust Company, signed instructions for the purchase of the two properties, and deposited in the escrow $35,000, which was the total purchase price, less the encumbrances. Instructions were prepared for the signature of defendant but neither he nor his wife signed the same. Both refused to go through with the sale of either property. Plaintiff's money remained in the escrow until after the trial of the action, when it was withdrawn and deposited with the clerk for payment to defendant John Malloy in accordance with the terms of the judgment, which judgment ordered defendants Malloy to convey the real and the personal property to plaintiff upon payment of the purchase price.

[1, 2] The writings under which defendant listed the properties with the broker were the only writings signed by defendant and they did not confer upon the broker any authority to enter into a contract of sale on behalf of the owner or owners. They were merely authorizations to the broker to find a purchaser or purchasers for the property. Authority given to a broker "to sell" real property, in listing it for sale, only authorizes him to find a purchaser; it relates to the services to be per-

formed by the agent in order to earn the agreed compensation and does not make him the agent of the owner to enter into a contract of sale. This is a well established canon of the law of real property. Duffy v. Hobson, 1870, 40 Cal. 240, 6 Am. Rep. 617; Gold v. Phelan, 1922, 58 Cal.App. 471, 208 P. 1001; Armstrong v. Lowe, 1888, 76 Cal. 616, 18 P. 758; Church v. Collins, 1912, 18 Cal.App. 745, 124 P. 552; Thompson v. Scholl, 1916, 32 Cal.App. 4, 161 P. 1006; Slater v. Rauer, 1919, 43 Cal.App. 748, 185 P. 864; Grant v. Ede, 1890, 85 Cal. 418, 24 P. 890, 20 Am.St.Rep. 237; Holland v. McCarthy, 1916, 173 Cal. 597, 160 P. 1069; Stemler v. Bass, 1908, 153 Cal. 791, 96 P. 809. These cases are directly in point; they are cited in the opening brief of appellants but are not mentioned in the brief of respondent nor does respondent cite any case which even tends to support his contention that the agent had authority to enter into a contract of sale.

[3, 4] The complaint alleged no agreement between plaintiff and defendants other than the unauthorized agreement signed by Dixon, and it alleged no writing signed by the defendants or either of them other than the agreement of listing. It therefore stated no cause of action and the proof showed that plaintiff has no cause of action. Inasmuch as there was no written agreement of sale or note or memorandum thereof in writing, subscribed by the owner, or an agent authorized in writing, to sell the property, the judgment in favor of plaintiff must be reversed. Civil Code, sec. 1624. It is therefore unnecessary to discuss the other grounds for reversal which are relied upon by appellants.

The position of Dorothy G. Malloy should be explained. Her appeal involves also the decision that she had conveyed her community interest in the real property to her husband and that therefore her signature was not necessary upon a sale of the properties. It appears that on or about April 5, 1943, Mrs. Malloy signed a quitclaim deed in favor of her husband, conveying the two apartment houses and certain other property. She filed a separate answer, alleging that the property was community property, that she did not deliver the deed to her husband, that it had been destroyed, and that her signing of it was procured by specific acts of fraud and undue influence of the husband and by specific promises which he did not intend to and did not keep. The court found that the property was community property until Mrs. Malloy gave her husband the quitclaim deed, that the deed was given as a part of a property settlement agreement, and that both were valid.

The husband and wife have separate counsel on the appeal but they have filed a single brief, in which they make a vigorous attack upon the findings which acquitted Mr. Malloy of the charges of fraud and undue influence and established the validity of Mrs. Malloy's deed. Mrs. Malloy gave testimony which, if believed, would have convicted her husband of fraud; it was stipulated as to some material facts (apparently to save the husband from embarrassment) that his testimony would be the same as hers; important evidence offered by Mrs. Malloy upon the fraud issue was excluded and the court of its own motion declined to allow Mr. Malloy to give testimony of a self-incriminating nature which he was quite willing to give. Mrs. Malloy sought no affirmative relief for the cancellation of her deed, and the impression which we gain from the record is that the trial of the issue of fraud was not regarded as an adversary proceeding as between Mr. and Mrs. Malloy. Furthermore, it might be added that it would be difficult indeed to reconcile the conclusion that there was no fraud with certain of the findings upon that issue. We mention these matters only to make it clear that a reversal of the judgment will have the effect of annulling all of the findings and conclusions relative to the validity of any property settlement agreement between Mr. and Mrs. Malloy and the validity of Mrs. Malloy's quitclaim deed to her husband.

The judgment is reversed and the court is directed to amend its conclusions of law to provide that plaintiff is not entitled to a judgment against the defendants or either of them, and thereupon to enter judgment in favor of defendants John Malloy and Dorothy G. Malloy against the plaintiff, A. T. C. Holway.

DESMOND, P. J., and PARKER WOOD, J., concur.

70 Cal.App.2d 322

DIXON v. MALLOY.

Civ. 14705.

District Court of Appeal, Second District, Division 3, California.

July 26, 1945.

Hearing Denied Sept. 20, 1945.

1. Brokers ⚷54

Where realty owner listed property with broker for sale at net price of $30,000, with "cash" typed under printed word "down" and blank left after printed word "Bal.", but with incumbrances listed below, "cash" meant only that there would be no deferred payments to owner, not that incumbrances were to be satisfied, and broker was entitled to commission when purchaser was willing to pay in cash the $30,000 less amount of incumbrances. Civ. Code, § 1641.

See Words and Phrases, Permanent Edition, for all other definitions of "Cash".

2. Vendor and purchaser ⚷46

A realty purchase contract should be construed as a whole, so as to give effect to every part, if reasonably practicable. Civ. Code, § 1641.

3. Brokers ⚷54

Where owner lists realty for sale with broker, specifying total price and describing incumbrances which are not yet due, and with no stipulation that incumbrances are to be paid off in case of sale, he authorizes agent to find a purchaser who will take subject to incumbrances and pay the difference either in cash or upon terms stipulated in the listing.

4. Brokers ⚷11

Finding that furniture and furnishings, included with realty listed for sale by husband, were community property, did not affect broker's right to damages for husband's failure to perform the contract, though wife did not sign agency agreement and refused to join in the sale.

5. Brokers ⚷54

Vendor's obligation to broker became fixed when broker found a purchaser ready, able, and willing to buy upon vendor's terms.

6. Brokers ⚷11

A realty broker was entitled to recover from vendor, as damages for vendor's failure to perfom the sales contract, the amount which broker would have received as compensation if sale had been consummated.

◆

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Alfred J. Dixon against John Malloy, also known as John Malloy, Jr., for damages to broker from refusal to perform contract to sell realty. From a judgment for plaintiff, defendant appeals.

Affirmed.

George J. Tapper, of Los Angeles, for appellant.

George W. Burch, Jr., of Los Angeles, for respondent.

SHINN, Justice.

We have in this case an appeal by John Malloy from a judgment in favor of plaintiff Dixon, the latter being the broker who found a purchaser for Malloy's property, accepted deposits from the purchaser, and notified the owner thereof under circumstances stated in Holway v. Malloy, Cal. App., 160 P.2d 893. The judgment in the present case awarded plaintiff the sum of $3,000 as damages for defendant's failure and refusal to convey his property to Holway, plaintiff in the other action, upon the terms stated in the written listing which defendant gave to plaintiff herein. The pertinent provisions of the writings involved are stated in our opinion in the other case and we shall not repeat them. When Holway gave two checks for $500 each and was given receipts by Dixon stating the terms of the purchase, he signed a writing on the bottom of each receipt, stating: "I agree to purchase the above described property on the terms and conditions herein stated." Each receipt stated, "purchase price to be $30,000.00 Plus 5%. Five per cent commission dollars," and it also stated, "commission to be paid out of escrow by buyer." The situation then was that Malloy had listed the two properties with Dixon for sale at a net price of $30,000 cash; Dixon was made exclusive agent for 30 days to find a purchaser and was to receive a 5 per cent commission from Malloy only in case the latter, himself, sold the property within that time. Before the term of the agency expired Dixon procured a purchaser who agreed to pay $31,500 for each property, $1500 of which was to be paid to the agent and the balance, less the encumbrances, to Malloy. The latter did not sign any agreement to sell the property other than the listing agreement and refused to sell it at all. Upon these facts the court gave judgment for Dixon for the sum of $3,000, and Malloy appeals.

[1, 2] Appellant contends that there was a failure to meet the requirement that an agent, in order to comply with the terms of an authorization to sell, must produce a buyer willing to buy upon the owner's stipulated terms. The rule is sought to be applied here upon the theory that the owner stipulated, in listing the property, for the payment of the entire sum of $30 000 for each property in cash, out of which he would pay the encumbrance of $12,000 on one property and $13,000 on the other, whereas Holway was proposing to pay in cash only the amount of Malloy's equity in each property. In arriving at a proper construction of the listing agreement, we derive little assistance from the cited cases, which involved agreements essentially different from the one before us. The first and principal case relied upon by appellant in support of his construction of the agreement is Cottingham v. Smith, 1938, 28 Cal.App.2d 345, 82 P.2d 479. The case, in our opinion, is not in point. The owner there had authorized an agent to sell her ranch for $35,000. The agent procured a buyer who was willing to pay $14,000 in cash and to assume a $21,000 mortgage held by the Federal Land Bank. It was held that the offer to purchase did not conform to the terms stated by the owner, in that it appeared that the latter expected to receive the entire purchase price in cash, and to be in a position to pay the encumbrance upon the land. The determinative fact in that case, which was emphasized as the reason for the decision, was that the listing with the agent made no mention of the encumbrance. Here the contrary is true. In the other cases cited by appellant the offers made by the intending purchasers were clearly at variance with the terms specified by the owners in the authorizations given to the agents. The factual situations were in no respect comparable to those of our case. One of defendant's listings stated: "Incumbrance $13,000.00, Interest 5% By Northern Life Insurance Per. Mo. ——— Taxes $500.00." The other listing showed an encumbrance of $12,000 and rate of interest 5%, but did not state the name of the holder. Each listing, under the printed heading of "price," stated, "Net 30,000" and under the printed word "Down" was typed "cash." Then in printing: "Bal. ———. Per Mo. ——— % ——— Yrs." But below these were the statements of the encumbrances. The statement of the price of $30,000 (typed) and the word "net" (handwritten) and the figure "$12,000" (typed) after the word "incumbrance" (printed) and "5%" (typed) below the word "interest" (printed), taken together, could be given but one of two meanings. Either the sum of $30,000 was to be paid in addition to the encumbrance, or the amount of the encumbrance was to be deducted from the price of $30,000. Clearly the latter was the case. If the owner's terms had called for the full sum of $30,000 in cash, out of which he would have to pay the encumbrances, no purpose would have been served by listing the encumbrances and the rates of interest. In order to give the word "cash" the meaning attributed to it by appellant it would be necessary to ignore altogether the specification of the encumbrances. This would violate a fundamental rule of construction which requires that the contract be construed as a whole, so as to give effect to every part, if reasonably practicable. Civil Code, sec. 1641. Under the circumstances, "cash" meant that there would be no deferred payments to the owner, such as might be evidenced by a second deed of trust. The court interpreted the listing agreements as calling for the payment of $17,000 cash for the property that had a $13,000 encumbrance, and $18,000 for the property that had the $12,000 encumbrance. In arriving at this interpretation the court no doubt took into consideration the following pertinent facts: The answer of Malloy alleged that he signed the agreement upon the condition that Dixon would obtain Mrs. Malloy's consent to a sale of the property upon the terms stated and that Dixon failed to obtain her consent. Upon sufficient evidence this defense was found to be untrue. It was found that Mrs. Malloy had previously executed and delivered to her husband a deed conveying all of her interest in the properties. It was alleged in the complaint, and admitted in the answer, that Holway deposited $18,000 as the purchase price of one property and $17,000 for the other; these allegations were admitted by the answer but it was not alleged that either sum was less than the price for which the respective

properties had been listed. The court heard extensive evidence as to all of the negotiations prior to the listing and of everything that transpired afterward. Malloy stated to Dixon the amount of the encumbrance on each property. Holway testified that he discussed the escrow with Malloy just before it was opened, that the latter asked him how much money he was putting in escrow, that he told Malloy he was depositing the full amount above the encumbrances and that Malloy stated that $5,000 would be enough with which to open the escrow. Malloy did not suggest in this conversation that he expected to receive more than $35,000 in cash. After this conversation he promised to meet Holway and Dixon and go into escrow but failed to do so and dropped out of sight for some three weeks. When Holway later demanded that he go through with the deal, Malloy gave as his sole excuse that Mrs. Malloy would not consent to it. The uncontradicted evidence was that Mrs. Malloy on April 5, 1943, gave her husband a quitclaim deed to the property in connection with a proposed property settlement agreement, but that it was not recorded and that she had torn it up on the following evening when it was presented to her in order that she might initial some corrections. There was not a word of testimony throughout the extensive trial to the effect that a greater sum than $35,000 in cash was ever mentioned or that Malloy understood that he was to receive any more than that sum on a completed sale. It was in evidence that on April 1, 1943, Dixon presented to Malloy a written offer of one Evanoff to purchase one of the properties for $30,000, $13,000 of which was to be represented by the encumbrance, $8,000 was to be in cash and the balance evidenced by second trust deed payable at the rate of $1,000 per month. Malloy signed an acceptance conditioned upon the payment of $31,000, out of which he would pay Dixon a commission, and upon the further conditions that Mrs. Malloy would sign the deed if it should be required by the title company, and that the second trust deed would constitute an encumbrance on the furniture. He allowed two days for the acceptance of this counter proposition, but it was not accepted. On April 7, the day the listings in question were made, he stated to Dixon that he did not want the Evanoff deal, did not want to take a second trust deed, but wanted to sell for cash. If a proper construction of the listings would be that Malloy was to receive $60,000 in cash he would have had a complete defense to the present action. He knew the terms of Holway's offer and he at no time made objection to the amount of cash included in that offer. Throughout the trial it was not suggested by counsel for either Mr. or Mrs. Malloy that the listing agreements called for cash payments of more than $35,000.

[3] After a diligent examination of the pleadings, and a reading of the entire transcript, we are forced to the conclusion that the point is made for the first time on the appeal that the listing agreement called for the payment of more than $35,000 in cash. However this may be, we are satisfied that the listing agreements, considered by themselves, or with all of the circumstances surrounding their execution, fully support the construction which the trial court gave to them. It seems entirely clear to us that when an owner of real estate lists his property for sale with a broker, specifying the total price to be paid, and describing encumbrances thereon which are not yet due, and with no stipulation that the encumbrances are to be paid off in case of a sale, he authorizes the agent to find a purchaser who will take the property subject to the encumbrances and pay the difference either in cash or upon terms stipulated in the listing.

The two actions were tried together but the sole defense presented in the present case was that the listing agreements were signed conditionally, as we have stated. There was a vast amount of evidence as to the domestic difficulties of Mr. and Mrs. Malloy and as to the circumstances under which she had executed the deed in favor of her husband. While this evidence was more pertinent to the issues in the specific performance case of Holway v. Malloy, it was to be considered in connection with Malloy's claim that he signed the agreements upon the condition that his wife's signature would be obtained. Although there was testimony given by Mr. Malloy which would have supported a finding that the listing agreement was not to become effective unless Mrs. Malloy signed it, which testimony would have been supported by some of the circumstances in evidence, it is not contended upon the appeal that the finding in favor of plaintiff upon this issue is not supported by the evidence. And there is evidence to support it; plaintiff testified that he knew of the execution of the quitclaim deed and he denied specifically any discussion or understanding that Mrs. Malloy's signature was to be obtained or that he was to obtain it.

Holway opened an escrow with the Title Insurance and Trust Company May 5, 1944, and deposited in escrow $35,000, which was the difference between the price Malloy was asking for the two properties and the unpaid balance of the encumbrances thereon. Appellant, in endeavoring to show that Holway was not willing to purchase upon the terms of Malloy's listing, points out what he contends are conditions in the terms of Holway's escrow instructions which differed from the terms of the listing. According to the instructions, 1943–44 taxes and prepaid rentals, and interest on the encumbrances, were to be adjusted as of the close of escrow May 15, or as soon as it was possible to close it. The instructions also called for "insurance as handed you" and a bill of sale of the personal property, with inventory to be approved by the buyer. Holway was to pay the "buyer's service fee," cost of recording deed, cost of chattel search, and cost of procuring beneficiary's statements as to the unpaid amounts of the encumbrances. Malloy had stipulated in his written listing of the property with Dixon that he would furnish "satisfactory title." He made no objection to any of the terms of Holway's instructions in the escrow, and it is apparent that he had no intention of going through with the sale upon any terms at the stipulated price of $30,000 for each parcel. The terms of the adjustments through the escrow were favorable to Malloy; Holway was offering to pay a part of the 1943–44 taxes, the second installment of which presumably had been paid by Malloy before delinquency April 20. Demand for adjustment of prepaid rentals and interest on the encumbrances as of the date of delivery of the deed was reasonable and customary and not in conflict with the terms upon which Malloy had listed his property for sale.

[4, 5] The court found that the furniture and furnishings listed for sale were the community property of defendants Malloy, no part thereof being the furniture, furnishings or fittings of the home of the defendants or either of them. It was also found that the real property had been the community property of defendants Malloy but that Mrs. Malloy had conveyed her interest to her husband April 5, 1943, and that the same thereby became his separate property. The finding as to the community character of the personal property does not affect plaintiff's right to recover damages. It is unnecessary to determine whether the evidence was sufficient to justify the finding that the real property was the separate property of Mr. Malloy. It was not stipulated as one of the terms of the agency agreement that Mr. Malloy's obligation was conditioned upon his wife's consenting to the sale. Even if the property was community property, neither the fact that Mrs. Malloy did not sign the agency agreement nor the fact that she refused to join with her husband in a sale of the property would avail Mr. Malloy as a defense to the action by the broker. His obligation to the broker became fixed when the latter found a purchaser ready, able and willing and who offered to buy the property upon Mr. Malloy's terms. Traxler v. Katz, 1931, 116 Cal.App. 226, 230, 2 P.2d 553; Russell v. Ramm, 1927, 200 Cal. 348, 366, 254 P. 532, and cases therein cited.

[6] Upon the facts found, plaintiff was entitled to recover from Mr. Malloy the amount which he would have received as compensation if the sale had been consummated. Klepper v. American-LaFrance F. E. Co., 1930, 104 Cal.App. 249, 285 P. 1048; Herman v. Savage, 1936, 17 Cal.App.2d 238, 243, 61 P.2d 1195.

Plaintiff performed services as broker which would have enabled him to receive $3,000 as compensation if the sale had been consummated; the failure of Mr. Malloy to consummate the sale resulted in damage to plaintiff in the amount of $3,000. Appellant has presented no sufficient ground for disturbing the judgment.

The judgment is affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.

70 Cal.App.2d 253

DENNING v. TABER.

Civ. 7151.

District Court of Appeal, Third District, California.

July 23, 1945.

Rehearing Denied Aug. 17, 1945.

Hearing Denied Sept. 20, 1945.

1. Partnership ⚷53, 328(3)

In suit for an accounting of partnership property, evidence supported finding that plaintiff and defendant had operated a saloon business as equal partners, terminated the business by mutual consent, and that defendant had agreed to divide the partnership assets equally. Civ.Code, § 2400.

2. Partnership ⚷17

The question of a partnership's existence depends primarily on the parties' intention ascertained from the terms of the agreement and the circumstances. Civ. Code, § 2400.

3. Partnership ⚷5

Ordinarily a partnership's existence is evidenced by parties' right to participate in the profits and losses and management of the business. Civ.Code, § 2400.

4. Licenses ⚷39

Where a business, which has been illegally conducted for lack of a license as distinguished from an unlawful and forbidden enterprise, has been completely terminated and one of the parties subsequently expressly agrees to divide in a specified manner the assets in his possession, courts will entertain suits for accounting, in assumpsit, or based on an implied trust, to recover the property belonging to the claimant.

5. Contracts ⚷138(2)

Where an illegal contract has been fully performed and is voluntarily terminated without the aid of a court and the possession by one party of property belonging to the other party is acknowledged, the source from which that property was derived becomes immaterial and the construction of the legality of the contract is unnecessary, and relief would not be denied on ground that a court is aiding or encouraging the execution or fulfillment of an illegal contract.

6. Intoxicating liquors ⚷327(1)

The illegal conducting of a saloon business without a proper license for each individual partner would ordinarily require a court to refuse on ground of public policy to determine issues between the partners regarding the division of or the title to the assets of the business; but, where a saloon partnership illegally conducted because plaintiff's name was not on the partnership license was voluntarily terminated by the parties who agreed to divide the property equally, plaintiff could maintain a suit for an accounting of an equal division of the partnership assets. St.1935, p. 1123, as amended; St.1937, p. 2139, § 10; St.1941, pp. 2521, 2852, §§ 8, 7; Civ.Code, § 2400.

◆

Appeal from Superior Court, Siskiyou County; A. F. Ross, Judge.

Suit by Dan Denning against Roy Taber for an accounting of partnership property. Defendant's motion to dismiss the action was denied and, from an interlocutory judgment against defendant, defendant appeals.

Interlocutory judgment affirmed.

Tebbe & Correia, of Yreka, and Glenn D. Newton, of Redding, for appellant.

J. Everett Barr, of Yreka, and Daniel S. Carlton, of Redding, for respondent.

THOMPSON, Justice.

The defendant has appealed from an interlocutory judgment which was rendered against him in a suit for an accounting of partnership property in his possession belonging to the plaintiff. The court determined that the plaintiff and defendant had been associated as equal partners in the conducting of a saloon business at Yreka from and after October 6, 1942. The partnership was terminated and the business closed by mutual agreement on February 1, 1944, and the defendant then agreed to equally divide the assets of the business in his hands. The answer merely denied the existence of the partnership, but at the trial the defendant invoked the rule that courts will not determine controversies between partners founded upon the illegal conduct of a business contrary to law. It appeared that plaintiff had not secured an individual liquor license as a member of the partnership as required by the Alcoholic Beverage Control Act. Stats.1935, p. 1123, and amendments thereto, 2 Deering's

Gen.Laws 1943, p. 1353, Act 3796. A motion to dismiss the action on that account was denied.

On appeal the defendant does not contend that the evidence fails to support the court's finding that the partnership existed. The sole question is whether the court erred in assuming that, since the partnership was terminated and defendant had agreed to equally divide the assets of the business, it was not precluded on the ground of public policy from entertaining this action for an accounting of the proceeds of a saloon business which was conducted by a partnership, without requiring each partner to secure a liquor license.

[1] While there is a conflict of evidence regarding the partnership business, there is very convincing testimony that the plaintiff and defendant agreed to and did purchase and operate the saloon business at Yreka as equal partners from October 6, 1942, to February 1, 1944, on which last mentioned day the business was terminated and closed by mutual consent and the defendant then expressly agreed to divide the partnership assets share and share alike, but subsequently failed and refused to do so.

The plaintiff testified that he was an experienced saloon man, having previously worked in that business for many years; that he and the defendant had been friends and roomed together; that he had been employed by Ranby Soldane who owned the Diamond Bar in Yreka and learned from him that he intended to sell his business; that he persuaded the defendant to associate with him as a partner for the purchase and operation of that saloon business; that the saloon was purchased by them for the sum of $3,500, which was obtained by the defendant and repaid according to agreement from the assets of the business; that the plaintiff employed the help, managed the business and devoted from twelve to fourteen hours per day to its operation and the defendant took charge of the bookkeeping and assets and he personally assisted in the operation of the saloon; that the business was profitable and each partner withdrew from the cash receipts from $200 to $350 per month; that the partners also invested proceeds from the business in the purchase of hogs and fruit, upon the sale of which the profits were equally divided; that they printed Christmas cards and twenty-five thousand match covers advertising the partnership and containing the legend "Dan and Roy, The Diamond," which were distributed to customers; that the defendant introduced plaintiff to several individuals as his partner; that plaintiff relied upon the defendant to secure the necessary liquor license for operating the partnership business, but that defendant, without plaintiff's knowledge or consent, procured a license in his individual name only; that when plaintiff discovered that fact he protested to the defendant and demanded that his name be included in the license; that the defendant claimed he obtained the license in his own name to protect him and his wife who had raised the purchase price of the saloon by mortgaging their mining property, but that as soon as the purchase price was repaid he would have plaintiff's name included in the license; that the purchase price was fully repaid but that the defendant then failed and refused to permit plaintiff's name to be included in the license; that the dispute over the liquor license led to irreconcilable differences and a voluntary termination of the business by mutual consent on February 1, 1944, together with an express promise on the part of the defendant to divide the remaining assets of the business equally. The plaintiff testified in that regard: "We decided we would split it right half and half, which was agreeable with him. * * * He said, 'We will split it right down the middle. You go your way and I will go mine.'"

[2-4] The question of the existence of a partnership between the parties thereto depends primarily upon the intention of the parties ascertained from the terms of the agreement and from the surrounding circumstances. De Rigne v. Hart, 94 Cal.App. 209, 270 P. 1013; Kersch v. Taber, 67 Cal. App.2d 499, 154 P.2d 934; 20 Cal.Jur. 686, sec. 7. A partnership is an association of two or more persons to carry on as co-owners a business for profit. Civil Code, sec. 2400. Ordinarily the existence of a partnership is evidenced by the right of the respective parties to participate in the profits and losses and in the management of the business. Black v. Brundige, 125 Cal. App. 641, 13 P.2d 999; Smith v. Grove, 47 Cal.App.2d 456, 118 P.2d 324; Martin v. Sharp & Fellows Cont. Co., 34 Cal.App. 584, 168 P. 373; Kersch v. Taber, supra; 20 Cal.Jur. 689, sec. 9. There is a clear distinction between an agreement to operate an illegal enterprise such as the business of prostitution or gambling, and the mere conducting of a legal business in an illegal

manner without the license required by law, such as the real estate brokerage business or the saloon business. We may assume the saloon business which is involved in the present case, was illegally conducted since a liquor license was not secured to include the name of the plaintiff as required by the Alcoholic Beverage Control Act. Section 7 of that act, St.1941, p. 2852, provides that: "Each license * * * shall be issued to a specific person." Section 10, St.1937, p. 2139, provides that "The application shall be signed by the applicant. In the case of a partnership the application shall be signed by each of the partners." Section 8, St.1941, p. 2521, provides that "All retailer's on-sale licenses, * * * shall be issued on a calendar year basis." The plaintiff testified that he relied upon the defendant to procure the necessary licenses which he failed to do. On account of that omission the business was actually conducted illegally, even though it was chiefly the defendant's fault. We may assume the plaintiff was not in pari delicto in failing to secure the license. But we cannot escape the conclusion that the illegal conducting of the saloon business without a proper license for each individual partner would ordinarily require the court to refuse upon the ground of public policy to determine issues between the partners regarding the division of, or the title to the assets of the business. Wise v. Radis, 74 Cal. App. 765, 242 P. 90. But there is a well recognized exception to that rule which appears to be founded on good morals and sound judgment. When a business, which has been illegally conducted for lack of license, as distinguished from an unlawful and forbidden enterprise, has been completely terminated and one of the parties subsequently expressly agrees to divide in a specified manner the assets in his possession, courts will entertain suits for accounting, in assumpsit, or based on an implied trust, to recover the property belonging to the claimant. Planters' Bank v. Union Bank, 83 U.S. 483, 21 L.Ed. 473; Fryer v. Harker, 142 Iowa 708, 121 N.W. 526, 23 L.R.A.,N.S., 477, note; Central Labor Council v. Young, 136 Wash. 550, 240 P. 919; De Leon v. Trevino, 49 Tex. 88, 30 Am.Rep. 101; Bellew v. Jacobs, Tex.Civ. App., 229 S.W. 928; 47 C.J. 652, § 44; 40 Am.Jur. 359, sec. 327. The reason assigned for the application of the foregoing exception to the general rule is expressed in the Central Labor Council case, supra, quoting with approval from the Planters' Bank case, supra, that [136 Wash. 550, 240 P. 920]:

> "When the illegal transaction has been consummated, when no court has been called upon to give aid to it, when the proceeds of the sale have been actually received, and received in that which the law recognizes as having had value, and when they have been carried to the credit of the plaintiffs, the case is different. The court is there not asked to enforce an illegal contract. The plaintiffs do not require the aid of any illegal transaction to establish their case. It is enough that the defendants have in hand a thing of value that belongs to them. Some of the authorities show that, though an illegal contract will not be executed, yet, when it has been executed by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise, express or implied, and the court will not unravel the transaction to discover its origin."

If that distinction controls an executed agreement which was illegally designed by the parties, it should apply with greater justice and force to a division of assets expressly agreed upon by the parties after the termination of the business by mutual consent which was merely conducted without a license contrary to law. This is especially true when the plaintiff is not in pari delicto, or when he is at least much less culpable of wrongful conduct.

The same exception to the rule is expressed in 40 American Jurisprudence at page 360, as follows:

> "Instead of an implied promise [to divide the assets after voluntary termination of the business], there may be an express promise, and where an illegal contract or partnership venture has been executed without the aid of the courts, by the voluntary acts of the parties, and a division of the profits has been agreed on, it seems to be generally considered that such division of profits forms a new contract, and that the partner entitled to a share of such profits may enforce his right thereto in the courts."

[5] The foregoing exception to the general rule is well established and supported by reputable authorities. When an illegal contract has been fully performed and is voluntarily terminated without the aid of a court, and the possession by one party of

property belonging to the other party is acknowledged, the source from which that property was derived becomes immaterial and the construction of the legality of the defunct contract is unnecessary. Under such circumstances it may not be said courts are aiding or encouraging the execution or fulfillment of illegal contracts. A court is not expected to trace the source of property beyond the issues necessarily involved, merely to determine whether it is tainted with illegality so as to punish the parties for violation of the law. The rule is intended to preserve the dignity of the law by refusing to determine controversies dependent upon the construction of illegal contracts. That rule is limited to the necessity of depending on the illegal contract to determine the issues. If that rule were not so limited, the courts would often be required to assume the impossible burden of determining just how serious or remote the taint may be.

In none of the cases relied upon by the appellant, and in none which we have been able to discover, has it been held that a court will refuse to determine issues regarding the ownership or possession of the assets of an illegal enterprise, or of a business which was conducted in an illegal manner, after the contract was executed and the business voluntarily terminated without the aid of the courts, and an agreement for division of the assets was subsequently made.

In the case of Chateau v. Singla, 114 Cal. 91, 45 P. 1015, 33 L.R.A. 750, 55 Am. St.Rep. 63, the court held that it was precluded, on the ground of public policy, from entertaining an action for accounting for the proceeds of an illegal contract involving the maintenance of houses of prostitution. The judgment of the trial court was reversed. But the contract was for a continuing business. There was no evidence that the business had been terminated by consent of the parties or otherwise. Nor was there any evidence of an agreement to divide the property after a voluntary termination of the business. The foregoing exception to the general rule was not discussed or involved in that case.

In the case of Wise v. Radis, 74 Cal.App. 765, 242 P. 90, 91, upon which the appellant chiefly relies, a judgment for plaintiff in a suit in assumpsit was reversed on the theory that it was founded on an illegal contract to divide broker's commissions in a continuing association or business of "negotiating the purchase and sale of real properties." That case is readily distinguishable from this suit since the transaction upon which plaintiff sued for "money had and received," was only one sale in a continuing business relationship as real estate brokers. Neither the termination of the business by voluntary action nor subsequent agreement to divide the proceeds was discussed or involved in that suit. For the reason that one of the parties failed to renew his broker's license as required by law, and because he held no license during the time in which a part of the business was transacted, the court properly held that the general rule precluded it from entertaining the action which was founded on an illegal oral agreement "to work together as brokers in negotiating the purchase and sale of real properties." That case is not determinative of the issues which are involved in this suit. That decision does not contemplate the exception to the rule above stated. We know of no case in conflict with the preceding statement of the exception to the general rule. It appears to be sound and just.

[6] Conceding that the saloon business was conducted illegally because a partnership license was not procured in the names of both partners as required by law, we are satisfied that the plaintiff is nevertheless entitled to maintain this suit for an accounting of assets because it does not necessarily involve the legality of the partnership agreement to conduct the Diamond Bar saloon but depends upon the oral agreement to divide the property equally which was made by the parties after the voluntary termination of the business without the aid of court.

The interlocutory judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

70 Cal.App.2d 241

LOUGHRAN v. REYNOLDS et al.

Civ. 14802.

District Court of Appeal, Second District, Division 2, California.

July 20, 1945.

Hearing Denied Sept. 17, 1945.

1. Judgment 🔑625, 632

Under California law it is not necessary to show that party asserting plea of res judicata was a party to earlier litigation although such plea may not be asserted against a party unless such party was bound by earlier litigation, hence it is not necessary to establish mutuality and privity where liability of party asserting plea of res judicata is dependent upon or derived from liability of one who was exonerated in an earlier action brought by same plaintiff upon same facts.

2. Judgment 🔑632

Where plaintiff asserted that defendant was liable to plaintiff for breach of employment contract under which plaintiff was employed by corporation on theory that defendant operated through agency of corporation as defendant's alter ego and previously, on plaintiff's claim against bankrupt corporation, bankruptcy court had held against plaintiff on issue of breach of contract and merely allowed plaintiff's claim for past services, superior court properly sustained defendant's special defense of res judicata on issue of wrongful discharge notwithstanding that defendant was not a party to bankruptcy proceeding, since plaintiff was bound by bankruptcy litigation. Code Civ.Proc. § 597.

3. Bankruptcy 🔑20(1)

California District Court of Appeal has no jurisdiction to review the proceedings of a bankruptcy court.

4. Bankruptcy 🔑20(1)

Where bankruptcy court, on plaintiff's claim against bankrupt corporation for recovery for damages for wrongful discharge and for back pay, refused to determine whether defendant in state court litigation was the alter ego of corporation, question of defendant's liability to plaintiff under doctrine of alter ego remained open to be pursued to final judgment in state court litigation.

5. Pleading 🔑93(2)

Individual defendant who was sued on theory that he was alter ego of bankrupt corporation was not obliged to forego claim that he was not alter ego of corporation in order to assert that if such issue be decided against him he was not liable for any greater sum than that specified in judgment of bankruptcy court allowing only a portion of plaintiff's claim against corporation since defenses were not inconsistent.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by John X. Loughran against James G. Reynolds and others to recover accrued salary and for breach of employment contract by a wrongful discharge. From an adverse judgment, plaintiff appeals.

Affirmed.

Abraham Setzer, of San Francisco, and O. T. Gilbank and N. E. Youngblood, both of Los Angeles, for appellant.

Stanley M. Arndt and Wood, Crump, Rogers & Arndt, all of Los Angeles, for respondent.

W. J. WOOD, Justice.

In this action, commenced November 13, 1940, appellant named as defendants James G. Reynolds, Anna F. Reynolds and 20th Century Health Institute, a corporation. The action was dismissed as to defendant Anna F. Reynolds. It was also dismissed as to the corporation on August 24, 1942, by order of the court, because of the discharge of the corporation in bankruptcy.

Appellant sought to recover the sum of $1,800 alleged to be due him as accrued salary under the terms of a written contract which he had entered into with the defendant corporation; also the sum of $39,264 for his alleged wrongful discharge and prevention of the performance of the contract. In separate counts appellant sought judgment for $168, but these counts are of no significance in this appeal. The trial court rendered judgment in favor of James G. Reynolds, respondent herein, after it had sustained a demurrer to appellant's first amended complaint without leave to amend. An appeal was taken by appellant and the judgment was reversed, the reviewing court holding that appellant's complaint stated a cause of action as against the individual defendant because of the allegations of "his operations through the agency of a corporation as his alter ego." Loughran v. Reynolds, 53 Cal.App.2d 250, 127 P.2d 586.

A voluntary petition in bankruptcy was filed in the United States District Court by defendant corporation on May 13, 1941. The corporation was thereupon adjudicated a bankrupt. Appellant filed a verified claim in the bankruptcy court against the bankrupt corporation upon the identical causes of action upon which he had sued the corporation and respondent herein. The trustee in bankruptcy and various creditors, including respondent herein, filed objections to the claim. Several hearings on the merits were held by the referee in bankruptcy, who found against appellant on the issues involved and particularly that there had been no anticipatory or other breach by the corporation but that appellant had himself breached the contract. He allowed the claim for $600 for services which had been rendered up to the time of the breach of the contract by appellant and also the sum of $168 above referred to. The order of the referee was affirmed by the United States District Court on September 1, 1943, and has become final.

The judgment of the bankruptcy court was pleaded by respondent as a bar to the present action and the issue thus presented was brought on for trial in the superior court in accordance with the provisions of section 597 of the Code of Civil Procedure. At the trial counsel for appellant stated: "We are attempting to hold Reynolds personally upon the theory and doctrine that he in fact was the alter ego of the corporation". The superior court rendered judgment on February 18, 1944, upholding the defense of res judicata and holding that the judgments and orders of the bankruptcy court were binding as between appellant and the corporation and as between appellant and respondent James G. Reynolds. The court further held that the question whether the corporation was the alter ego of respondent Reynolds was still open and to be determined in further proceedings, but that there could be no recovery against respondent in any sum greater than that allowed by the bankruptcy court. It is from this judgment that the appeal herein is being prosecuted.

Appellant's main contention is that the judgment of the bankruptcy court is not binding on him because, as claimed, respondent was not a party to the bankruptcy proceedings and that there was no mutuality of the parties. Respondent stoutly asserts that because of the active participation of the parties in the proceedings pending in the bankruptcy court there was in fact mutuality and privity. But he also correctly argues that mutuality is not necessary in all cases in order to make the plea of res judicata available.

[1, 2] The decision in Bernhard v. Bank of America, 19 Cal.2d 807, 122 P.2d 892, clarified the law in California and thoroughly established the rule that it is not necessary to show that the party asserting the plea of res judicata was a party to the earlier litigation. A plea of res judicata may not be asserted against a party unless he was bound by the earlier litigation in which the matter was decided. It is not necessary to establish mutuality and privity where the liability of the party asserting the plea of res judicata is dependent upon or derived from the liability of one who was exonerated in an earlier action brought by the same plaintiff upon the same facts. Triano v. F. E. Booth & Co., Inc., 120 Cal.App. 345, 8 P.2d 174; Duell v. Metro-Goldwyn-Mayer Corporation, 128 Cal.App. 376, 17 P.2d 781; Perna v. Bank of America, 28 Cal.App.2d 372, 82 P.2d 605. A common application of the rule is to be found in cases growing out of automobile collisions, where it has been held that if the driver of a vehicle is sued and is exonerated by a judgment on the merits the judgment in his favor bars a similar action against the employer of the driver by the same plaintiff who sues upon the same set of facts. Shippy v. Peninsula Rapid Transit Co., 97 Cal.App. 367, 275 P. 515. The decisions in such cases are founded upon allegations of agency. In the case now before us appellant alleges that respondent operated "through the agency of a corporation as his alter ego". Although this allegation is yet to be passed upon by the trial court, the issues concerning the breach of the contract, identical in the bankruptcy court and in the superior court, have been decided by the bankruptcy court. As to those issues there has been a judgment on the merits. The party against whom the plea of res judicata is asserted was a party to the prior adjudication and the judgment therein has become final. The trial court ruled correctly in sustaining the plea.

[3, 4] Appellant complains that the referee in bankruptcy refused to rule that respondent was the alter ego of the corporation and also refused to bring into the bankruptcy proceedings the personal assets of respondent. This court, of course, does not review the proceedings of the bankruptcy court. The referee's duties concerned the affairs of the bankrupt corporation. He was justified in leaving the question of the alleged liability of respondent, under the doctrine of alter ego, to the state courts. That question, being still open, may be pursued to final judgment in the present litigation.

[5] Appellant is not prejudiced by the fact that respondent in his answer denies that he is the alter ego of the corporation and at the same time claims the benefit of the adjudication of the bankruptcy court limiting the liability of the corporation. There is no inconsistency in these defenses. Respondent is not compelled to forego his claim that he is not the alter ego of the corporation in order to assert that if this issue be decided against him he is not liable for any greater sum than that specified in the judgment of the bankruptcy court.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

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70 Cal.App.2d 309

CAMPBELL v. FORSOM et al.

Civ. 14681.

District Court of Appeal, Second District, Division 3, California.

July 26, 1945.

Hearing Denied Sept. 20, 1945.

1. Mines and minerals 🔑101

Where declaration of trust covering oil and gas leases gave trustees an absolute discretion over trust estate and business thereof, trustees' discretion could not be reviewed or controlled by any persons or courts on considerations going to the soundness of the judgment exercised by trustees, but exercise of such discretion could be attacked for fraud or bad faith. Civ.Code, § 2269.

2. Mines and minerals 🔑101

That some other person might be found who could keep books, pay bills, and send out checks to unit holders in trust covering oil and gas leases, and who would be willing to render such services for less than the amount paid one who had done the office work and kept the books since 1933, did not establish bad management on part of trustees in keeping old employee, whose familiarity with all details of the business could be considered by trustees in retaining such employee and determining her compensation.

3. Mines and minerals 🔑101

That one trustee was paid $50 per month for assistance in pumping wells did not indicate either fraud or bad faith on part of trustees. Civ.Code, § 2269.

4. Mines and minerals 🔑101

The allowance to one of trustees of trust covering oil and gas leases of $45 per month for use of automobile was not unreasonable.

5. Appeal and error 🔑1008(1)

Whether, under broad provisions of trust, trustee was properly allowed compensation for services in connection with sale of compressor belonging to trust, was for trial court.

6. Mines and minerals 🔑101

Where declaration of trust covering oil and gas leases empowered trustees to deal with trust properties and moneys and to conduct trust in any manner trustees saw fit, and there was no proof of fraud, buying and renting of property from concerns in which one of the trustees was interested were not subject to attack.

7. Mines and minerals 🔑101

Where declaration of trust covering oil and gas leases gave trustees absolute discretion over trust estate and business thereof, and there was no claim that various fees received by one of the trustees for his legal services were excessive or that the services performed were not necessary, objection that such trustee, together with other trustees, determined whether legal services were necessary for the best interests of the trust and also the reasonable value thereof when such services were rendered, was properly overruled.

8. Mines and minerals 🔑101

The trustees of trust covering oil and gas leases are entitled to the benefit of the presumptions of regularity and good faith.

9. Mines and minerals 🔑101

Findings that trustees of trust covering oil and gas leases had managed and operated properties of trust honestly in good faith and had not abused the discretion vested in them were sustained by the evidence and court properly refused to remove such trustees. Civ.Code, § *2269*.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by W. A. Campbell, as an individual, and W. A. Campbell, as executor of the last will and testament of Emerson B. Campbell, also known as E. B. Campbell, deceased, against W. C. Folsom and others, to remove the defendants as trustees of certain trust known as the E. B. Campbell Company. From a judgment for defendants, the plaintiff appeals.

Judgment affirmed.

Wm. H. Cree, of Long Beach, for appellant.

Oliver O. Clark and Robert A. Smith, both of Los Angeles, for respondents.

FOX, Justice pro tem.

By this action plaintiff individually and as executor of the estate of E. B. Campbell, deceased, seeks the removal of the defendants as Trustees of that certain trust known as the E. B. Campbell Company. From a judgment in favor of the defendants, plaintiff appeals.

This trust was created in 1927 by the decedent, E. B. Campbell. He owned certain oil and gas leases on properties in the Signal Hill oil field. He conveyed to the trust these leases. The trust was divided into 100 units of beneficial interest; 50 of which were sold to the public; 48 of which were issued to the decedent; one to his son, the plaintiff herein, and one to defendant Folsom. These three were designated as the original trustees. In July, 1933, the decedent (who died in November of that year) and the plaintiff resigned as trustees and others were designated to take their places. Due to the resignation of such other trustees the defendants Clark and Pollard became trustees in September, 1941, and are still serving in that capacity. Defendant Folsom has continued to be and still is a trustee. He has been the manager of the trust for a number of years. He owns a part of one unit while neither of the other trustees has any investment in the trust. Plaintiff, in his individual capacity, owns one unit, while the estate which he represents owns 51 units. The remaining units are owned by a great number of other persons scattered over a large territory.

Plaintiff urges the removal of the defendants as trustees because of their alleged mismanagement and neglect of the trust estate and because of certain transactions with the trust by individual trustees which were either approved, or at least not disapproved, by the other trustees.

To determine whether these charges are well founded requires an examination of the provisions of the Articles of Agreement and Declaration of Trust, hereinafter referred to as the Declaration of Trust, for the purpose of ascertaining the extent of the authority conferred upon the trustees by that instrument. It is provided in section 4 of Article I that: "All investments and titles to all properties shall be made, held, managed and controlled by said Trustees and their successors, under this Declaration of Trust, for and on behalf of the said Trust Estate, absolute and free from all limitations save and except those specifically set out herein * * *." Then follow ten paragraphs setting out at great length the powers and authority of the trustees in conducting the business of the trust. The final paragraph of this section gives them authority "to deal with and use the Trust properties and moneys and to manage and conduct the Trust hereby created in any manner to said Trustees seeming fit * * *." Section 6 of Article I says, among other things, that it is "the purpose of the Trust Estate hereby created to vest full and absolute control of the Trust properties in said Trustees." The complete control of the Trustees over the property of the Trust Estate is again indicated by the recitation in section 3 of Article II that it is "fully understood that absolute control and dominion over said property so held in Trust, by said Trustees, is hereby created for and during the period of the natural lives of the said Trustees and their successors." This idea of complete control over the Trust Estate by the trustees is emphasized by the provision in section 1 of Article III that unitholders shall not be entitled "to an accounting in the courts of law or in equity against said estate, its unitholders, Trustees, or its property or business operations of any kind, it being hereby distinctly understood and agreed that full and complete title, ownership, management, direction, control and dominion is vested in said Trustees, and their successors * * *." It is also provided in the Declaration of Trust that the trustees may adopt by-laws for the conduct of the business of the company and may from time to time amend the same in any particular. It is further provided that if at any time a majority of the Board of Trustees should deem it advisable, the trust estate may be by them incorporated under the laws of any state for such an amount as to them may seem advisable. The trustees are also given authority to amend the Declaration of Trust provided such amendment does not change the purposes of the trust or in any way affect, modify or change the liability of the Trustees or beneficiaries. No approval of or notice to the beneficiaries is required to make such amendment effective. Upon such amendment being executed by the Trustees and recorded it "shall constitute conclusive proof of the facts thereby shown." Under the Declaration of Trust the trustees "have the power to fix the salary or wages of all officers and employees of the company from time to time, in their discretion." The trustees are also given authority to fix their own compensation. The term of office of the trustees is "for and during their natural lives, unless the same be terminated by death, voluntary resignation or for breach of personal trust" and no trustee shall be liable "for any other than his own personal breach of trust."

[1] From the provisions of the Declaration of Trust herein mentioned it is unmistakably clear that the trustees are given an "absolute discretion" over the trust estate and the business thereof. The exercise, therefore, of this discretion "cannot be reviewed or controlled by any other person or tribunal on consideration going to the soundness of the judgment exercised" by them. Neel v. Barnard, 1944, 24 Cal.2d 406, 417, 150 P.2d 177, 183; see, also, Civ.Code, sec. 2269. The exercise, however, of this discretion may be attacked for fraud or bad faith. Neel v. Barnard, supra.

An examination of the findings discloses that the court found: "That said defendants, as trustees of said trust, have conducted the business of said trust, and have managed and operated the properties of said trust honestly, and in good faith and within the scope of their powers as trustees of said trust as conferred by, and defined in, said declaration of trust, and in accordance with and in furtherance of the objects and purposes of said trust as defined in said declaration of trust, and in their conduct as trustees of said trust, said defendants have not exceeded their powers in respect thereof, as conferred by and defined in said declaration of trust, and have not abused the discretion vested in them as trustees of said trust" and "That each of said trustees at all times during his occupancy of the office of a trustee under said trust has been interested in the faithful performance by each of the trustees of his duties as a trustee of said trust, and in the proper and efficient management and operation of the business and properties of said trust." The court further found that none of the Trustees had received "from the funds of said trust any sum in excess of the reasonable value of the services rendered by them to and for said trust." The court also found to be untrue the allegations of the plaintiff charging misuse of the properties of the trust by the defendants and also charging that the defendants had permitted other enterprises in which they had a financial interest but in which the trust had no interest to improperly use the properties and facilities of the trust estate.

Plaintiff bases his charge of general mismanagement and neglect of the trust largely on the fact that since 1936 the income from the wells has declined substantially while the expenses have not decreased in like manner. This conclusion, however, does not necessarily follow from the stated premises. Many items of operating expense such as wages, salaries, auditing and office supplies might well remain substantially constant even though production declined considerably. In this connection plaintiff complains that the costs of management, office salaries and miscellaneous office expense has never been reduced and that for the years 1940, 1941, 1942 and ten months of 1943 these salaries and office expenses amounted to $23,773.38. It is significant, however, that during this period living costs were increasing and there was pressure generally to increase wages and salaries. Still, these items of expense do not appear to have been increased by the trustees. Plaintiff emphasizes the fact that Folsom was paid a salary of $250 per month to manage the trust. It is to be noted that he was one of the three original trustees, the other two being the plaintiff and his father. By reason of his long connection with the trust he was no doubt familiar with its entire business. He, like the other defendants, did not receive any salary as a trustee. Under the Declaration of Trust the trustees had the power to "fix their own compensation, and the compensation of all other officers." It does not appear that the trustees acted either fraudulently or in bad faith in fixing the salary of Folsom, as Manager of the Trust, at $250 per month, or in not reducing it when the production of the wells declined.

[2] Plaintiff also complains that Mrs. Pollard, the wife of trustee Pollard, is paid $87 per well monthly for keeping the books. She has held this position since 1933 and does all the office work and devotes her full time to it. Such a salary does not appear to be unreasonable for an experienced bookkeeper who also handles all the detail of the office and who is familiar with the business and its operations. The fact that some other person might be found who could keep the books, pay the bills, and send out the checks to the unitholders and who would be willing to render such service for less than the amount paid Mrs. Pollard does not establish bad management on the part of the trustees in keeping her. There are innumerable other items and details in operating such an office and familiarity with them, and long and apparently satisfactory service on the part of Mrs. Pollard are factors which the Trustees could properly consider in retaining her services and in determining her compensation therefor.

[3] Plaintiff further complains of the payment to Mr. Pollard of $50 per month for assistance in pumping the wells. He had only been receiving pay for this service for "about a year" at the time of the trial, which was in January, 1944. It seems that he helped out when some additional assistance was needed in connection with the operations of the wells, thus making it unnecessary to call in another man. He was generally around there from 1:00 o'clock to 5:00 o'clock in the afternoons, and sometimes at night. He was also there about two Sundays a month. During this period of labor shortage, it was no doubt difficult to get an extra man for even a short period. Such payments do not indicate either fraud or bad faith on the part of the Trustees.

[4] Plaintiff criticizes the allowance of $45 per month to the Pollards for the use of their car. This allowance was by way of reimbursement. The trust did not own a car so the Pollard car was used to go to the post office, to the bank, to pick up the check from the company that brought the oil from these wells, to locate needed equipment and to deliver the same to the wells, as well as, no doubt, for many other purposes incident to the operations of the trust business. It does not appear that the allowance for the use of this car is unreasonable.

[5, 6] Plaintiff takes exception to the payment of $200 to Pollard for his services in connection with the sale of a compressor that belonged to the trust and the payment of $252 as rental for certain equipment which belonged to a concern in which he was financially interested and the purchase of certain rods for $320.05 from another company in which he was a stockholder. It appears that Pollard had been working on a sale of this compressor for a long time prior to his becoming a trustee and that he had spent considerable time and effort in that behalf. If he had not become a trustee it hardly seems that any question could be raised about this transaction, and undoubtedly the trial court so considered the matter. In any event, under the express provisions of the trust, no reason appears why Pollard might not properly have been compensated for his time in attempting to make the sale. It was for the trial judge to determine whether under the broad powers of the Declaration of Trust the trustees had authority to handle the transaction as they did and whether fraud or bad faith existed. As to the rental item for the machinery and the purchase of the rods it is not claimed that there was any unfairness in either of these transactions. In passing upon these matters it must be borne in mind that under the express terms of the Declaration of Trust the trustees had authority "to deal with and use the Trust properties and money and to manage and conduct the Trust * * * in any manner to said Trustees seeming fit * * *."

It is not claimed that the trustor did not have the power to confer such broad authority on the trustees. In fact, the plaintiff was one of the original parties to the Declaration of Trust and his father, whose estate he here represents, and whose oil leases made up the trust property, was also a party to that instrument. There can be little doubt that they were personally responsible for the inclusion in the Declaration of Trust of the very broad and comprehensive powers which were vested in themselves as trustees. Those who purchased beneficial units in the trust did so with notice of the authority thus conferred on the trustees. (Incidentally, none of these latter parties are here complaining.) In view of this comprehensive authority it cannot be said that any of these transactions were not within the powers of the trustees. Hence, they may not be successfully attacked except upon the ground of fraud or bad faith, and in the view of the trial court neither of these grounds was established.

As to trustee Clark, who is an attorney, plaintiff's first complaint is that he acquiesced in and approved the various transactions hereinbefore discussed that Pollard had with the trust, and that having done so he is equally culpable with Pollard. Since, however, none of these transactions establish any culpability on the part of Pollard, no odium can attach to Clark by reason of his approval.

[7] Plaintiff's second complaint against Clark is that although he receives no salary as a trustee he performs all the legal services which the trust requires and that he, along with the other trustees, determines whether legal services are necessary for the best interest of the trust, and also the reasonable value thereof when such services are rendered. Appellant, however, in his brief states that he "makes no claim that the various fees received by the trustee Clark for his legal services were excessive or that the services performed were not necessary." This concession makes it unnecessary to consider this point further in view of the broad powers conferred upon the trustees in the Declaration of Trust as heretofore noted.

Plaintiff's first complaint against trustee Folsom is that he, like trustee Clark, acquiesced in and approved the alleged improper acts of Pollard in his transactions with the trust. What we have said about trustee Clark in this respect applies equally to trustee Folsom.

Plaintiff further places a large share of the blame for the alleged excessive cost of operation of the wells on Folsom since he is manager of the trust. We have, however, heretofore discussed these various items in sufficient detail.

[8, 9] It is to be borne in mind that the trustees are "entitled to the benefit of the presumptions of regularity and good faith." Neel v. Barnard, supra, 24 Cal.2d 406, 421, 150 P.2d 177, 185. These, together with the inferences that the trial court could reasonably draw in favor of the judgment, furnish sufficient evidentiary support for the findings of the court that the trustees have managed and operated the properties of the trust "honestly, and in good faith," and "have not abused the discretion vested in them." Since no "breach of personal trust" appears to have occurred, no basis is established for the removal of the defendants as trustees in view of the very broad powers conferred on them in the Declaration of Trust. Because of these broad powers the authorities relied on by the appellant are not here controlling.

The judgment is affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.

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70 Cal.App.2d 80

KYNE v. KYNE.

Civ. 12811.

District Court of Appeal, First District, Division 1, California.

July 6, 1945.

1. Bastards 🔑19

The issues involved in fixing the amount of support under Civil Code section providing for recovery of support from the father of an illegitimate child are of equitable cognizance. Civ.Code, § 196a.

2. Bastards 🔑78, 92

In fixing award against father for support of illegitimate child, trial court has a wide discretion and, unless there has been an abuse of discretion, appellate courts will not interfere, but such discretion is not absolute and must be exercised along legal lines, taking into consideration circumstances of parties, their necessities, and financial ability of the father. Civ.Code, § 196a.

3. Bastards ⟹78

In a legal sense, trial court's discretion in fixing award against father for support of illegitimate child is abused whenever, in its exercise, a court exceeds the bounds of reason, all the circumstances before it being considered. Civ.Code, § 196a.

4. Bastards ⟹55

In bastardy support proceeding, trial court is not bound by technical rules of evidence and should admit all relevant testimony relating not only to needs of child but also to financial condition of mother and father. Civ.Code, § 196a.

5. Parent and child ⟹3(1)

A child is entitled to be supported in a style and condition consonant with the position in society of its parents. Civ.Code, § 196a.

6. Bastards ⟹55

In bastardy support proceedings, wherein an increase in support award was sought, refusal to permit child to show that father's actual income for particular year was $30,000 rather than $6,400 admitted that father had transferred his property without consideration to his wife to avoid supporting child or to question father as to truth of his former testimony concerning income was error. Civ.Code, § 196a; Code Civ.Proc. § 2055.

7. Bastards ⟹78

In bastardy support proceedings, property fraudulently conveyed by father should be considered in fixing support order. Civ.Code, § 196a.

8. Bastards ⟹55

The pendency of an action by illegitimate son against father to set aside father's purported fraudulent transfers did not preclude the admission of evidence concerning such transfers on application in bastardy support proceedings for an increase in support award.

9. Bastards ⟹55

In bastardy support proceedings on child's application for an increase in support award, evidence as to income of father's wife is competent as bearing upon father's obligation to support his wife as an element of father's ability to pay. Civ. Code, § 196a.

10. Bastards ⟹55

In bastardy support proceedings, on child's application for increased support, he was entitled to examine father with respect to father's prospective income for current year and to show, if he could, that father's income for such year would, in all probability, exceed that for immediate past year and such showing is not objectionable as speculative. Civ.Code, § 196a; Code Civ.Proc. § 2055.

11. Bastards ⟹78

Where award of $60 per month for support of illegitimate child made in 1937 when child was approximately two years old was reasonable under circumstances then existing, changed circumstances consisting of the passage of approximately seven years, substantial increase in father's income, and serious illness of mother preventing her from further contributing to child's support, established need for an increased support allowance. Civ.Code, § 196a.

12. Bastards ⟹94

Award of attorney fees in bastardy support proceedings was reversed, when it appeared that main proceeding would have to be tried anew, so that trial court on new hearing could evaluate attorney's services as a whole.

WARD, J., dissenting.

* * *

Appeal from Superior Court, City and County of San Francisco; Peter J. Mullins, Judge.

Action by Tom Kyne, Jr., a minor, by his guardian ad litem, Nola McMinn, against Tom Kyne, wherein plaintiff was adjudicated to be defendant's illegitimate son, 38 Cal.App.2d 122, 100 P.2d 806, and defendant was ordered to pay a monthly sum for plaintiff's support. From an order denying plaintiff's application for an increase and fixing a fee for plaintiff's attorneys, plaintiff appeals.

Reversed.

See, also, 60 Cal.App.2d 326, 140 P.2d 886, 141 P.2d 221.

Allen Spivock, of San Francisco, for appellant.

John T. Rudden, Jr., of San Francisco (William Clecak and Doyle & Clecak, all of San Francisco, of counsel), for respondent.

PETERS, Presiding Justice.

By a judgment affirmed by this court (Kyne v. Kyne, 38 Cal.App.2d 122, 100 P. 2d 806) defendant Tom Kyne was ordered to pay a monthly sum for the support of plaintiff, Tom Kyne, Jr., found by a jury to be Tom Kyne's illegitimate son. The present proceeding is a motion in the original action to increase the monthly support allowance from $60 to $250, and for attorneys' fees. The trial court denied the application for an increase, and awarded plaintiff's attorneys for their services on the motion the sum of $150. Plaintiff appeals from both portions of the order, contending that the trial court abused its discretion in denying the increase and in fixing the amount of the fee, and that prejudicial error was committed in excluding certain evidence.

[1] The main action was brought under section 196a of the Civil Code which, prior to certain 1939 amendments, read as follows: "The father as well as the mother, of an illegitimate child must give him support and education suitable to his circumstances. A civil suit to enforce such obligations may be maintained in behalf of a minor illegitimate child, by his mother or guardian, and in such action the court shall have power to order and enforce performance thereof, the same as under sections 138, 139 and 140 of the Civil Code, in a suit for divorce by a wife." It has been held that the issues involved in fixing the amount of support under this section are of equitable cognizance. Kyne v. Kyne, 38 Cal.App.2d 122, at page 133, 100 P.2d 806.

The original judgment was dated December 16, 1937. At that time plaintiff was one year and ten months old. The judgment provided that defendant should pay to plaintiff $100 a month from the date of birth, February 15, 1936, to January 15, 1938, and thereafter "and continuing until further order of this Court, or until the majority of plaintiff" the sum of $60 per month. Defendant has made all payments called for by this judgment. No application for an increase was made until the present motion was noticed for March 22, 1944. On that date plaintiff was eight years and one month old. The motion was based on the theory that since the original order was made in 1937 circumstances have so changed that an increase in the award is warranted. The alleged changed circumstances are that plaintiff is now eight years old, that the cost of living has increased since 1937, that defendant's income has increased since 1937, and that the health of plaintiff's mother is now such that she cannot work to contribute to his support.

[2, 3] Before directly discussing the evidence, some reference should be made to the rules of law applicable to this type of proceeding. In fixing the amount of allowance the trial court necessarily has a wide discretion, and unless there has been an abuse of discretion the appellate court will not interfere with the determination of the trial court. Gambetta v. Gambetta, 30 Cal.App. 261, 157 P. 1141; Brockmiller v. Brockmiller, 57 Cal.App.2d 623, 135 P.2d 184; Hale v. Hale, 55 Cal.App.2d 879, 132 P.2d 67; see cases collected 9 Cal.Jur. 809, § 147. But the discretion conferred on the trial court is not absolute. As was said in Makzoume v. Makzoume, 50 Cal.App.2d 229, 231, 123 P.2d 72, 73: "But this discretion is not arbitrary. '* * * it must be exercised along legal lines, taking into consideration the circumstances of the parties, their necessities, and the financial ability of the husband. * * * In a legal sense, discretion is abused whenever, in its exercise, a court exceeds the bounds of reason,—all the circumstances before it being considered.' 1 Cal.Jur. 965." See, also, to the same effect Kosloff v. Kosloff, 67 Cal. App.2d 374, 154 P.2d 431.

[4, 5] In such a proceeding the trial court is not bound by technical rules of evidence. Rose v. Rose, 109 Cal. 544, 42 P. 452; Busch v. Busch, 99 Cal.App. 198, 278 P. 456; Youree v. Youree, 1 Cal.App. 152, 81 P. 1023. The trial court should admit all relevant testimony relating not only to the needs of the child but also to the financial condition of the mother and father. A child, legitimate or illegitimate, is entitled to be supported in a style and condition consonant with the position in society of its parents. As was said in Bailey v. Superior Court, 215 Cal. 548, at page 555, 11 P.2d 865, at page 868: "The father's duty of support for his children does not end

with the furnishing of mere necessities if he is able to afford more."

[6-8] The evidence in the present case, insofar as it relates to the issue of support, consists of the testimony of defendant, called by plaintiff under section 2055 of the Code of Civil Procedure, and the deposition of plaintiff's mother. Defendant offered no evidence at all on his own behalf. Defendant testified that in 1943 he had filed a separate income tax return showing an income of about $6,400 for that year. He admitted that his wife likewise filed a separate return in the identical amount and that this entire income was from his business. Plaintiff then sought to prove that defendant's actual income in 1943 was in fact $30,000. The trial court sustained objections to these questions. Counsel for plaintiff then made a formal written offer to prove that defendant had testified in 1936 and 1937 that he had transferred to his wife in April, 1936, just after the birth of plaintiff, certain real property, his interest in a partnership operating a concession at Bay Meadows and certain stock; that the above was all of defendant's property with the exception of his betting commission business; that all of said transfers were made without consideration and for the express purpose of preventing plaintiff and his mother from obtaining any of said property for plaintiff's support; that after making said transfers defendant received the income from the above-mentioned properties from his wife whenever he wanted it; that in 1943 the total income from the stock, the Bay Meadows partnership and the betting business was $30,000. As already indicated, the trial court refused to admit this testimony. The trial court also sustained objections to all questions relating to the income of defendant's wife. Defendant testified that in 1937, when the original order for $60 per month was made, he had testified that his income was then $2,000. The trial court sustained an objection to the following question: "Was that affidavit and your sworn testimony that your income was $2,000.00 in 1938, true?" Counsel for plaintiff then attempted to get the witness to discuss his probable earnings in 1944 but the trial court sustained objections to all such questions. All of these rulings were erroneous, and clearly prejudicial. As already pointed out, one of the major issues in such a proceeding is the financial position of the father. Obviously, what might be a reasonable award against a father making $6,400 a year might and probably would be totally inadequate against a father making $30,000 a year. If defendant had in fact divested himself of his properties to defeat plaintiff's claims for support, and if he was still enjoying the income from such properties, the trial court should have considered those facts in making the award. The law is well-settled, and defendant cites no case to the contrary, that property fraudulently conveyed by a husband or father should be considered in fixing alimony or support. The rule is thus stated in 27 C.J.S., Divorce, p. 955, § 233, subsec. b (2), (b): "Property fraudulently conveyed by the husband to third persons may be considered in fixing the amount of alimony to be awarded." See, also, 19 Cor. Jur. 253, § 588(2); cited in support of both texts are Dougan v. Dougan, 90 Minn. 471, 97 N.W. 122; Griffith v. Griffith, Mo.App., 190 S.W. 1021; Grobart v. Grobart, 119 N.J.Eq. 565, 182 A. 630; Ball v. Ball, 206 Ky. 532, 267 S.W. 1081; see, also, Youree v. Youree, 1 Cal.App. 152, 81 P. 1023.

Defendant tacitly admits that in most cases evidence of fraudulent transfers is admissible in support cases, but urges, without citation of authority, that it was not admissible here because the evidence shows that long prior to the filing of the present motion plaintiff instituted an action against defendant to have these allegedly fraudulent transfers set aside, and that such action is still pending in another department of the Superior Court. There was no showing that the delay in deciding that case was in any way the fault of plaintiff. The exact theory why the pendency of this action should make the proffered evidence inadmissible is not very clearly stated by defendant. He states: "If the trial judge in the instant case had allowed evidence of the purported fraudulent transfers to be introduced, he would, in effect, be passing upon or rendering a decision in a matter that was not properly before the court and, in fact, was under submission in another department of the same court before a different judge." Res. Br. p. 10. Apparently it is the thought of defendant that the pendency of the other action creates some sort of estoppel. The contention is without merit. The mere fact that plaintiff, to protect his rights in certain other judgments he has against defendant, has seen fit to bring an action to have certain claimed fraudulent transfers set aside, cannot justify the trial court's refusal to consider all relevant evidence in this support proceeding. Support proceedings are of an emergency nature, and both parties are entitled to have all relevant evidence admitted on the issues involved. One of the main issues involved is the actual income of the father. Here plaintiff not only offered to prove that the transfers were fraudulent, but also that the income from the properties was actually made available to defendant by his wife whenever he wanted it. This was certainly relevant testimony on the issue of defendant's ability to pay, and its exclusion was clearly not only erroneous but also prejudicial.

[9] The evidence as to the wife's income also should have been admitted. Obviously, in considering defendant's ability to pay, evidence of his obligations, including his duty of support of his wife, is admissible. If the evidence shows that the wife has a large independent income and is in fact not being supported by the husband, those factors would be clearly relevant in determining how much money defendant actually had available to support his son.

[10] The various questions relating to defendant's prospective income for the year 1944 were also proper. They were not speculative. Plaintiff was entitled to show, if he could, that defendant's income for 1944 would in all probability exceed that for 1943.

The trial court should clearly have permitted counsel for plaintiff to inquire as to whether, in 1937, when the original award was made, defendant's income was but $2,000. If the original award was based on such an income, the admitted increase of income to at least $6,400 a year would be a most relevant factor to consider in determining whether the award should be increased.

[11] In view of these serious and prejudicial errors the issues here involved must be sent back for a new trial. It should be mentioned that plaintiff's mother testified to facts which, if believed, amply warranted an increase in the support allowance. Some time before she filed this proceeding as guardian ad litem for her son, she underwent a hysterectomy for a cancerous condition of her female organs. She was in bed when her deposition was taken and had been told that she must remain there indefinitely and would not be able to work for at least a year. She was heavily in debt to relatives and doctors for expenses in connection with her operation. She has no assets of any kind. She testified that plaintiff is unable, on the allowance now existing, to dress like other boys, and has on occasion, expressed to her his embarrassment caused by his lack of proper clothing; that for the same reason he cannot attend Sunday School; that she has been unable to buy him toys similar to those the other boys in his class have; that the boy would like to study music but she cannot, out of the present allowance, pay for such lessons; that the boy would like to go to a summer camp with his friends but cannot do so for lack of money; that the boy needs his tonsils removed but has no money to pay for the operation; that because of her sickness she must hire someone to assist her in caring for the boy. She also testified that she is now married; that her husband had been in the service; that he had been discharged about five months before the date her deposition was taken; that he was temporarily employed as a bartender at a salary of about $200 per month. Her husband, of course, is under no legal responsibility to contribute to the support of the child. Defendant analyzes the testimony of this witness, and by making certain calculations proves to his apparent satisfaction that the witness admitted that $60 a month was all that was necessary to support the boy. This result is arrived at by simply disregarding certain of the items appearing in her testimony, such as the proposed tonsilectomy, the cost of music lessons, summer camp and incidentals, and by making no allowance at all for a reasonable amount for the care of the boy. While her estimate of $250 a month was undoubtedly too high, there can be no reasonable doubt but that the evidence demonstrates to a certainty the need for a material increase in the award. If the $60 award was reasonable in 1937, under the circumstances then existing, and we must conclusively presume that it was, then, in view of the increased cost of living in recent years, in view of the mother's present inability to contribute to the child's support, in view of the increased income of the defendant, and in view of the other changed circumstances appearing in the record, the need for an increased allowance was definitely established. In the light of this evidence, it might well be held that as a matter of law this plaintiff established the need for such an increased allowance. However, in view

of the erroneous and prejudicial rulings in the evidence already discussed, it is not necessary to base the reversal on this ground. There can be no doubt that the rulings on the admission of evidence were erroneous and were prejudicial, and this alone requires a reversal.

[12] So far as the allowance of attorneys' fees is concerned, it is obvious that there must be a new trial and that further services in connection with the motion have been rendered on this appeal and will be rendered on the new trial. The trial court on the new hearing will be in a position to evaluate the services as a whole. For that reason justice will best be served by reversing that portion of the order appealed from.

The portions of the order appealed from are reversed.

KNIGHT, J., concurs.

WARD, Justice (dissenting).

I dissent.

This is an appeal from an order and decree denying plaintiff's motion to increase an allowance for support from $60 to $250 a month and ordering defendant to pay $150 for legal services. No appeal is taken from the order in so far as it directs that an amount of $16.43, in addition to $100 already paid as costs on this motion, shall be paid by defendant. In brief, the appeal involves the following: Does the record support the order denying an increase in the monthly payment for the support of the plaintiff child? Was the trial court justified in refusing to admit testimony relative to a transfer of certain property by defendant to his wife? Should the trial court have awarded more than $150 as attorney fees?

In an application of this kind, while the discretion given the trial court to fix amounts to be paid for support may not be used arbitrarily, of necessity a wide latitude must be allowed for the reason that an appellate court is unable to test the credibility of witnesses or note their reaction, generally or particularly, during the giving of testimony. Unless the conclusion of the trial court indicates a plain abuse of discretion resulting in injustice to one side or the other, an appellate court should not interfere. "In a legal sense, discretion is abused whenever, in its exercise, a court exceeds the bounds of reason." Makzoume v. Makzoume, 50 Cal.App.2d 229, 231, 123 P.2d 72, 73.

A parent's duty may not end by supplying necessaries if he is able to afford more (Bailey v. Superior Court, 215 Cal. 548, 11 P.2d 865), but that does not mean that a parent should be forced to maintain a child, the mother of the child and her relatives in a state of luxury as compared with their former mode of living if the trial court may reasonably draw an inference of the existence of such a situation. There is evidence that formerly the family of the minor plaintiff's mother contributed to the upkeep of her home, and that she borrowed money from her brother and sisters, but the principal means of the family's support was the $50 a week which the husband of plaintiff's mother received as salary, plus the monthly payment of $60 by defendant for the support of the minor, which amount was paid regularly. No record of the disbursement of the $60 was kept. The money seems to have been mingled with the husband's salary of approximately $225 a month.

The guardian ad litem, the mother of the minor child, now requests $250 a month. My associates find that such amount "was undoubtedly too high * * * but that the evidence demonstrates to a certainty the need for a material increase in the award." The majority opinion also declares that "it might well be held that as a matter of law this plaintiff established the need for such an increased allowance." If it might be so held, why not do so and eliminate the discussion of prejudicial error in the rulings of the court on the admission of evidence. If the alleged errors of the court on admission of evidence afford a sound basis for reversal, I cannot understand the purpose of a reviewing court determining as a fact that $250 is too high and $60 too low. As I understand the function of an appellate court, in a proceeding of this nature it is to determine whether there is any substantial evidence to support the conclusion of the trial court. The opinion of my associates in reference to the minimum and maximum amounts is not an adjudication and hence not binding on the trial court.

It is my duty to determine whether the trial court under all the circumstances abused its discretion in denying an increase. Brockmiller v. Brockmiller, 57 Cal.App.2d 623, 135 P.2d 184. In that regard the following circumstances may be considered.

The record shows that the defendant has never been in default in the $60 monthly payment for the support of the child. This is the first attempt since the original order was signed in 1937 to obtain an increase. About two and a half years prior to the present hearing the mother requested one of her attorneys to have the amount increased, but the attorney thought "That at the present time sixty dollars was probably enough." At a later date the attorneys could not present the motion for increase because they were busy with another appeal in the same case.

There does not appear to have been a diligent effort to increase the amount until the present application was filed, in which it is claimed the boy needs $250 a month. The mother testified to expenditures for necessaries, such as food, clothing, etc., in itemized amounts which total $601.50 annually. A balance of $118.50 from the $720 contributed yearly by defendant was left to pay for luxuries for this nine year old boy—a sum in excess of $9 a month.

The amount claimed by the mother as proper for necessities and luxuries is $250. It should be remembered that the income of the mother's husband and the payments for the support of the child have not been heretofore segregated. The amount of $250 exceeds the income of the mother's husband by $25 a month *when* he is working. The mother itemized the amounts which total $250 as follows: food, $40; clothing, $40; medical care, $15; housekeeper, $100 salary and $25 food; toys, vacation, music lessons, etc., $30 a month. In addition, the mother testified that she owed $800 for doctors' and hospital bills and several thousand dollars to other parties from whom she had borrowed money. She also discussed the probability of sending the minor to a boys' summer camp for three months at a cost of $100 a month, and the possibility of an operation for the removal of his tonsils and adenoids at a cost of from $150 to $180. These items would seem to be extraordinary expenses for which a special application to the court might be made if the vacation is advisable and the operation necessary. Whether the $300 vacation cost plus the "$150.00 to $180.00" was included in the amount requested by appellant is not made plain. If such amounts were included in the yearly total, there would be insufficient funds to pay for music lessons, toys, etc.

Much of the evidence presented by the mother is a recital of her own unfortunate physical condition, and some of the questions presented to the defendant might indicate a desire to prove and force him to admit that he is in the "betting business." There is not an iota of evidence in the present record that he is in that business. Though one might unconsciously be prejudiced against the defendant, and likewise sympathetic with the ill mother, after reading appellant's brief I am satisfied that it was not the intention of appellant to override judicial rules and have this case decided by the trial court through sympathy on the one hand or prejudice on the other.

The trial court was not only fair in assisting appellant to prove his case by pointing out the proper method of procedure, but stated several times that "There is just one issue before me: Does this child require more money? And should the defendant pay more money? And are the assets such that he should pay more money?" Appellant seemed anxious to prove that the wife of defendant is in possession of certain assets the income from which amounts to $25,000 a year. The court insisted that the first issue to determine was: "Does this child require more money?" The trial court may have taken judicial notice (Code Civ.Proc. § 1875) of the fact that during the depression years $60 a month for the support of a child of one or two years was in excess of the ordinary allowance by fifty per cent or more. The trial court found that for a child of nine years $60 was more than enough to cover expenses for necessities, leaving $10, minus a few pennies, for luxuries, and that it was sufficient under the present circumstances. The court may have considered that expenditures from the $60 had not been segregated from those made from the mother's husband's $225, and that the $250 might assist materially in supporting the family when the husband was not working. The court considered that if the testimony relative to the physical condition of the mother is true, in a short period she will be incapacitated and unable to care for the child, in which event his best interests would doubtless require investigation and readjustment. It is impossible to determine the exact reasons actuating the trial judge, but from the foregoing facts and circumstances he may have concluded that there should not be an increase in the amount for the support of the child. If so, he did not act arbitrarily. It is the duty of appellant to establish an abuse of discretion. Hale v. Hale, 55 Cal.App.2d 879, 132 P.2d 67. In Gambetta v. Gambetta, 30 Cal.App. 261, 263, 157 P. 1141, 1142, referring to an amount fixed by the trial judge, the court said: "* * * we are not in a position, nor are we disposed, to interfere with the conclusion of the trial court upon that subject." I am unable to say that the trial judge, in view of all the circumstances, abused his discretion and that as a matter of law he exceeded "the bounds of reason." Sharon v. Sharon, 75 Cal. 1, 48, 16 P. 345, 366. This brings me to a consideration of the designated cause of reversal set forth by appellant.

Among the "issues involved" the opening brief presents the following: "In determining the amount of support by a father for his minor child, may the Court refuse to consider the father's admittedly fraudulent transfer of about $100,000.00 worth of his property to evade said support?" The opening statement contains the following: "[Attorney for Appellant] We expect to prove, we expect to show when the $60.00 allowance was made in 1938 or 1939, it was based on a showing and affidavit filed in the papers of this case by Tom Kyne, saying his earnings were $200.00 a month. * * * We expect to show further, from official records and transcripts, that at that time he was making over $25,000, and to-day we will show he is making in excess of that amount. That will be our showing in this case." The transcript also shows the following:

"[Attorney for Appellant] Q. Well, let us ask the direct question. Take the period for the last twelve months, what has been your average earnings each month? A. I made about $6400.00 last year. * * *

"Q. Now, Mr. Kyne, do you own any shares in the Multnomah Kennel Club? A. No, sir, I don't.

"Q. Does your wife? A. Yes, sir, she does. * * *

"Q. Now, isn't it true, Mr. Kyne, that you testified earlier that the reason for that transfer on those just referred to hundred shares at the dog track, was because you felt you were being blackmailed in this paternity case? [An objection was here sustained.] * * *

"Q. Now, Mr. Kyne, that $6,400.00, without telling us where it came from, did not come from either the earnings from the dog track or the H & K concessions? A. No sir.

"The Court: Q. So you claim no further interest in those matters? A. That is right, Judge. * * *

"The Court: The only thing I am concerned about now is his present financial status, and what the child's requirements are.

"[Attorney for Appellant] Very well. For the record, Your Honor, may we make an offer of proof at this time: That six or seven years ago this defendant transferred assets in the neighborhood of $100,000.00 to his wife. We expect to show—We offer to show that the purpose for which that transfer was made was to evade his liability to this child. We offer further to show that at the present time his wife is receiving in the neighborhood of $25,000.00 a year from these very assets that were transferred by this defendant to his wife, to evade his liability toward this child. That is our offer of proof."

The offer was denied. The transcript also shows:

"[Attorney for Appellant]: Q. And at that time is it true you testified, and filed different papers under oath that your earnings were $2,000.00 or thereabouts a year? A. At that time, yes."

The witness was then interrogated relative to his interest in a race track, his bank accounts, commercial and savings, stock and bonds held by himself or by any person for him. He testified that he did not receive money from his wife at "any time" he asked for it.

A written offer of proof was introduced as an exhibit. It contained the following offers pertinent to the present claim of prejudicial error in the admission of evidence: (1) That defendant shortly after the birth of the minor transferred to his wife, without financial consideration, certain real property and interests in certain concessions for the "purpose of preventing plaintiff and his mother from obtaining any of same for plaintiff's support or otherwise"; (2) that after said transfers he received income from the above property from his wife whenever he wanted it. There is definite testimony that he did not receive any income from any of the property whenever he wanted it. It appears that a separate action to set aside the alleged fraudulent transfers is now pending.

If defendant had testified in a previous proceeding that he transferred property to his wife because he thought that he was being blackmailed, appellant should have produced and confronted the witness with the record. I do not quite understand how appellant would have gained an advantage had the defendant been permitted to repeat (if he had previously so testified) that he had transferred the property because he thought he was being blackmailed.

All questions relating to the income of defendant's wife in the form in which they were propounded, irrespective of relevancy or materiality, were objectionable as incompetent. Notwithstanding that under judicial decision in this class of cases the court is not always bound by technical rules, nevertheless litigants should present the best evidence reasonably obtainable. All of these matters could have been proved, if true, by the production of other evidence which the surrounding circumstances show to have been available. Defendant testified that he had no interest in or income from his wife's property. Appellant did not seek to call defendant's wife as a witness or to contradict him by other evidence.

Property fraudulently conveyed to some other person by a parent with intent to defraud a minor child may be considered in fixing the amount of support to be awarded unless it appears that there are sufficient funds to amply cover the support of the child without considering property which, as in the present case, up to date has never been judicially declared *fraudulently* conveyed property.

Unless proof of the alleged fraudulent transfer is vital to this case, the evidence should not be admitted. Ordinarily litigants should not be permitted to unravel issues in one action by instituting a second action which is not a part of the main proceeding, but the evidence thereon merely tends to prove or disprove a vital issue in the first action. It is true that support of a minor child is a matter in which the state and the parties are materially interested. The truth of a statement made in 1938 that if the wife returned the alleged fraudulently conveyed property the defendant would have an income of $25,000 a year is immaterial if the parent has sufficient now to support the child.

The amount that the mother requests is $250 a month. If appellant's statement is correct—that the $60 a month order was based on an income of $2,000 a year, then the trial court, if convinced that any increase should be made, would be justified in awarding 180 odd dollars a month based upon an income of $6,400 a year. There are certain statements in appellant's brief from which an inference may be drawn that appellant did not expect to obtain $250. In the brief the following appears: "The estimate of $125 per month for the boy's needs was reasonable * * *" This, of course, would exclude the $125 for the housekeeper who would be performing work not only for the child but for the mother and the mother's husband. However, it may be contended that the "$125" was a clerical error; that $250 is the figure intended in the brief. This is not borne out by the subsequent statement in the brief that "The denial of *any* increased support above said $60.00 per month is shocking * * *" (Emphasis added.) This statement is repeated in substance in the closing brief. On appeal there is no real contention made that the amount should be fixed in the sum of $250.

In my opinion the transcript indicates that the trial judge was patient and helpful to appellant during the presentation of the evidence. He had a thorough grasp of the issues involved and the purpose of the application. He also refused to permit appellant to attempt to degrade the defendant on matters which were not vital to the issues in the case. The record indicates that the hearing was conducted in a dignified manner and that the rulings on admission of evidence were fair and just under all of the circumstances, and in accordance with the established rules of evidence. The record does not indicate that the trial judge was in any respect swayed by caprice or partiality, or that he was arbitrary in the conduct of the hearing. Certainly appellant was not prejudiced by any ruling made in this particular proceeding. At a later age and under different circumstances the trial court might be justified in changing the amount of support for this minor.

So far as the appellate court is concerned, its function and the trial court's broad latitude in passing upon the evidence were well set forth as follows by this court during the oral argument: "Now, it is incumbent upon you, as I see it, to show not only that the evidence would have supported an increase in the award, but that that is the only possible conclusion and that the Trial Court's power to pass on credibility of witnesses, which is almost unlimited, pass on the weight of the evidence—you have to say that the only possible conclusion as a matter of law that can be entered here that there was no basis for the Trial Court disbelieving your testimony, it is not a question of whether there is any evidence to support the negative finding; it is whether or not it is compelled to enter into a finding raising the award, considering the fact that the Trial Court has a power to pass on credibility and weight of evidence. * * * Of course, the Trial Court is in a different position than the Appellate Court in passing on credibility of witnesses. What may seem to be totally uncontradicted evidence here so far as the record is concerned may have other factors of inherent weakness that makes the Trial Court nearly omnipotent in that field."

The last question presented on appeal is the question of the insufficiency of the order for attorney fees. The majority opinion reverses that portion of the order and suggests that on a new trial the court may "evaluate the services as a whole." This may be done if the defendant consents to such procedure (Newlands v. Superior Court, 171 Cal. 741, 154 P. 829), otherwise an allowance may not be made for past services. Dixon v. Dixon, 216 Cal. 440, 14 P.2d 497; Brockmiller v. Brockmiller, supra. Supplemental allowances may be made. Collins v. Welsh, 2 Cal.App.2d 103, 37 P.2d 505. "The court has no jurisdiction to order payment for services rendered prior to the order." Shopiro v. Shopiro, —— Cal.App.2d ——, 153 P.2d 62, 68. In the present proceeding it appears that it was stipulated that the fixing of the fee might be deferred until proceedings on the motion in the trial court were concluded.

In awarding support for a child or in fixing attorney fees the court should be guided by what appears to be for the best interests of the child. Attorney fees in a case of this character should not be fixed nor should they be sought on a scale to unduly enrich the attorney. The amount of attorney fees in a proceeding for support of a child should be fixed somewhat as the amount of support for a wife in a divorce action is ascertained—by considering the importance of the action, the legal questions involved, the amount of time consumed in the conduct of the case, the usual charges in similar communities and the possible and probable amount, if any, that may be recovered. Shopiro v. Shopiro, supra.

Nothing was recovered, and it appears to me that the fee fixed was sufficient under the circumstances. "The value of an attorney's services is a matter with which a judge must necessarily be familiar. When the court is informed of the extent and the nature of such services, its own experience furnishes it with every element necessary to fix their value. Consequently, the trial court is not bound to fix the amount of the fee in accordance with the opinion of expert gentlemen, learned in the law." 3 Cal.Jur. § 111, pp. 714, 715. The record herein referring to fixing the amount of attorney fees shows definitely that appellant consented that the court might use its judgment in awarding the amount.

In my opinion the order and decree appealed from should be affirmed.

SATTERLEE v. ORANGE GLEN SCHOOL DIST. OF SAN DIEGO COUNTY et al.*

Civ. 3381.

District Court of Appeal, Fourth District, California.

July 16, 1945.

Hearing Granted Sept. 13, 1945.

1. Evidence 🔑265(18)

Testimony that defendant school bus driver told witnesses immediately after automobile collision at intersection that he did not know how accident happened because first thing he knew plaintiff's automobile was in front of him and defendant did not have time to stop, sustained jury's implied finding that defendant's negligence was proximate cause of collision.

2. Automobiles 🔑245(39)

Generally when a person looks and sees an automobile and either misjudges its speed or distance from him, the question of whether he should have looked again, on issue of his contributory negligence, is one of fact for jury and not of law for court.

* Subsequent opinion 177 P.2d 279.

3. Appeal and error ⚷1001(1)

Jury's implied finding in automobile collision case that plaintiff was not contributorily negligent in failing to further observe defendant's approaching school bus could not be disturbed on appeal where amply supported by evidence, though a contrary finding would have had much evidentiary support.

4. Automobiles ⚷246(25)

Trial court's failure to instruct jury that plaintiff motorist's failure to observe Vehicle Code right of way rules as to approaching and entering intersection constituted negligence as requested by defendant was error. Vehicle Code, § 550, St.1937, p. 619.

5. Trial ⚷253(4)

Instructions that motorist approaching or entering intersection cannot arbitrarily rely on statutory right of way rules, ignoring any danger to another motorist, but that true test is what would a reasonably prudent person do under same or similar circumstances, were erroneous as stating only part of law on subject, and as not in proper form. Vehicle Code, § 550, St.1937, p. 619.

6. Automobiles ⚷171(4)

That defendant's school bus approached intersection on right of plaintiff's automobile would not give bus right of way if plaintiff's automobile entered intersection first. Vehicle Code, § 550, St.1937, p. 619.

7. Automobiles ⚷244(11)

In automobile collision case, evidence that at moment of impact defendant's school bus had proceeded 11 feet into intersection and that plaintiff's automobile had traveled 20 or 22 feet into intersection, justified finding that plaintiff had entered intersection first and, therefore, had right of way, though otherwise bus, being on plaintiff's right, would have had right of way. Vehicle Code, § 550, St.1937, p. 619.

8. Appeal and error ⚷1170(9)

Where evidence in collision case justified finding that plaintiff's automobile had entered intersection first and therefore had right of way over school bus, though otherwise bus would have had right of way because it approached intersection from plaintiff's right, error in giving and refusing instructions as to statutory right of way at intersections, and that violation of such statute constituted negligence was not prejudicial to defendant, and therefore would not authorize reversal of judgment for plaintiff. Vehicle Code, § 550, St. 1937, p. 619; Const. art. 6, § 4½.

◆

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Action by G. E. Satterlee, also known as Ed Satterlee, against Orange Glen School District of San Diego County and others for injuries and death sustained in an automobile collision. Judgment for plaintiff, and defendants appeal.

Affirmed.

Tripp, Callaway, Sampson & Dryden, of Los Angeles, for appellants.

William M. Hawkes, of Escondido, and Monroe & McInnis, of San Diego, for respondent.

MARKS, Justice.

This is an appeal from a judgment for damages suffered by plaintiff in a collision between motor vehicles in the intersection of Citrus Drive and Bear Valley Road near Escondido in San Diego County on May 27, 1943. Plaintiff was seriously and permanently injured and his wife died as a result of the injuries suffered in the collision. No question is raised as to the amount of damages awarded.

Citrus Drive runs in a general northerly and southerly direction, and Bear Valley Road in a general easterly and westerly direction. Both are improved, hard surfaced country roads. The surfaced portion of Bear Valley Road, together with its shoulders, is 29 feet wide, while that of Citrus Drive is 32 feet wide. From several hundred feet south of Bear Valley Road, and thence northerly, the roadway of Citrus Drive descends a slight grade to a point about 60 feet south of Bear Valley Road where the grade flattens out. The grade of Bear Valley Road is approximately level on both sides of Citrus Drive. Drivers approaching the intersection from the east and south have a clear and unobstructed view in those directions of the roads for a distance of from five to six hundred feet from the intersection.

The accident happened at about 8 o'clock a.m. The morning was misty so that the roadways were damp but the mist was not sufficiently dense to affect visibility.

Defendant Paul Osteraas was employed by the Orange Glen School District to drive the school bus. He was driving west on Bear Valley Road on the business of his employer at the time of the accident. Plaintiff, accompanied by his wife, was driving his automobile north on Citrus Drive.

Plaintiff testified that he was driving at a speed of about 25 miles an hour; that when he was 75 or 100 feet south of the intersection he looked to his right and saw the school bus on Bear Valley Road about double that distance from the intersection; that he thought he had "worlds of time" and proceeded on his way; that he did not see the bus again until just before the impact. A witness who lived on Citrus Drive just south of the intersection testified that he was driving his automobile from his garage to Citrus Drive and saw plaintiff's car pass him; that it was traveling between 25 and 30 miles an hour.

[1] Osteraas testified that he was driving the bus west on Bear Valley Road at a speed of between 25 and 35 miles per hour; that when he was 195 feet east of the intersection he looked to his left and saw plaintiff's car about 300 feet south of the intersection proceeding north at a speed of between 35 and 45 miles an hour. In reply to the question of which vehicle entered the intersection first, he said: "I did." He admitted he realized that if neither vehicle slackened its speed the two would reach the intersection at approximately the same time; that he expected plaintiff to slacken his speed; that he did not again see plaintiff's car until it was too late to avoid the collision.

Considerable doubt may have been cast on this testimony of Osteraas by the testimony of four disinterested witnesses who heard him say after the accident that he did not see the Satterlee car until just before the collision; that he did not know how the accident happened as the first thing he knew the car was in front of him and he didn't have time to stop. He made other remarks of like impact. With this evidence before them the jurors might well have concluded that Osteraas did not see plaintiff's car when it was south of the intersection and that he did not look for traffic approaching on Citrus Drive until the school bus was too close to plaintiff's car to stop or otherwise avoid the collision. This amply sustains the implied finding of the jury of negligence on the part of Osteraas which was the proximate cause of the accident.

[2, 3] It is well established as a general rule that when a person looks and sees an approaching automobile and either misjudges its speed or the distance from him, the question of whether he should have looked again, in other words, his contributory negligence, is one of fact for the jury and not of law for the court. Shaw v. Robertson, 8 Cal.App.2d 520, 48 P.2d 128. Thus the implied finding of the jury that plaintiff was not guilty of contributory negligence in failing to further observe the approaching school bus may not be disturbed on appeal although a contrary finding, had one been made, would have had much evidentiary support.

As grounds for reversal defendants urge errors on the part of the trial judge in failing to give an instruction which they requested, and giving another instruction on his own motion.

The requested instruction first quoted section 550 of the Vehicle Code, St.1937, p. 619, which governs rights of way at intersections. It proceeded to inform the jury that a violation of these rules by plaintiff would constitute negligence and that if such violation contributed to the accident and injury plaintiff could not recover.

[4] The trial judge gave the jury the substance of section 550 of the Vehicle Code but failed to inform that body that violation of law is negligence. This is the law and the failure to so instruct the jury, when requested to do so, was error.

[5] The trial court gave the following instructions:

"Now, with reference to this matter of right of way, I wish to tell you members of the jury that one may have the right of way and yet be negligent. One cannot rely on the right of way arbitrarily and force everyone else off the highway. He cannot barge in and claim the right of way over one whose approach may be a menace to his safety or to the driver of that automobile's safety. The same test which I have given you originally applies in cases on intersections of highways, regardless of who was in the intersection first, and regardless of which automobile is on the right, if they approached at the same time; that is, what would a reasonably prudent person have done under the same or similar circumstances. That applies to both drivers colliding, whether they approach the intersection at the same time, enter it at the same time, or one entered the intersection first. In other words, these rules of law are not absolute. They must be considered in connection with what would a reasonably prudent person have done under the same or similar circumstances. * * *

"I told you substantially of the rules of law and gave you what is called the basic speed law. I told you that when two automobiles enter an intersection at the same time the automobile or motor vehicle, whether bus or lighter vehicle, on the right, has the right of way, and if one motor vehicle enters an intersection before the other, that motor vehicle has the right of way, but that the right of way is not an absolute right to barge through ignoring any danger to the other motorist or to the barging motorist. One cannot arbitrarily rely on the right of way and expect to scatter from his path all of those who have lesser rights. In other words, the same general rule applies, and the test is: What would a reasonably prudent person do under the same or similar circumstances? It is possible that one who has the right of way may be negligent in the operation of that unquestioned right, under a certain set of circumstances."

While there is much of common sense in the quoted instructions, they only state part of the law on the subject which they purport to cover and we do not regard them as in proper form. It remains for us to determine whether or not these errors were prejudicial. This requires a consideration of the evidence as to which vehicle entered the intersection first. If plaintiff entered the intersection first, then he had the right of way and Osteraas was the one who violated the law in trying to take that right of way from him. If plaintiff entered the intersection first, the failure of the trial judge to instruct the jury that violation of section 550 of the Vehicle Code was negligence could not have prejudiced defendants. The same is true of the two quoted instructions for they were directed against the driver of the vehicle which had the right of way.

[6] It is admitted that the school bus approached the intersections on the right of plaintiff. This would not give the bus the right of way if plaintiff's vehicle entered the intersection first. (Sec. 550, Vehicle Code.)

[7, 8] It is established that the left front corner of the bus struck the right side of the automobile either over the right front wheel or opposite the right front door which would be from 4 to 6 feet to the rear of the front of the sedan. Osteraas applied the brakes on the school bus when it was several feet east of the intersection.

The point of impact was 1½ feet north of the center line of Bear Valley Road produced across the intersection, and 5 feet east of the center line of Citrus Drive produced across the intersection. Thus at the moment of impact the front of the school bus had proceeded 11 feet into the intersection while the front of the automobile driven by plaintiff had traveled 20 or 22 feet into it. Thus the jury was fully justified in concluding, and probably did conclude, that plaintiff entered the intersection first and therefore had the right of way over the bus. Thus the refusal to give the requested instruction and the giving of the quoted instructions did not prejudice defendants.

In any event a careful study of the instructions given and refused, and of the entire record, has failed to show us that there has been a miscarriage of justice in this case. For this reason we cannot reverse the judgment because of the constitutional provisions. (Art. VI, Sec. 4½, Const.)

The judgment is affirmed.

BARNARD, P. J., concurs.

CALHOUN v. CALHOUN.

Civ. 3376.

District Court of Appeal, Fourth District, California.

July 19, 1945.

Rehearing Denied Aug. 11, 1945.

Hearing Denied Sept. 13, 1945.

1. Divorce ⚷327

Evidence did not justify holding Nevada divorce decree obtained by husband invalid on ground of fraud on husband's part in leaving California and going to Nevada for sole purpose of obtaining a divorce, where it appeared that husband had established a bona fide residence in Nevada and had become a resident and citizen of that state.

2. Divorce ⚷329

Failure of husband to disclose to Nevada court, when obtaining divorce under statute authorizing divorce, at either spouse's suit, when spouses have lived apart for three years without cohabitation, that a California decree had denied him a divorce on ground that separation of parties was caused by sole fault of husband, did not render Nevada divorce decree invalid on ground of fraud on husband's part, since Nevada statute does not require that a party should be without fault. Comp. Laws Nev. § 9467.06.

3. Divorce ⚷327

The California courts must give full faith and credit to divorce decree of a sister state obtained in accordance with laws and practices of that state and obtained without fraud if prevailing party was a bona fide citizen of sister state and resident of California had been served with process or had appeared in the action in the other state.

4. Husband and wife ⚷285½

California court could not award support to wife after husband had obtained Nevada divorce decree, since power to award support grows out of the marital relation.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Suit by Ritchie Calhoun against Samuel Wilson Calhoun to compel division of community property of the parties and to require defendant to contribute to support of plaintiff. From that part of judgment refusing to require defendant to contribute to plaintiff's support, the plaintiff appeals.

Affirmed.

Clarence Harden, of San Diego, and Henry F. Walker, of Los Angeles, for appellant.

Monroe & McInnis, of San Diego, for respondent.

MARKS, Justice.

This is an appeal from a judgment which divided the community property of the parties, but failed to require defendant to contribute anything to the support of plaintiff. Plaintiff raises no question as to the division of the community property but argues that the trial court erred in refusing to require defendant to contribute to her support.

The parties were married in Oakland, California, on May 24, 1923, and lived together as husband and wife until November, 1939, when they separated. On January 3, 1941, Mr. Calhoun brought an action for divorce in the superior court of San Diego County alleging wilful desertion by Mrs. Calhoun. She appeared and successfully contested that action. The trial court found that Calhoun had deserted and abandoned Mrs. Calhoun without cause or excuse and against her will and without her consent. The decree denying the divorce was entered on November 13, 1941.

In February, 1943, probably about the 6th, Calhoun left California and went to Nevada. He filed an action for divorce there about March 21, 1943. Mrs. Calhoun was served with the summons and complaint in California. She did not appear in the action and Calhoun was granted a decree of divorce on April 27, 1943.

The divorce was granted under the provisions of section 9467.06, Nevada statutes, Comp. Laws, which provides in effect that where a husband and wife had lived separate and apart for three consecutive years without cohabitation the court may grant an absolute decree of divorce in the suit of either party. This was an amendment of a prior statute which required five consecutive years of separation without cohabitation. Nevada Stats. 1931, p. 180, c. 111, sec. 1.

The complaint in the instant action attacked the validity of the Nevada divorce on the ground of fraud on the part of Calhoun in (1) leaving the State of California and going to Nevada for the sole purpose of obtaining a divorce, and (2) in failing to disclose to the Nevada court that the California decree had denied him a divorce on the ground that the separation of the parties was caused by the sole fault of the husband. In this connection it is argued in effect that the three years of separation without cohabitation required by the Nevada statute started to run on March 21, 1940; that the California decree denying Calhoun a divorce was rendered November 13, 1941, so that three years following that date had not elapsed between that date and the filing of the Nevada action about March 21, 1943, which should defeat Calhoun's action in Nevada.

[1] The first contention is fully answered by the evidence introduced in the instant case and the findings of the trial court. Calhoun moved to Nevada about February 6, 1943, established a residence there and has continued to reside there ever since. He became a registered voter of Nevada, remarried there and has had no other home. He came to California temporarily to attend to business affairs in the city of Coronado and was served with summons and complaint in the instant action while on that trip. The trial court found that he had established a bona fide residence in Nevada and had become a resident and citizen of that State. Upon the evidence no other conclusion could have been reached.

[2] The second argument is answered in the case of Herrick v. Herrick, 55 Nev. 59, 25 P.2d 378, 379, where three decrees or orders of California courts were pleaded by the wife as a bar to the husband's action for divorce filed in Nevada. The Supreme Court of Nevada said:

> "The statute is very plain. It does not in terms require that a party should be without fault, and we do not think that such limitation may be inferred from it. * * *
>
> "The idea of a divorce on the ground stated is an idea of recent origin. The legislative concept embodied in the statute is that when the conduct of parties in living apart over a long lapse of time without cohabitation has made it probable that they cannot live together in happiness, the best interest of the parties and of the state will be promoted by a divorce. * * *
>
> "We are satisfied that the fault of one or both of the parties which may have caused the separation is merely a circumstance for the trial court to consider in the exercise of its discretion. It is unnecessary for us to determine if in any of the California decrees the husband is adjudged to have been to blame in causing maintain the suit for divorce as contended by appellant. This contention is disposed of by our ruling that it is not an essential element of the statute that a party be without fault to maintain an action for divorce on the ground of separation for five years without cohabitation.
>
> "Appellant's contention that the decree of divorce in this case impairs the obligation of contract evidenced by the California decree of separate maintenance is devoid of merit. The dissolution of the marriage relation extinguishes the subject-matter which forms the basis of an action or proceeding for separate maintenance. Bushnell v. Cooper, 289 Ill. 260, 124 N.E. 521, 6 A.L.R. 1517; 30 C.J. 1075." See also, Jeffers v. Jeffers, 55 Nev. 201, 29 P.2d 351; George v. George, 56 Nev. 12, 41 P.2d 1059, 97 A.L.R. 983.

[3] It is admitted that we must give full faith and credit to the divorce decree of a sister state obtained in accordance with the laws and practice of that state and obtained without fraud if the prevailing party was a bona fide citizen of the sister state and the resident of this state had been served with process or had appeared in the action in the other state. Williams v. North Carolina, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279, 143 A.L.R. 1273. It is argued that giving full faith and credit to the Nevada divorce decree does not prohibit the California courts from awarding Mrs. Calhoun support money as the Nevada court only granted a divorce and did not attempt to pass on the question of the support of the wife; that the California courts may give a wife support independent of statute, under their powers in equity, citing Galland v. Galland, 38 Cal. 265; Murray v. Murray, 115 Cal. 266, 270, 47 P. 37, 37 L.R.A. 626, 56 Am.St. Rep. 97; Livingston v. Superior Court, 117 Cal. 633, 49 P. 836, 38 L.R.A. 175.

[4] The answer to this argument lies in the fact that the power to award support grows out of the marital relation. As said in Howell v. Howell, 104 Cal. 45, 37 P. 770, 771, 43 Am.St.Rep. 70: "After the judgment granting the divorce the plaintiff was no longer the wife of the defendant, and he owed her no longer any marital duty. From that time she could enforce against him no obligation not imposed by the court at the time of the judgment." See Hite v. Hite, 124 Cal. 389, 57 P. 227, 45 L.R.A. 793, 71 Am. St.Rep. 82; Bancroft v. Bancroft, 9 Cal. App.2d 464, 50 P.2d 465. As Mrs. Calhoun was not the wife of defendant at the time she instituted this action against him, we can find no error in the trial court's refusal to require him to support her.

We believe the case of Cardinale v. Cardinale, 8 Cal.2d 762, 68 P.2d 351, 352, is decisive of the questions presented here. Sabina Cardinale and Mario Cardinale were married in San Francisco in 1910 and lived together until July, 1921 having one child. The plaintiff wife commenced an action for separate maintenance in the superior court of San Diego County. The defendant husband cross-complained, asking a divorce on the grounds of desertion and extreme cruelty. After a trial the court denied the husband a divorce, gave the custody of the child to the mother and ordered the husband to pay $40 per month for the support of the child and a like amount for the support of the wife. The child died in December, 1924, and the husband discontinued the payments for its support but continued to pay support to the wife until some time in 1931.

The husband went to Nevada in the fall of 1931 and on December 9, 1931, procured a decree of divorce on the grounds of extreme cruelty and separation for more than five consecutive years without cohabitation. As stated by the Supreme Court:

"On June 18, 1932, in San Diego county, in the separate maintenance action, the wife, without notice to the husband, procured a judgment against him for $998, the alleged amount of arrears in monthly payments due her under the separate maintenance decree. In October, 1932, the husband moved the court to set aside this judgment for arrears and to modify the decree of separate maintenance and to decree that payments for the child terminated as of her death, and payments for the wife's support terminated as of the date of the Nevada divorce, December 9, 1931. * * *

"The trial court, having found no invalidity in the Nevada divorce decree, properly terminated the allowance to appellant of separate maintenance as of the date that decree was rendered. 1 Cal. Jur., p. 1038, § 88; 30 C.J. 1095."

The judgment is affirmed.

BARNARD, P. J., concurs.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

BUSCH v. TRUITT.

2 Civ. 14861.

District Court of Appeal, Second District, Division 2, California.

July 10, 1945.

Rehearing Denied July 27, 1945.

Hearing Granted Aug. 27, 1945.

1. Trusts 🔑25(1)

An express trust in corporate stock was not created by stockholder's letter to third person stating, "I owe you 1,380 shares of escrowed stock", resulting from listed advances to stockholder, in absence of declaration by stockholder that he held any shares of stock belonging to third person, or held stock in which third person had an ownership.

2. Trusts 🔑25(1)

In absence of proof of an express declaration by alleged trustee, or acts equivalent to such declaration, evincing intention to create a trust, there is no express trust.

3. Trusts 🔑63¾

Where corporate stock was held in escrow subject to permit of corporation department, in name of particular stockholder, there was no resulting trust in favor of third person who had made loans to stockholder, in absence of proof that stockholder's escrow holdings increased by virtue of transaction with third person, notwithstanding letter from stockholder stating, "I owe you 1,380 shares of escrowed stock."

4. Trusts 🔑358(1)

One claiming to be beneficiary of a trust must identify specific property to which he has title, or which was acquired with funds furnished by him, before he can realize upon his claim.

5. Trusts 🔑358(1)

One claiming to be beneficiary of trust must be able to identify the trust fund or follow it through its mutations, and, failing to do so, is no more than a general creditor.

6. Specific performance 🔑28(1)

An agreement by administratrix with corporation to pay all claims for stock agreed by decedent to be delivered to claimant, except any case to which administratrix should have a bona fide defense, did not unreservedly require the estate to pay every claim listed and could not be made basis for action for specific performance.

7. Executors and administrators 🔑225(7)
Limitation of actions 🔑175

An administrator cannot waive the statute of limitations nor do any act having effect of extending time for filing claims, so as to bind estate.

8. Executors and administrators 🔑228(5)

An agreement by stockholder's administratrix with corporation to pay claims for stock except any case as to which administratrix should have a bona fide defense, and listing claims already disclosed, was not within statute referring to "sufficient evidence of a new or continuing contract" and was not an acknowledgment that particular claimant had filed or presented a verified claim. Code Civ.Proc. § 360; Probate Code, §§ 707, 716.

9. Executors and administrators 🔑96

In order for contract by stockholders' administratrix with corporation to constitute an obligation to pay third party's claim with respect to stock allegedly owed by decedent to third party, administratrix must have been in debt to the corporation. Code Civ.Proc. § 360; Probate Code, §§ 707, 716.

10. Executors and administrators 🔑222(1)
Limitation of actions 🔑132

One having claim against estate should first present a verified claim, and upon failing to obtain approval of claim within six months after publication of first notice to creditors, gain such approval by judicial decree, and conversations with administrator and promises of subsequent administratrix indicating intention to pay the claim would not be an adequate substitute, as affecting running of general statutes of limitations. Code Civ.Proc. §§ 337, 339, 343.

11. Limitation of actions 🔑46(4)

A letter from stockholder acknowledging that stockholder owed third person shares of escrowed stock was in effect a "due bill" so that time to sue thereon ran from its date. Code Civ.Proc. §§ 337, 339, 343.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Bill".

12. Limitation of actions 🔑83(1, 2)

Death of debtor or inaction of debtor's administrator or probate judge in not approving claim cannot lengthen statute of limitations on contracts in writing. Code Civ.Proc. §§ 337, 339, 343.

13. Limitation of actions 🔑83(2)

The statute authorizing suit within one year after issuance of letters of administration if death occurs before expiration of limitations adds nothing to the four-year statutory period, and was of no avail where cause of action accrued and death occurred in 1938 and action was not brought within four years. Code Civ.Proc. §§ 343, 353.

14. Limitation of actions 🔑46(4)

Action on a contract, which was in effect a due bill executed March 1, 1938, could not have been barred before February 28, 1942. Code Civ.Proc. §§ 343, 353.

15. Limitation of actions 🔑138

Failure to manifest interest in claim filed against estate for more than two years after claim was informally presented was laches such that no amount of excuse or of conversation with administrator would toll general statute of limitations against the claim. Code Civ.Proc. § 360; Probate Code, §§ 707, 716.

16. Executors and administrators 🔑228(5)

An administrator cannot waive necessity of presenting a verified claim to him or of filing it with clerk. Code Civ.Proc. §§ 337, 339, 343.

17. Limitation of actions 🔑83(2), 85(2)

Vacancy in office of administrator and administrator's absences from the state did not toll general statutes of limitation on claim against estate. Code Civ.Proc. § 337, subd. 1.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by George J. Busch against Mae Truitt, as administrator of the estate of Charles C. Truitt, deceased, to recover shares of corporate stock. From a judgment for plaintiff, defendant appeals.

Reversed with instructions.

Haight, Trippet & Sycertson, of Los Angeles, for appellant.

MacDonald, Wallace, Cashin & Arrington, of Los Angeles, for respondent.

MOORE, Presiding Justice.

Respondent sued to recover 1,380 corporate shares of the Dried Food Products Company held by defendant as administratrix of the estate of her deceased husband, Charles C. Truitt. He alleged two counts, namely, (1) that defendant holds the shares in trust for plaintiff; (2) that decedent owed him the shares; that within the time allowed by law he presented his claim to the administrator of decedent's estate for the stock; that such claim was not actually approved but that by reason of divers statements and promises of the first administrator and of appellant and because of the promise of appellant in a new contract executed by her with the corporation, respondent was led to believe that his claim had been allowed and that the shares would be assigned to him, but that on November 16, 1942, appellant refused to make delivery.

Defendant denied generally both counts of the complaint and pleaded as a bar to both actions the 4-year and 2-year statutes of limitation, towit, section 343 and subdivision 1 of sections 337 and 339, Code of Civil Procedure. Also, she pleaded the insufficiency of any "promise * * * of a new or continuing contract" by appellant to avoid the operation of the statutes of limitation (Code Civ.Proc. § 360), and alleged noncompliance with 707 and 716 of the Probate Code, which sections require the filing of claims against a decedent's estate within 6 months after the first publication of notice to creditors. Also, she alleged the nullity of the alleged transaction as a violation of the Corporate Securities Act, St.1917, p. 673.

The court found that for a valuable consideration on March 1, 1938, decedent executed and delivered to plaintiff a writing wherein he declared that he owed to plaintiff 1,380 shares of his escrowed stock of the corporation as of that date, and "That said Charles C. Truitt stated and represented to plaintiff that the stock owned by him was held in escrow and that he would secure the consent from the Corporation Commissioner of the State of California to transfer to plaintiff said 1380 shares of said stock. That plaintiff relied upon said promise and believed said representation that the said Charles C. Truitt would secure such consent. That the said Charles C. Truitt died before he did secure such consent to transfer said stock."

In addition to the foregoing the court found that after appellant became administratrix she promised to effect the transfer of the 1,380 shares to respondent and that she told him it was unnecessary for him to do anything further in the matter; that he relied upon her statements; that decedent had promised to transfer the 1,380 shares to respondent and to cause their release from escrow; that on August 12, 1942, by written agreement appellant promised to transfer the shares to him; that in September, 1942, by her application she caused the corporation commissioner to release the 17,145 shares of the Dried Food Products Company standing of record in the name of decedent and held in escrow; that on November 16, 1942, appellant rejected respondent's demand for the transfer to him of the 1,380 shares to which he is entitled; that its value then was $5,520; and that she had collected net dividends on the shares in the amount of $1,817. All of the special defenses were decided against appellant.

On its date decedent delivered to respondent the following letter:

"Maywood, California
"March 1, 1938

"Mr. Geo. J. Busch
"834 North Hudson
"Hollywood, California

"Dear Mr. Busch:

"My records now show that I owe you 1,380 shares of escrowed stock which is made up of advances to me from time to time as follows:

"On April 10, 1937, I received $115.00, making a total amount received up to that time of $225.00. Then there was 100 shares assumed by me which was owing to you by Ross Robertson; there was $80.00 left with Wilson for me; $200.00 paid Kallock for me; and $75.00 given to me. Also, I owe you 700 shares of escrowed stock in exchange for 600 shares of free stock.

"All told, this amounts to 1,380 shares of escrowed stock that I owe you as of this date.

"Very truly yours,
"Chas. C. Truitt"
"Chas. C. Truitt."

Thirty-nine days later Mr. Truitt departed this life. At the time he owned 17,145 shares of the capital stock of the Dried Food Products Company, held in escrow under order of the State Corporation Commissioner.

Following the decease of decedent one F. C. Hendrix qualified as administrator to whom respondent presented his claim. That officer stated he would acknowledge the debt of the estate and that the shares would be transferred to respondent, but he did not approve, reject or file the claim in his lifetime. He died on July 16, 1939. After his decease there was a vacancy in the administration from July 16, 1939, to January 19, 1940, when appellant qualified.

Questions for Decision

We are now to determine the following:

1. Did decedent or his administratrix hold in trust for respondent the 1,380 shares?

2. Is respondent a creditor of the estate (a) either by having presented a verified claim to the administrator or (b) by the written contract of August 12, 1942?

3. Is respondent's action barred by any statute of limitation?

There was No Trust

[1, 2] If a trust ever existed it was either an express trust or a resulting trust. It could not have been an express trust, for there is no evidence that decedent ever declared that he held any shares of stock belonging to respondent or that he held certain corporate stock in which Busch had an ownership to the extent of 1,380 shares or in any amount. In the absence of proof of an express declaration by the alleged trustee or of acts that are equivalent to such declaration, evincing an intention to create a trust, there is no express trust. 65 C.J. 220.

[3] There was no resulting trust. All the shares to which decedent ever had title was the 17,145 shares in his name held in escrow subject to the permit of the corporation department. There is no proof that his escrowed holdings increased by virtue of his transaction with respondent. While some shares and some money were transferred or paid by Busch to decedent, they were mere loans. To have effected a resulting trust in the corporate shares it would have been necessary for respondent to advance to decedent a fund with which the latter purchased the shares, taking title in his own name but for the benefit of respondent. Watson v. Watson, 198 Pa. 234, 47 A. 1096; Smith v. Smith, Ky., 121 S.W. 1002. Nothing like that occurred between decedent and respondent. After Mr. Truitt had used the money and shares loaned to him by respondent he settled with his creditor by giving him the letter of March 1, 1938. That writing means no more than what it says, "I owe you 1,380 shares of escrowed stock." It does not evidence a resulting trust Vol. 2, Restatement of Trusts, § 440. It merely acknowledges decedent's debt for advances made to him by respondent on divers occasions in the past and states merely that he owes 1,380 shares in full settlement.

[4, 5] Before one who claims to be the beneficiary of a trust can realize upon his claim, he must identify specific property to which he has title or which was acquired with funds furnished by him. Holland v. Bank of Italy, 115 Cal.App. 472, 1 P.2d 1031; Roncelli v. Fugazi, 44 Cal.App. 249, 186 P. 373; Lathrop v. Bampton, 31 Cal. 17, 89 Am.Dec. 141; Byrne v. Byrne, 113 Cal. 294, 45 P. 536. He who claims to be the beneficiary of an alleged trust must be able to identify the trust fund or follow it through its mutations. Failing to do so, he is no more than a general creditor. Roncelli v. Fugazi, supra.

Respondent has No Enforcible Rights under the Writing of August 12, 1942.

[6, 7] The bases of respondent's claim as a creditor of the estate are (1) that he presented an "acknowledged" claim to the administrator on November 14, 1938, and (2) that on August 12, 1942, appellant executed a written agreement with the corporation whereby she promised to transfer 1,380 shares of decedent's escrowed stock to respondent upon its release by the corpo-

ration commissioner. We first direct our attention to the corporate contract. This contract was the fruitage of an action by appellant against the corporation upon a contract to pay decedent 50,000 shares for his services during a term of years. Negotiations for a settlement resulted in a compromise evidenced by a written contract. The provision of the contract under which respondent makes his claim is as follows:

> "3. First Party as Administratrix agrees that she will pay all claims now or heretofore filed or presented against the Estate of said Charles C. Truitt for stock of Dried Food Products Co. agreed to be delivered by said Charles C. Truitt to pay such claimant, excepting as to any such case to which she, as such Administratrix, *shall have a bona fide defense.* Said claims which have been disclosed by first party to second parties are the following:

	Shares
Walter Kroger	850
Charles Reis	900
Geo. J. Busch	1380
Wm. W. Stokes	575" etc.

That such language cannot serve as the basis for an action for specific performance is readily apparent. The writing promises no more than that she will pay all claims theretofore presented for stock which decedent had promised to deliver to any such claimant, but it is equally as emphatic that she would not pay any claim against which the estate had a bona fide defense. The instrument was drawn under the advice of competent counsel for appellant who demanded of the corporation's counsel that it be inserted in the agreement that appellant would not pay any claim to which she had a bona fide defense. Not having pledged the estate to pay outright every claim included in the list without regard to its merits, the writing cannot be construed unreservedly to require the estate to pay every claim listed. 49 Am.Jur. 34, § 22 et seq. If the purpose of the contract was to obtain appellant's waiver of the defense of the statute of limitations, it failed of its mark for an administrator has no authority to waive a statute of limitations. In re Estate of Cates, 195 Cal. 319, 232 P. 972. Neither can an administrator do any act which would have the effect of extending the time for filing a claim so as to bind an estate. Ibidem.

[8, 9] The contention that the corporate contract is an acknowledgement that respondent had filed or presented a verified claim is not justified by the language of the instrument. The qualification contained in the promise to transfer the stock to respondent takes it out of the category of those unequivocal promises that are "sufficient evidence of a new or continuing contract." Code Civ.Proc. § 360. Where an estate based its suit for recovery upon the debtor's promise to pay the claim if it was valid and if he ever got money enough was held too uncertain to come within the exception of section 360. Visher v. Wilbur, 5 Cal.App. 562, 90 P. 1065, 91 P. 412. Also, a promise made to the corporation in order to satisfy its requirements was not a promise to respondent and does not take the case out of the operation of that section. President, etc., of California College v. Stephens, 11 Cal.App. 523, 105 P. 614; Roper v. Smith, 45 Cal.App. 302, 187 P. 454. Respondent had no claim against the corporation. The corporation owed no debt to respondent. In order for the contract to constitute an obligation of appellant to pay a claim of respondent, appellant must have been in debt to the corporation. Restatement, Law of Contracts, Vol. 1, § 133b.

The Second Count is Barred

[10] We have for final consideration appellant's plea that respondent's claim is barred by the statutes of limitation. Code Civ.Proc. §§ 337, 343 and 339. Respondent concededly never procured the approval of his claim by either the administrator or the judge. The most that can be said for his case is that he testified that he presented an "acknowledged" claim to the administrator and relied upon that official's oral statement that the claim would be honored. He should first have presented a verified claim (Probate Code, § 705), and upon failing to obtain such approval within 6 months after publication of the first notice to creditors it was incumbent upon him to exercise diligence to gain its approval by judicial decree. Instead, he waited and talked until after 4 years had elapsed from the date his cause of action arose. Not only did he neglect to file or present a verified claim, but in order to recover he contends that he had the right to rely upon conversations with Mr. Hendrix at first and later to depend upon promises of appellant. Neither could have been a substitute for (1) procuring the approval of his claim or (2) prompt action to obtain judgment upon it.

[11-14] The last cited sections inhibit the maintenance of a cause of action upon a contract in writing after the lapse of 4 years and 2 years respectively. Since the writing of March 1, 1938, is in effect a due bill, time runs from its date. Harrigan v. Home Life Co., 128 Cal. 531, 58 P. 180, 61 P. 99; Witman v. Board, 19 Cal.App. 229, 231, 125 P. 265. The cited sections are general statutes governing the limitation of actions and are supplemented by no provision of the Probate Code whereby the period of the life of a cause of action may be extended. Neither the death of decedent nor the inaction of the administrator or of the probate judge in not approving the claim can lengthen the term named in the Code sections. The only statute touching upon grace to a claimant whose debtor dies is section 353, Code of Civil Procedure, which grants to a claimant the privilege of filing suit within one year after the issuance of letters of administration if the death occurs before the expiration of the time limited for the commencement of the action. Since the one year's grace adds nothing to the 4-year statute period, that section is of no avail to appellant. Decedent died April 9, 1938. Letters were issued May 24, 1939. But since the date of the contract granted him till February 28, 1942, his action could not have been barred prior to the latter date. Barclay v. Blackinton, 127 Cal. 189, 59 P. 834.

[15] But he did not choose to file suit at any time within the 4 years after the date of the contract. He displayed no diligence at any time in the protection of his claim. Although decedent passed away on April 9 and letters issued to the first administrator on May 24, 1938, he presented no claim until 5 months and 20 days had elapsed when he prepared and "acknowledged" a claim and presented it to the officer. No sign of interest in the claim was manifested by respondent throughout the calendar year 1939, although administrator Hendrix who had advised the presentation of a claim departed this life on July 16, 1939. It is an unusual event in a man's life such as that ascribed by respondent to Hendrix in having his assistance in preparing the claim. Yet respondent did not bestir himself to ascertain the fortunes of his asserted claim for 5 months and 15 days in 1939 for 12 months in 1940, and for 9 months and 27 days in 1941. In view of such laches no amount of excuse or of conversation will toll the statute. If the excuses urged by respondent may keep alive a claim, it would be possible for a claimant in collaboration with a corrupt administrator to keep alive a claim until such time as they would encounter no opposition and by its untimely allowance rob the estate of its substance. See Barclay v. Blackinton, supra, 127 Cal. at page 193, 59 P. 835. "The right of a claimant to enforce his claim under our statutes of limitations depends upon his own vigilance, and is often lost by his own laches." Id.

To excuse his laches if not his utter failure to act for the protection of his claim respondent pleads that he was lulled into a sense of security by the following events: (1) That administrator Hendrix promised him that he would honor the claim; (2) that appellant had on several occasions promised that his claim would be paid; (3) that limitation was interrupted by the vacancy in administration and appellant's absences from the state. The evidence as to these excuses is presented in the discussion that follows.

Notwithstanding his first conversation with Hendrix concerning his claim was on May 24, 1938, he did not present a claim to Hendrix until November 14, 1938, when according to respondent the latter stated: "I'll acknowledge that; it will be just a matter of a few days until I can get this thing taken care of. * * *" Although the administrator told him it would be just a few days respondent offered no testimony of further interviews with Hendrix during the succeeding 8 months of the latter's life. In that interval a reasonably prudent person would have ascertained the status of a claim theretofore presented to the administrator; also, if he had discovered that his claim had not been approved he would have taken steps to procure the appointment of a special administrator with a view of establishing his claim. The record discloses only the silence of respondent during the 6 months of vacancy.

[16, 17] He testified that he had a conversation with appellant on the very day she qualified, towit, January 19, 1940, but no substance of that conversation was revealed by him. He had conversations with her in August and October, 1942, both in person and by telephone, but all of such conversations were after the expiration of 4 years from the date of decedent's promise. The statements made by appellant's attorney at the two meetings of the stockholders in October and November, 1941,

were not such as would suspend the running of the statute of limitations. The statements of the attorney were to the general effect that all just claims against the estate would be paid. But if either appellant or her attorney had stated definitely that the estate would transfer 1,380 shares of escrowed stock to Mr. Busch, he would not have been able to make good. The administrator is without power to waive the necessity of presenting a verified claim to him or of filing it with the clerk. Since these conversations were impotent to toll the running of the statute and no promises were ever made to induce respondent not to sue the estate, the action was barred by the 4-year statute (Code Civ.Proc. § 337, subd. 1), unless the running of the statute was tolled by the vacancy in the office of the administrator and by appellant's absences from the state. Such facts are unavailing to toll the statutes of limitation. Conceding that a verified claim had been presented within the 6 months following the first publication of notice to creditors, more than 4 years intervened between the day of the promise and the day of filing the action.

In view of the foregoing it is ordered that the judgment be and is hereby reversed with instructions that the action be dismissed.

W. J. WOOD and McCOMB, JJ., concur.

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